

Renewable Energy

Contributing editor
Eric Pogue

HUNTON &
WILLIAMS



2018

GETTING THE
DEAL THROUGH 

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DEAL THROUGH 

Renewable Energy 2018

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Published by
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First published 2017
First edition
ISSN 2515-3773

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Korea	43
Eric Pogue Hunton & Williams		Hoon Lee, Hera Kim and Pan-Soo Kim Jipyong	
Brazil	7	Mexico	49
Fabiano Ricardo Luz de Brito, Bruno Werneck, Pablo Sorj, Giovani Loss and Ana Carolina Calil Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados		Rogelio López-Velarde, Amanda Valdez and Daniela Monroy Dentons López Velarde, SC	
Chile	12	Nepal	54
Felipe Bahamondez Prieto, Paulina Fariás Castro and Diego Peña Diez BAZ DLA Piper		Mahesh Kumar Thapa Sinha Verma Law Concern Ryan T Ketchum Hunton & Williams	
Denmark	17	Nigeria	57
Jens Blomgren-Hansen and Emilie Vingtoft Rye-Andersen Kromann Reumert		Ike C Ibeku, Ifeyinwa Ufonde and Felix Obetta Benchmac & Ince	
Egypt	22	Spain	63
Donia El-Mazghouny Shahid Law Firm		Gonzalo Olivera and Alberto Artés King & Wood Mallesons	
Ethiopia	26	Turkey	69
Mahlet Kassa Woldesenbet Lidet Abebe Tizazu Law Office Ryan T Ketchum Hunton & Williams		Mehmet Feridun İzgi Firat İzgi Avukatlık Ortaklığı / Firat İzgi Attorney Partnership	
Germany	29	United Kingdom	77
Stephan Gerstner Redeker Sellner Dahs		John Dewar and Seyda Duman Milbank, Tweed, Hadley & McCloy LLP	
India	33	United States	83
Dibyanshu, Prateek Bhandari and Shikha Rastogi Khaitan & Co		Mike Klaus, Jeff Schroeder, Eric Pogue and Laura Jones Hunton & Williams LLP	
Japan	38		
Norio Maeda, Amane Kawamoto, Yasuo Asami, Daiki Akashika and Kentaro Moriya Nishimura & Asahi			

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Market framework

1 Who are the principal government participants in the electricity sector? What roles do they perform in relation to renewable energy?

Government policy in respect of the electricity sector is established by the Ministry of Water, Irrigation and Electricity. The electricity sector is regulated by the Ethiopian Energy Authority (EEA), which is an independent regulatory authority vested with the power to issue licences for the generation, transmission, and distribution of electricity within Ethiopia as well as the import and export of electricity into and out of the country. Ethiopian Electric Power (EEP) is responsible for the generation and transmission of electricity. The Ethiopian Electric Utility (EEU) purchases capacity and energy from EEP and distributes electricity to end users. Both EEP and EEU are public enterprises. They are wholly owned by the government of Ethiopia and governed by regulations issued by the Council of Ministers.

The majority of the energy generated by EEP is generated from hydroelectric resources. A relatively small percentage of power is generated from wind, geothermal and thermal sources.

2 Who are the principal private participants in the electricity sector? What roles do they serve in relation to renewable energy?

Although no independent power production (IPP) project has yet achieved financial close in Ethiopia, Ethiopia has recently determined that it should, as a matter of policy, use what limited financial resources it has available for the development of infrastructure to develop infrastructure in other sectors that are not as capable of generating self-sustaining revenues the electricity sector. As a result, Ethiopia has recently begun to examine legal and regulatory framework in Ethiopia in order to (i) determine whether it is capable of supporting an IPP programme, (ii) identify any changes that should be made to the legal and regulatory framework to facilitate the development of a successful IPP programme, and (iii) consider how best to approach the development of such a programme.

3 Is there any legal definition of what constitutes 'renewable energy' or 'clean power' (or their equivalents) in your jurisdiction?

No.

4 What is the legal and regulatory framework applicable to developing, financing, operating and selling power and 'environmental attributes' from renewable energy projects?

The EEA is responsible for issuing generation licences, and would, in the case of an IPP, authorise the project company to generate electricity from a particular generation facility. Given that EEP is responsible for generating (or procuring the generation of) electricity in Ethiopia and that EEU has a monopoly over the distribution of electricity to end users, any IPP seeking to develop a project in Ethiopia would need to enter into a Power Purchase Agreement with EEP. The foregoing applies to renewable and non-renewable projects alike. There is no legal or regulatory framework for selling environmental attributes from renewable energy projects, but the high cost of electricity in Sub-Saharan Africa in general and Ethiopia in particular means that

renewable projects have a much easier time achieving grid parity than they would in other markets with lower electricity prices.

