# Argentina

**Legal framework – RenovAr auction – PPA analysis**

# Speaker

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**Legal**

- ✓ **Mergers & Acquisitions**
- ✓ **Corporate Law**
- ✓ **Project Finance**
- ✓ **Commercial Law**
- ✓ **Construction / Project Management / Claiming**

**Operative**

- ✓ **Previously heading business development department of juwi AG for LatAm**
- ✓ **Director of 50 MW windfarm in Uruguay**

# Agenda

1. Legal framework
2. Renewable Energy Act 27,191
3. PPA analysis
4. Alternative Corporate PPAs

# 1. Legal framework (1/3)

- ✓ **General**
  - Legal system based on civil law and statute, principles of roman law
  - Legal proceedings are uncertain and lengthy and costly even for winning party, hard to enforce small-mid cap claims
  - Due diligence on local partners is essential (1-2 years probation time is common)
- ✓ **Commercial Law**
  - Código Civil y Commercial (Ley No. 26.994) recently reformed 01/08/2015
  - No secret lien (“Eigentumsvorbehalt”) !
  - Changes to corporate law, contract law, international private law (e.g. franchise Art. 1.512 ff., leasing (Art. 1.227ff.), trust agreement (Art. 1.666ff.), agency contract (Art. 1.479ff.)
  - Contrato de Usufructo (Art. 999)
- ✓ **Corporate Law / Local entity**
  - Most common Sociedad Anonima (S.A.) or Sociedad de Responsabilidad Limitada (S.R.L.) – no local minority stake required; 100.000 ARS (ca. 6.000 EUR)
  - Recent changes in CCyC allow one person to own equity (Sociedad Anónima Unipersonal – S.A.U.)
  - General assembly → directory (no three-party constitution like German AG)

# 1. Legal framework (2/3)

✓ **Technology transfer / licensing**

- Technology transfer law (Ley de Transferencia de Tecnologia – No. 22.426/1981)
- Foreign investment law (Ley de Inversiones Extranjeras – No. 21.382/1976)
- Things to consider in licensing agreements:
  - Clearly defining scope of the license you are issuing and what the royalty is paid for
  - Rights of licensee to issue sub-licenses
  - Termination rights, restrictions related to the use of the license, etc.

✓ **Labor Law**

- “Contrato de Trabajo” (Ley 20.744), “Riesgos de Trabajo” (Ley 24.557), “Ley de Empleo” (Ley 24.013), “Ley de Reforma Laboral” (Ley 25.013)
- 8 working hours / day; max. 38 hrs / week; extra hours paid at +50%; weekend extra 100%; night shift limited to 7 hours between 9pm-7am.
- “aguinaldo” of 50% of highest monthly salary each 6 months (usually June and December)
- Strong labor unions – **consider delays caused by strikes for project schedule during construction !!**
- **Assure that project contract structure includes “back-to-back” provisions between EPC and subcontractors !!**

# 1. Legal framework (3/3)

- ✓ **Tax law**
  - Corporate and income tax: 35%; dividend tax: 10%; 5 years carryforward (loss relief)
  - VAT: 21%
  - Double tax treaty with Germany
- ✓ **Dispute Settlement**
  - Current judicial process is lengthy and suffers from significant backlog causing it to be ineffective and not reliable
  - Assure arbitration rules in contracts (e.g. ICC, DIS)
  - Chamber of Foreign Trade (AHK) Argentina offers settlement of both disputes and claims -> dispute resolution center
- ✓ **Corruption**
  - ✓ Existing OECD and UN Conventions against corruption, German IntBestG penalize corruption committed in foreign countries (up to 10 years prison or sensible fines)
  - ✓ Make sure to introduce anti-corruption policy and train employees
  - ✓ Careful analysis of consultancy contracts and local agents

