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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

Addendum

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* Revised dates.



II. Compilation of comments

A. States

Italy

1. The Government of Italy confirms its appreciation for the work accomplished on the task of drafting model legislative provisions on privately financed infrastructure projects to be submitted to the United Nations Commission on International Trade Law (UNCITRAL) at its next session. Indeed, the model provisions reproduce most of the suggestions and views expressed by the Italian delegation, which, however, wishes to make some comments on individual provisions always with the aim of increasing transparency and fairness in the competitive procedures.

2. As regards the relationship between the draft model provisions and the legislative recommendations contained in the Legislative Guide, the Italian delegation suggests the adoption of the third option mentioned in paragraph 2 of the note by the Secretariat of 19 December 2002 (A/CN.9/522/Add.1). Since it is not actually possible to replace the legislative recommendations in their entirety with the model legislative provisions (second option), it might be desirable to replace only those legislative recommendations in respect of which the Commission adopts model legislative provisions.

Model provision 5. Rules governing the selection proceedings

3. Obviously, the model provisions do not deal with a number of practical procedures or steps that would normally be found in an adequate general procurement regime (such as, for example, bid security and review of procedures, right of information of the public, manner of publication of notices, etc.). However, if some of these practical, yet fundamental, procedural provisions are not contained in the general framework of the enacting State, it would be preferable for the model provisions to contain a reference to supplementary provisions (for instance, to provisions of the UNCITRAL Model Procurement Law) providing for transparent and efficient competitive procedures.

Model provision 6. Purpose and procedure of pre-selection

4. The invitation to participate in the selection proceedings should contain sufficient information for bidders to be able to ascertain whether the works and services entailed in the project could be provided by the interested bidder (for instance, with reference to possible pre-selection criteria, such as the use of national goods or employing local labour).

5. Thus it could be envisaged to add a closing phrase to the provision, such as, for example, “any other information concerning essential elements of the project”.

Model provision 15. Comparison and evaluation of proposals

6. This model provision could make a reference to alternative evaluation processes such as a two-step evaluation process or the two-envelope system

(described in chap. III, “Selection of the concessionaire”, paras. 79-82, of the UNCITRAL Legislative Guide).

Model provision 17. Final negotiations

7. Such negotiations may have a number of disadvantages since they both require highly skilled personnel with sufficient experience and bring with them a higher risk of abusive or corrupt practices. Therefore, it would be preferable to specify in the model provision that the use of competitive selection procedures is a rule for the award of privately financed infrastructure projects and to reserve concession awards without competitive procedures only for exceptional cases.

Model provision 19. Procedures for negotiation of a concession contract

8. For the purpose of enhancing transparency, the provision could establish a minimum number of bidders with whom the contracting authority, where possible, should negotiate or from whom the contracting authority could solicit proposals (subpara. b)).

Model provision 26. Record of selection and award proceedings

9. The record of selection and award proceedings is necessary with the aim of ensuring transparency and accountability and to make it easier to exercise the right of bidders to ask for review of decisions made by the contracting authority.

10. Thus, it would be advisable to assert this right also if the laws of the enacting State do not adequately address these matters, for instance, by adding the words “if they exist” or similar wording with reference to the pertaining provisions of the enacting State.

Model provision 30. Organization of the concessionaire

11. As discussed in the Legislative Guide, it would be advisable for the model provision to refer to the legislative provisions or to require the consistency of regulatory requirements with international obligations assumed by the host country.

Model provision 33. Easements

12. Easements are usually not expeditiously or easily obtained by the concessionaire directly from the owners of the properties concerned; for that reason it is more frequent for the necessary easements to be compulsorily acquired by the contracting authority at the same time as the project site. It would be advisable therefore to use the words “the concessionaire shall be granted”.

Model provision 34. Financial arrangements

13. This provision sets forth the concessionaire’s right to charge and collect tariffs or fees, which are the main, if not the sole source of income for the concessionaire.

14. The concession contract shall provide for methods and formulas for the establishment and adjustment of those tariffs and fees; it is assumed that in drafting the concession contract the contracting authority takes into account parameters for pricing goods or services on the basis of principles of standards of fairness and

equity. For these reasons, it would be advisable to eliminate the words contained in square brackets.