The following is a list of the principal legislation governing the development of energy in Ethiopia:

- Energy Proclamation No. 813/2013;
- Ethiopian Energy Authority Establishment Council of Ministers Regulation No. 308/2014 (this Regulation is currently under review and will likely be amended);
- Electricity Operations Council of Ministers Regulations No. 49/1999 (under revision);
- Geothermal Resources Development Proclamation 981/2016;
- Investment Proclamation No. 769/2012 as amended;
- Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulations No. 270/2012 as amended;
- the Constitution of the Federal Democratic and Republic of Ethiopia;
- the 1960 Federal Democratic Republic of Ethiopia Civil Code;
- Environmental Protection Authority Establishment Proclamation No. 9/1995m as amended;
- Environmental Impact Assessment Proclamation No. 299/2002; and
- National Bank Directives.

Foreign banks can lend to an Ethiopian incorporated company only if they obtain an authorisation from the National Bank of Ethiopia, where the Ethiopian company cannot find adequate funding from Ethiopian banks. The authorisation by the company in Ethiopia to borrow money from abroad is granted by the National Bank of Ethiopia and is granted on a case-by-case basis.

5 Can environmental attributes be stripped and sold separately?

No.

6 Does the government offer incentives to promote the development of renewable energy projects? In addition, has the government established policies that also promote renewable energy?

Foreign investors investing in an approved investment project may benefit from tax incentives depending on the type of investment they intend to make and the area in which the project will be located. An exemption from income taxation for a limited number of years is available to companies that are engaged in the generation of electricity in certain areas. Companies that invest in generation may also benefit from customs duty exemptions for capital goods and equipment. No incentives other than the foregoing are currently in place that would provide for additional incentives for investments in renewable energy projects.

7 Are renewable energy policies and incentives generally established at the national level, or are they established by states or other political subdivisions?

Ethiopia is a federation made up of nine ethnically based regions or states. The Constitution vests the right of ownership over rural and

urban land, as well as of all natural resources, exclusively in the state and the nations, nationalities, and peoples of Ethiopia. The government of Ethiopia has wide-ranging powers deriving from the Ethiopian Constitution in relation to formulating and implementing major policy and institutional reforms aimed at creating an efficient and environmentally sustainable energy sector and at supporting investments in the electricity sector. Regions may enact laws in line with federal legislation and polices to implement the same, but in practice policy in the electricity sector is generally established at the national level.

8 What mechanisms are available to facilitate the purchase of renewable power by private companies?

None have been established to date.

9 Describe any notable pending or anticipated legislative proposals regarding renewable energy in your jurisdiction.

In relation to the energy sector, two pieces of legislation are expected to pass in 2017. They are (i) the Draft Council of Ministers Regulation to provide for Energy Operations and (ii) a regulation to implement the Geothermal Resources Development Proclamation. The government is also developing a public-private partnership (PPP) proclamation. In line with Ethiopia's evolving policy to stimulate private investment in the electricity sector, it has become evident that the government will need to pass new laws in relation to IPPs and PPPs. The above legislation, if approved, will promote the participation of the private sector in building infrastructure and developing public sector projects.

The geothermal proclamation, which was promulgated in early 2017, aims to stimulate investment in geothermal resources. The development of geothermal resources is currently governed by generally applicable mining legislation, and its use to date has been limited as a result. The new proclamation will, if enacted, set forth the overall framework governing geothermal resources. The draft regulation will implement the proclamation at a more practical level by providing guidance on issues such as how licences should be applied for and issued to IPPs, and the requirements that projects must satisfy in order to qualify for a licence.

10 What are the biggest drivers of change in the renewable energy markets in your jurisdiction?

As mentioned above, the major source of energy in the country is hydroelectric power. Although hydroelectric power has provided the majority of generation capacity for decades, there is a growing recognition that hydroelectric power alone will not be sufficient to serve the country's growing economy. As is also noted above, there is a growing recognition that private capital will be required in order to make the sizeable investments that will be required in the electricity sector over the near to medium term.

11 Describe the legal framework applicable to disputes between renewable power market participants, related to pricing or otherwise.

Ethiopia is not a contracting party to either the New York Convention or the Washington Convention. Nonetheless, foreign arbitral awards are, as a general matter, enforceable under the Civil Procedure Code.