# 2. RenovAr - Act 27, 191 (1/5)

## → Framework and goals

- ✓ Promotional framework for the use renewable resources for power generation in the national wholesale electric market
- ✓ Mandatory targets: 8% by 2017-18, 16% by 2021, 20% by 2025
- ✓ Annual installations of new capacity are expected to be in the order of 1.0 – 1.5 GW
- ✓ Fiscal Incentives: Applicable to IPPs and Local Manufacturers
- ✓ Resource Diversification
- ✓ FODER: Creation of special master trust (“FODER Trust”) funded by the Argentine government annually, through direct contributions, fees charged to final users. In 2016, funding will amount approx. US$ 800 million
- ✓ Each project company will join the FODER Trust as beneficiary by entering into a project-specific Trust Joinder with the trustee and the Ministry of Economy – **see PPA Analysis.**

# 2. RenovAr - Act 27, 191 (2/5)

## → Key Features of the Auction

- ✓ **The process for obtaining eligibility ("Certificado de Inclusion") for the tax benefits will be part of the bidding process**
  - The cap on the value of tax benefits to be granted in 2016/2017 is US$1.7 billion.
  - Bidders will include their tax applications as part of the offer package
  - Offer prices must assume available tax benefits.
  - Evaluation and allocation of tax benefits will be decided and informed to the bidders
  - Those who are not allocated the expected level of benefits may withdraw their bid without penalty but they may not change their offer price.
  - Once awarded, additional security as required under the law must be posted to guarantee compliance with tax benefits.
  - In accordance with the law, the risk of losing tax benefits related to construction start is a risk borne by the Project.

## → Deal Structuring Considerations

- ✓ **Strategic investors will be required to maintain a 25% interest through COD**
  - Strategic Financial investors are those with the balance sheet requirement (US$250k/MW/ bid).
  - PPA can be terminated for breach of this requirement.
- ✓ **Milestone dates will be established by the bidders in their offers – although all projects must be completed within 2 years of contract signing – and include:**
  - Financial Close
  - Construction Start
  - Arrival of Equipment
  - Commercial Operation Date

# 2. RenovAr - Act 27, 191 (3/5)

## → Key Features of the Auction

- **The auction is designed for Projects which are fairly well advanced as prequalification includes demonstration of:**
  - Site control (although not for the transmission line)
  - A certain level of environmental approvals
  - Description of selected equipment
  - Independent resource studies (for both wind and solar)
- **The level of Bid Security is fairly low at US$35,000 per MW bid**
- **Bidders are required to disclosed the % of national content which will be considered during evaluation of bids**

## → Deal Structuring Considerations

- **Dates can be extended with the payment of delay damages**
  - The first three milestones are permitted be extended for up to 60 days for justified reasons at no cost. Extensions beyond 60 days will require a 20% increase in the completion guarantee.
  - COD can be extended by up to 180 days for justified reasons, incurring daily delay damages of US$1,388/MW.

# 2. RenovAr - Act 27, 191 (4/5)

→ **Auction results**

| **Wind** | **Round 1** ( Sept. – Oct.) 2016 | **Round 1.5** (Nov. 2016) |
|---|---|---|
| – Received bids | 49 (3.468 MW) | 19 (1.561 MW) |
| – Awarded | 12 (707 MW) | 10 (765 MW) |
| – **Ø US$ / MWh** | **US$ 59,39** | **US$ 53,34** |
| **Solar** | | |
| – Received bids | 58 (2.811 MW) | 28 (925 MW) |
| – Awarded | 4 (400 MW) | 20 (516 MW) |
| – **Ø US$ / MWh** | **US$ 59,75** | **US$ 54,94** |

