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Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Note by the Secretariat

Compilation of comments by Governments and international organizations

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* Revised dates.

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I. Introduction

1. The Working Group on Privately Financed Infrastructure Projects was established by the United Nations Commission on International Trade Law at its thirty-fourth session and entrusted with the task of drafting core model legislative provisions in the field of privately financed infrastructure projects.

2. At its fifth session, held in Vienna from 9 to 13 September 2002, the Working Group reviewed the draft model provisions that had been prepared by the Secretariat with the assistance of outside experts and approved their text, as set out in the annex to its report on that session (A/CN.9/521). The Working Group requested the Secretariat to circulate the draft model provisions for comments and to submit the draft model provisions, together with the comments received, to the Commission, for its review and adoption, at its thirty-sixth session.

3. The present note reproduces comments received from an international organization. Further comments will be issued as addenda to the present note in the order they are received.

II. Compilation of comments

International organizations

International Lawyer's Union

[Original: English]

Model provision 2. Definitions

We understand that the Working Group on Privately Financed Infrastructure Projects has faced difficulty in agreeing on a definition of the word "concession" that would be appropriate for all legal systems.

However, it is essential for a concession law to have its scope of application determined clearly. This is especially true when a law on public procurement exists. In such a case, it is necessary to make clear which law shall apply to a particular contractual relationship irrespective of the name given to the contract regulating the relationship (concession, license, lease, usufruct rights, head of agreement, etc.).

In many countries where a build-operate-transfer or concession law exists, it can be seen that contractors try to escape its application (in particular the strict provisions on selection of concessionaires), by using different contract titles or by negating the fact that there is a concession.

The difficulty of defining the term concession has been addressed by the European Union in the European Commission interpretative communication on concessions under Community law, dated 12 April 2000, which defines concessions as follows:

> "This communication therefore concerns acts attributable to the State whereby a public authority entrusts to a third party—by means of a contractual act or a unilateral act with the prior consent of the third party—the total or partial management of services for which that authority would normally be

responsible and for which the third party assumes the risk. Such services are covered by this communication only if they constitute economic activities ... These acts of State will henceforth be referred to as 'concessions', regardless of their legal name under national law."

Obviously this definition, which is a compromise between common law and civil law systems, might be improved. However, it could be given as an example for guidance to the legislator.

It would be counterproductive to simply elude this most important question of defining what the law is about.

Model provision 3. Authority to enter into concession contracts

It is always difficult to fix precisely in a concession law what assets or services may be subject to a concession and by which entitled organ. Names and competences of organs may change. For the concession law to be acceptable, in particular in countries with economies in transition, it should not affect any previously agreed distribution of power (in particular of local self-government). It is therefore recommended to adopt a neutral provision referring to the proper authority having jurisdiction over assets and services to be conceded.

Model provision 4. Eligible infrastructure sectors

The remark for model provision 3 also applies to model provision 4.

In most legal systems, a concession law cannot grant more rights than those granted by sectorial or specific laws. Rather than an indicative or exhaustive list of matters that may be conceded, it is preferable to refer generally to services and assets that can be conceded pursuant to any applicable law and, if necessary, to amend specific or sectorial laws to allow concessions, if not already provided for.

Conversely, a list of assets or services that cannot be conceded as being part of national sovereignty or national wealth, is often established.

Model provision 18. Circumstances authorizing award without competitive procedures

Exception (b) should be based not only on a maximum amount of investment, but also on a maximum yearly turnover and a maximum contract duration (three to five years).

Model provision 26. Record of selection and award proceedings

It should be recommended that each concession agreement be registered in a separate national concession registry, kept within a specific agency or ministry (Ministry of Finance) and accessible to all interested persons or entities. This would facilitate recourse and give to other contracting authorities the possibility to benefit from past contractual experience.

Model provision 27. Review procedures

Where a regulator exists, it might be advisable to provide for a first instance recourse to the regulator during the tender/direct negotiation process or soon afterwards, prior to the effective date of the concession.

Model provision 40. Revision of the concession contract

In order to reduce contractual uncertainty, a fourth condition should be added in paragraph 1:

> "(d) Exceed a threshold amount [to be determined] of investment cost or of operational expenses, over a certain period of time [to be determined], or upset the overall financial or economic balance of the contract (*bouleversement de l'économie du contrat*)."