Utility-scale renewable projects

12 Describe the primary types and sizes of existing and planned utility-scale renewable energy projects in your jurisdiction.

As of mid-2017, EEP was conducting or planning to conduct two tenders for a total of 150 to 200MW of utility-scale PV solar projects. These would be the first PV solar projects to be procured by EEP.

13 What types of issues restrain the development of utility-scale renewable energy projects?

In our view, the principal issues are:

- lack of a formalised legal framework governing IPPs
- lack of experience in procuring utility-scale IPPs and in approving the tariffs for such IPPs;
- the lack of a track record in promoting IPPs; and
- a shortage of hard currency.

Hydropower

14 Describe the primary types of hydropower projects that are prevalent.

EEP owns and operates several large hydropower projects. No hydropower IPPs have yet been developed.

15 What legal considerations are relevant for hydroelectric generation in your jurisdiction?

Not applicable.

Distributed generation

16 Describe the prevalence of on-site, distributed generation projects.

The use of solar panels in households and small businesses is becoming more widespread. The legal framework that would be necessary to support net metering is not in place.

17 Describe the primary types of distributed generation projects that are common in your jurisdiction.

The only type of distributed generation we have seen so far (aside from backup diesel generation, which is relatively common in Ethiopia) involves the Ethiopian government entering into a PPA with an investor to provide energy for off-grid and micro-grid projects in rural areas.

18 Have any legislative or regulatory efforts been undertaken to promote the development of microgrids? What are the most significant legal obstacles to the development of microgrids?

No framework for the promotion of micro-grids has been developed to date. Despite the lack of a framework, some communities have taken the initiative and invested in small micro-grids using a cooperative approach.

19 What additional legal considerations are relevant for distributed generation?

Not applicable.

Energy storage

20 What storage technologies are used and what legal framework is generally applicable to them?

None.

21 Are there any significant hurdles to the development of energy storage projects?

Not applicable

Foreign investment

22 May foreign investors invest in renewable energy projects? Are there restrictions on foreign ownership relevant to renewable energy projects?

Investment by international investors in Ethiopia is strictly regulated. Investments by foreigner in transmission and distribution are prohibited. However, private developers are allowed to develop renewable energies in Ethiopia by obtaining a generating licence from EEA and entering into a PPA with EEP.

23 What restrictions are in place with respect to the import of foreign manufactured equipment?

As stated above, investments in Ethiopia by international investors are subject to strict regulation. However, where they are permitted to invest, investors may be permitted to import equipment (capital goods) needed for their projects free of any import duties. In general, where exemptions are not available tariff rates range from zero to 35 per cent.

Projects**24 What government authorisations must investors or owners obtain prior to constructing or directly or indirectly transferring or acquiring a renewable energy project?**

The EEA is the regulator of the electricity sector. Its powers derive principally from the Energy Proclamation. The EEA approves PPAs and has the power to grant generation licences. All foreign investments must first be approved by the Investment Commission or Ministry of Trade, as the case may be.

25 What type of offtake arrangements are available and typically used for utility-scale renewables projects?

Long-term PPAs entered into by EEP.

26 How are long-term power purchase agreements procured by the offtakers in your jurisdiction? Are they the subject of feed-in tariffs, the subject of multi-project competitive tenders, or are they typically developed through the submission of unsolicited tenders?

No feed-in tariffs have been approved. EEP does not have an extensive track record from which these types of generalisations can be drawn.

27 What government authorisations are required to operate a renewable energy project and sell electricity from renewable energy projects?

See question above.

28 Are there legal requirements for the decommissioning of renewable energy projects? Must these requirements be funded by a sinking fund or through other credit enhancements during the operational phase of a renewable energy project?

In practice, these obligations remain unsettled.

Transaction structures**29 What are the primary structures for financing the construction of renewable energy projects in your jurisdiction?**

Although no IPPs have achieved financial close to date, we would expect the principal sources of financing for first mover projects in Ethiopia to be loans from development finance institutions, multilateral development banks, and export credit agencies.

Foreign banks can lend to a company organised under the laws of Ethiopia only if they obtain an authorisation from the National Bank of Ethiopia, and only if the Ethiopian company cannot find adequate funding from Ethiopian banks. Authorisations to borrow funds from abroad are granted by the National Bank of Ethiopia and on a case-by-case basis.

30 What are the primary structures for financing operating renewable energy projects in your jurisdiction?

Not applicable.

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Renewable Energy
ISSN 2515-3773



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