# 2. RenovAr - Act 27, 191 (5/5) → Risk analysis of tender

| Risk | Responsible Party | Comment |
|---|---|---|
| **Resource** & Site Selection | SPV | ✓ Project assumes risks of financial penalties associated with not meeting P90 and P99 MWh production levels.<br>✓ All sites are privately selected and all risks borne by Project. |
| Permitting & Construction Risk | SPV → EPC Contractor | ✓ Projects to be executed under fixed-price turnkey contract with high quality international and local contractors, together with Tier 1 equipment suppliers.<br>✓ Substantial delay penalties under PPA will be covered by EPC contractor. |
| O&M Risk | SPV → O&M Contractor | ✓ O&M contractor shall provide O&M services for a pre-agreed, inflation indexed fee, supervised under an Asset Management Agreement. |
| **Curtailment/Grid** Stability Issues Risk | CAMMESA/GOA | ✓ The Project will be given credit for energy which was generated but not delivered to the grid for reasons outside of its control.<br>✓ Grid stability or congestion issues are explicitly carved out of the Force Majeure definition meaning that CAMMESA cannot use these issues as a reason not to purchase energy. |
| **Credit Risk** | CAMMESA/GOA | ✓ CAMMESA's payment risk will be backed by the FODER fund which is expected to have 12 months of payments in reserve funded by a user tariff and/or government funds; there are mechanisms for replenishment when the levels falls below 65% |
| Force Majeure Risk | Shared | ✓ Each party will get relief under its PPA obligations for FM events and the contract will be extended for any FM event (whether during construction or operation).<br>✓ In an extended FM event (180 days) either party may terminate the PPA and no compensation is due. |
| **Change in Law** and Tax Risk | CAMMESA/GOA | ✓ The Project has the right to claim for adjustments under the PPA for changes in law which have a negative impact on the results and for most tax changes (except for those excluded by the law). |
| Tax Benefit Risk | SPV | ✓ Although the delay protections under the PPA are reasonable, the Project runs a risk of losing its tax benefits if the construction start date is delayed beyond the Law's deadlines. |
| Transmission Risk | CAMMESA/GOA | ✓ The Project is only responsible for losses up to the delivery point (the substation connection). |
| **Termination Risk** | CAMMESA/GOA | ✓ The Project has the rights to exercise a Put Option (see PPA analysis) |

# 3. PPA Analysis (1/6)

| Topic | Description | Issues / Assessment |
|---|---|---|
| **PPA Counterparty** | • CAMMESA will purchase electricity for all small users to meet the renewable energy targets as well as for large users (>300kW) who would like to participate. | • The PPAs will have credit enhancements features.<br>• Payment delay is somewhat generous: Event of default trigger is 4 missed payments in a row or 6 in rolling 12-month period. |
| **Price / Revenues** | • Prices will be set in USD<br>• Payments will be made in Argentine pesos with an FX catch-up to the date prior to payment due date<br>• Payments must be made to an account in Argentina<br>• Price is adjusted by year of delivery as reflected in previous table. | • The FX adjustment method is sufficient to mitigate rate risk<br>• Under circumstances of significant transferability issues and inconvertibility, the Project has the right to exercise a Put Option with payments backed by the FODER, the GOA and which may carry a (partial) World Bank guarantee. |
| **Dispatch** | • By law, renewables will be dispatched as are run-of-river hydro plants which is **"must-run"**.<br>• The PPA will remunerate energy generated and injected to the grid at the delivery point<br>• Only losses to the delivery point are assumed by the Project | • The legal protection should be largely sufficient<br>• **CAMMESA is not permitted to declare FM** (and thus not take/purchase) for grid stability issues which should protect against curtailment risks<br>• The Project is given credit for energy not taken by the grid due to causes unrelated to the Project |
| **Volumes** | • Price is adjusted by year of delivery<br>• Projects must commit to a Committed Energy = **P90** scenario<br>• Projects must commit to a Minimum Committed Energy = **P99** scenario<br>• Financial penalties will be assessed for failure to meet these targets within certain parameters/timetables | • P90 and P99 levels should be verified by an independent source<br>• Scenarios will need to be run to assess the degree of risk being assumed by the Project and how it can be mitigated<br>• **No termination is permitted for failure to meet minimums – which is positive** |
| **PPA Credit Enhancement** | • The FODER fund has been established to credit enhance the PPAs<br>• FODER will set up a Guarantee Account to be funded by a system charge to all users and/or government funding that should maintain a balance of 12 months of PPA obligations which will support all renewable PPAs. | • As contemplated, FODER should serve as a meaningful credit enhancement although there is certain discussion about how fast is can be filled (and replenishment). |

# 3. PPA Analysis (2/6)

| Topic | Description | Issues / Assessment |
|---|---|---|
| **Term** | • 20 years from COD; extensions permitted for FM delays in start up as well as during operation. | • Market standard provisions |
| **Transmission and other charges** | • The Project is responsible for any **losses prior to the Delivery Point**<br>• The other sector charges are the responsibility of CAMMESA | • Each project will need to assess its losses to its selected node<br>• Other sector charges are substantial and the Project's protection is valuable (this exemption is found in the law as well). |
| **Completion Guaranty** | • The Project must post security in the amount of **US$250K/MW** until 6 months after COD. No operation security is required. | • Quite standard in the region although considered fairly high |
| **Arbitration** | • Disputes are to be settled in a jurisdiction to be selected by the Arbitration Panel based on the nationality of CAMMESA (on the one hand) and the beneficial owner of the Project (on the other), implying international arbitration will be permitted. | • We believe that an Arbitration Panel will be likely to select a neutral location in any dispute which should provide comfort around international arbitration<br>• CAMMESA renounces any claim to sovereign immunity |
| **Change in Law and Tax Protection** | • The Law and regulations provide for protection (and price increases) related to increases in existing taxes as well as new taxes – until the current renewables benefit expire in 2025 and for those provinces which have signed on to the law<br>• The projects are also exempt from certain sector charges as well as from the costs associated with reserve power related to intermittent supply (which in the latter case will be paid by the system as a whole).<br>• These provisions are reiterated in the PPA and include changes in law | • There is a mechanism to request an increase in the PPA price for changes in law or taxes which cannot be reasonably denied. |
| **Lenders Rights** | • Full security package available and acknowledged<br>• Lender's right acknowledged, explicitly including (i) notification rights, (ii) certain Project actions requiring Lender's consent to be valid and (iii) extended cure periods | • Lenders will benefit from an extended cure period of 180 days which is quite comfortable. |

# 3. PPA Analysis (3/6)

| Topic | Description | Issues / Assessment |
|---|---|---|
| **Delay Risk** | • Financial Close, Construction Start and Equipment Arrival milestones may be extended up to 60 days with no penalty; additional delays require an **increase in the Completion Guarantee of 20%**<br>• The COD milestone may be extended by up to 180 days paying daily penalties of **US$1,388/MW** | • Bidders can set their own milestone as long as the COD date is within the required 730 days from Contract signing<br>• Revenues appear to begin at COD regardless of whether such date is in advance of the COD milestone<br>• We believe that these cushions are sufficient<br>• Possible loss of tax benefits (levels of which are keyed to the beginning of significant investment) are independent of the PPA and are a Project risk to be evaluated. |
| **Force Majeure** | • All obligations are excused with the typical exception that payments are not excused by FM unless expressly linked to event<br>• However, CAMMESA is not responsible to make payments for energy not delivered<br>• Both parties have a termination right at the end of 180 days | • As discussed above, extension risks are well covered<br>• Revenues during FM should be covered by business interruption insurance<br>• No termination payment or Put Option is available in such case |
| **EOD/Causes of Termination** | • The list of EODs for the Project are market standard, including missing the COD Date<br>• The EODs for CAMMESA are limited and limitative | • The existence of a Lender’s cure period of 180 days provides adequate protection<br>• The contract makes it difficult to terminate the PPA – which is a credit positive due to the uncertainties of the market<br>• The possibility of CAMMESA being a habitual late payer and/or irregular payer can be addressed structurally |
| **Consequences of Termination** | • If the PPA is terminated by either party, no payments are due and payable<br>• Under the Adhesion to the Trust Agreement, under certain circumstances the Project may exercise the **Put Option** or the government may exercise the Call Option – both cases leading to the purchase and transfer of the assets | • In order to benefit from the Put Option, the Project must not terminate the PPA<br>• The WB Facility will be available to (partially) backstop the termination payment obligation if that option is selected and paid for by the Project.<br>• These mechanics are more fully discussed in a following slides. |

# 4. PPA Analysis (4/6)

→ **Trust structure FODER**

- ✓ Law 27.191 created the FODER *(“Fondo Fiduciario para el Desarrollo de Energías Renovables”)* with the objective of financing and supporting the execution and financing of eligible projects
- ✓ FODER is a fund whose trustor and fiduciary agent is the *Ministerio de Economia y Finanzas Públicas* and whose trustee is the *Banco de Inversion y Comercio Exterior* (BICE)
- ✓ Three principle agreements which govern the credit enhancement for the PPAs:
  - **Master Trust Agreement** covering all FODER activities for the benefit of all renewable PPAs
  - **Adhesion to the Trust Agreement**: each project will enter into such agreement with the FODER and the GOA where its rights relative to FODER and the GOA are outlined
  - **World Bank Guarantee**: together with the GOA, the FODER will also enter into an agreement with the World Bank which may partially credit enhance the project in case of **Put Option (see next slides).**
    - Project company may opt to purchase a World Bank Guarantee in an amount of up to US$ 500.000 per MW which will backstop the payment by the FODER trust in case of a Put Option
    - WB will charge **up-front fee** of 90bps on the guaranteed amount and a **bi-annual maintenance fee** ranging from 50bps to 100 bps annually based on the overall term of the guarantee

# 4. PPA Analysis (5/6)

→ <u>Project´s "Put" and "Call" Options</u>

- ✓ To incentivize the parties not to terminate a PPA, the contractual framework sets forth put or call options to sell or purchase the relevant project that may be exercised upon the occurrence of a PPA termination event or any of the other events described below, in each case, so long as the PPA is not actually terminated.
- ✓ Compensation in the form of a project sale or purchase price will be payable by the FODER trust upon the exercise by the project company of a put option or the exercise by FODER of a call option
- ✓ **Put Option** (The Project Company will have the right but not the obligation to require FODER to acquire the Project) under the following circumstances:
  - Any event entitling it to terminate the PPA;
  - Inconvertibility or non-transferability of currency; or
  - Amendment or termination of the FODER trust affecting its guarantees
  - ➢ <u>Purchase price</u> determined in US$ equal to **(a)** the lower of (i) the value of the investment made as of COD and (ii) a pre-set value per MW for each technology multiplied by the contracted capacity, in each case amortized at at rate of 5% per annum after COD, plus **(b)** any amounts due to the Project Company under unpaid invoices
- ✓ **Call Option** (CAMMESA may exercise its call option due to any event entitling it to terminate the PPA
  - ➢ <u>Purchase price</u> determined in US$ equal to (a) the lower of (i) 75% of the value of the investment made by the project company as of COD amortized at 5% annually and (ii) a pre-set value per MW for each technology multiplied by the contracted capacity, in each case amortized at at rate of 5% per annum after COD, plus **(b)** any amounts due to the Project Company under unpaid invoices

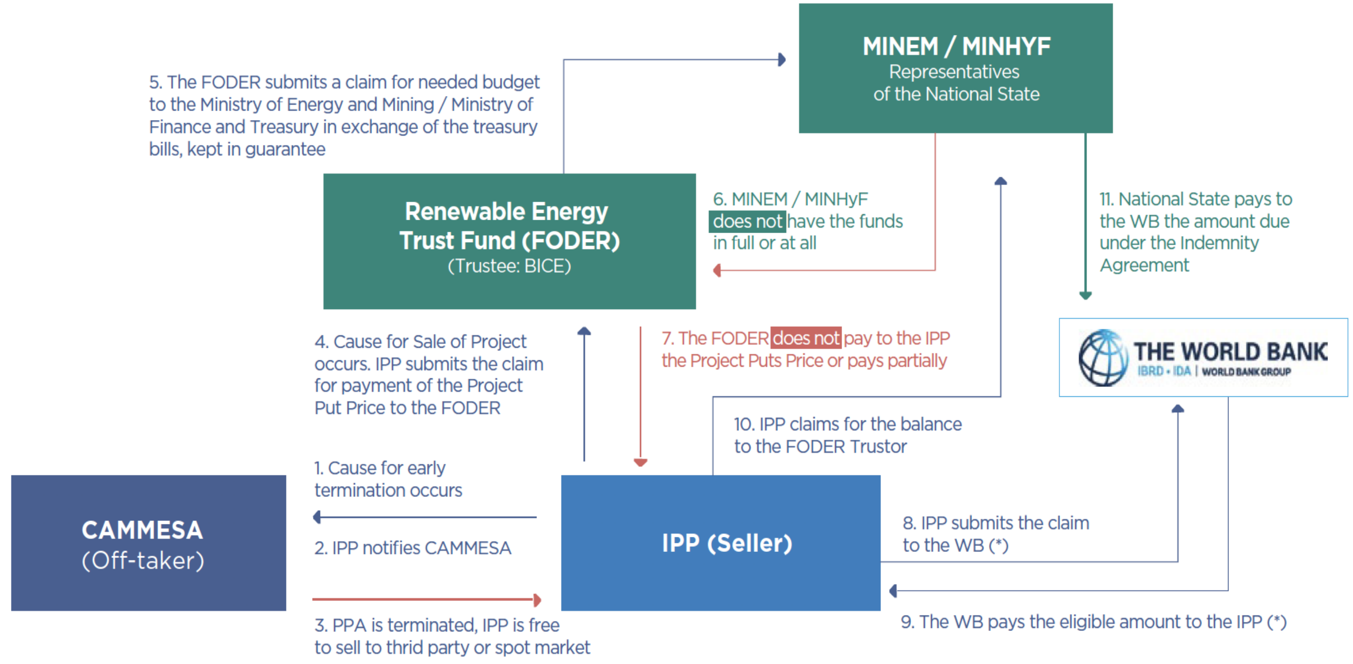
# 3. PPA Analysis (6/6)

## → Termination Guarantee

- ✓ **Put-Option:** project company to transfer the project assets (not the project company !) to FODER and receive compensation
- ✓ **Alternative**: project company keeps the power plant and markets electricity with any third party.
- ✓ Events of default: no payment for 4 consecutive months or 6 non-consecutive months within a 12 months period and/or CAMMESA does not comply with arbitration sentence

## 2. TERMINATION PAYMENT GUARANTEE VIA TREASURY BILLS

## 3. THE WORLD BANK



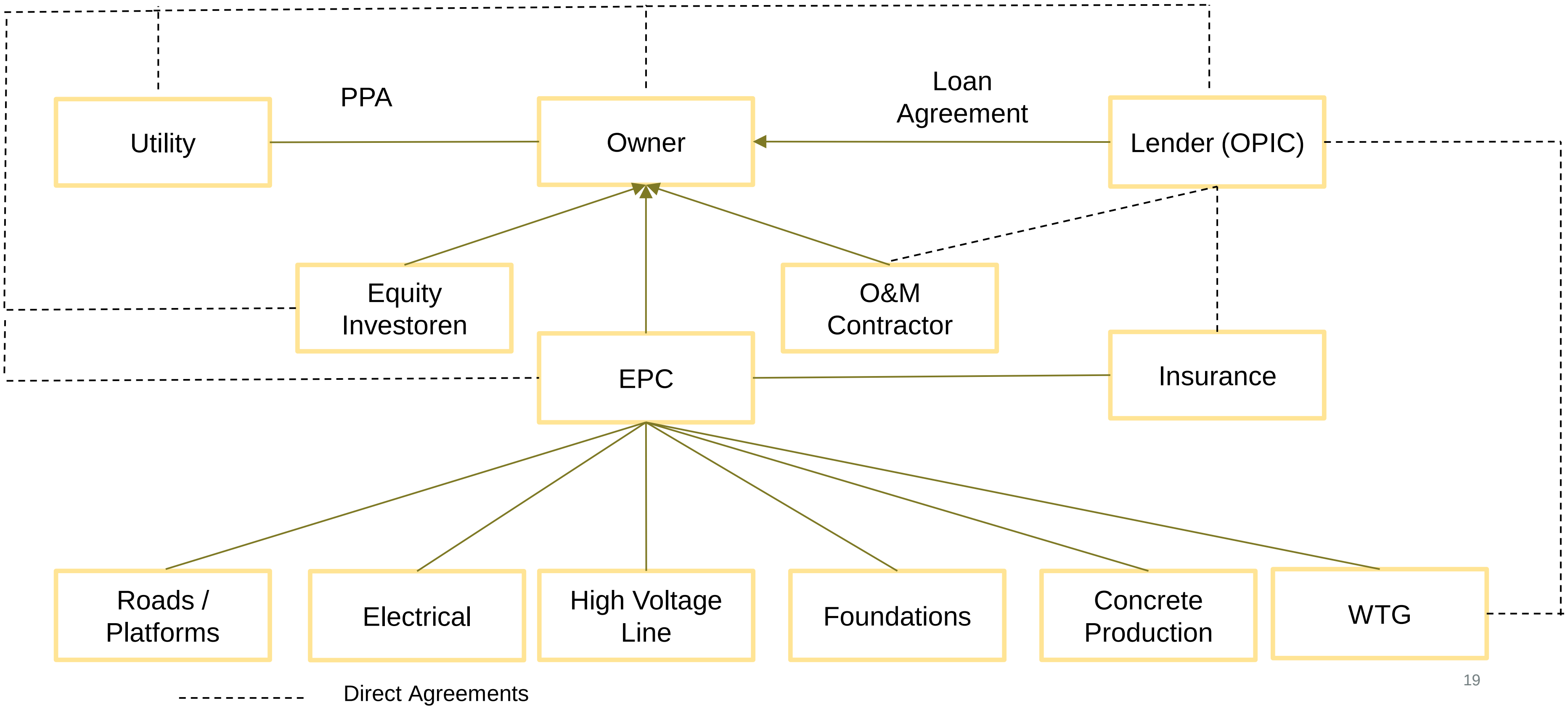

(*) The FODER grants project companies who are awarded and become beneficiaries the irrevocable right to directly submit claims before the World Bank in certain cases and to receive payments from the World Bank.

# 4. Alternative Business Models (1/2)

- ✓ In the US the corporate renewable energy capacity has already grown significantly in the past three years
- ✓ **MINEM announced to publish detailed regulation for corporate PPAs and self-generation projects in 2Q 2017**
- ✓ Outside of the U.S. no statistics available but studies say that large businesses throughout the world are now more than ever seriously exploring purchasing renewable power (source: American Clean Skies Foundation and GreenBiz – www.greenbiz.com/article/google-just-small-slice-new-corporate-ppa-boom, 2015)
- ✓ Reasons for corporate PPA growth
  - Low returns in tender processes due to low prices
  - Energy efficiency and sustainability policies obligating companies to cut greenhouse gas emissions
  - Corporates willing to pay higher prices than utilities
- "Synthetic" PPAs preferred
  - Contracts between offtaker and project company where no physical exchange of power takes place. The project sells power directly to the open market and offtaker purchases from the open market.
  - Offtaker guarantees a set strike price to pay for each unit of energy generated over a period of time
  - If prices rise above strike price, project pays the difference to the offtaker. The offtaker compensates the project in case that market prices fall below strike price.

# 4. Alternative Business Models (2/2)

## → Structure "ring fencing" Project Finance in multicontracting project



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# Thank you.

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