Model provision 43. Duration and extension of the concession contract

15. The Working Group has already examined the possibility for the contracting authority and the concessionaire to agree on the extension of the term of the concession in the concession contract. In that regard, the Working Group agreed to preserve the body of the text of the provision, suggesting the addition of a footnote. Notwithstanding the above, since in general terms it is not advisable to exclude entirely the option to negotiate the extension of the concession period, the footnote could be modified by replacing the words “compelling reasons of public interest” with the words “under certain specific circumstances (such as specified in the concession contract)”.

Model provision 44. Termination of the concession contract by the contracting authority

16. In consideration of the serious consequences of its application, termination should be regarded as an extreme measure. The conditions for the exercise of this right by either party should therefore be limited, for instance, by maintaining the word “compelling” when reasons of public interest are invoked.

17. Also, it could be desirable for the model provision to imply the possibility of termination in the public interest only on condition that it has been already expressly mentioned in the draft concession contract circulated with the request for proposals.

18. Furthermore, since it is not appropriate to use the right of termination for reasons of public interest as a substitute for other contractual remedies in case of dissatisfaction with the concessionaire’s performance, the model provisions could contain wording such as “if not otherwise specified in the concession contract”.

19. With the aim of reducing the discretionary power of the contracting authority to terminate the contract unilaterally, the model provision could establish the need for a decision by a judicial or other dispute settlement body.

Malaysia

1. Malaysia notes that the objectives of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects is to provide model provisions with a view to:

(a) Establishing a favourable legislative framework to promote and facilitate the implementation of privately financed infrastructure projects by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;

(b) Developing general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects.

2. Based on these objectives, the model provisions include, among others:

- (a) Provisions on authority to enter into concession contracts and rules governing the selection of the concessionaire;
- (b) Procedure for pre-selection of bidders;
- (c) Circumstances authorizing award of concession contracts without competitive procedures;
- (d) Procedures for negotiation of a concession contract and content of the concession contract.

3. At the moment, Malaysia does not have any specific legislation that covers this process. An agency in the Prime Minister's Department is entrusted with the powers to oversee and implement matters relating to the privatization process and procedures. As regards regulatory regimes, specific laws have been enacted to regulate and enforce rules against concessionaires and privatized activities. For the purpose of the present comments, reference is made to the model provisions and the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects.

Provisions on authority to enter into concession contracts

4. The draft model legislative provisions propose that the enacting State list the relevant public authorities that may enter into concession contracts. It is also recommended that the law identify the public authority that is empowered to award concessions and enter into agreements for the implementation of privately financed infrastructure projects.

5. Malaysia finds that this proposal is highly regulatory and may be too restrictive. A public authority need not be a party in all concession contracts, but there can be instances where a public authority may need to be a party for purposes of ensuring effective implementation of a concession contract. In cases where domestic law has been enacted to legislate the specific functions of the public authority, such law will be sufficient to confer on the public authority the necessary powers to regulate and control the privatized entity and its activities. It is therefore not necessary to list the relevant public authorities that may enter into a concession contract.

Rules governing the selection of the concessionaire

6. The draft model legislative provisions propose that the selection of the concessionaire be conducted through transparent and efficient procedures. This proposal augurs well and can be considered subject to the State's policies and practices. Malaysia notes that in some countries the authorities encourage a limit on the number of prospective bids to ensure meaningful competition (for example, three or four). Also, some countries practise a rating system on prospective bidders in order to maintain quality. Such practices can promote transparency and efficiency.

Circumstances authorizing award of concession contracts without competitive procedures

7. Where the project involves national defence or national interests and where there is only one source capable of providing the required service, the model provisions recommend that approval from a higher authority be obtained. Malaysia

finds that this recommendation is useful in the practical sense and can be given due consideration.

8. Malaysia is also of the view that when such a contract is offered to a foreign bidder, special provisions on secrecy and confidentiality must be formulated. To some extent a degree of flexibility should be offered in order to meet the changed conditions, including expansion of the service to meet additional demand.

Procedures for negotiation of a concession contract

9. The draft model legislative provisions propose that a notice of intention to commence negotiation of a concession contract be made, that the authority identify as many capable persons as it can and that evaluation criteria be established. That proposal can only be effective if an independent and efficient committee is established to oversee all these criteria. Proposals should be presented before this committee, whereby the formulation of the criteria and the evaluation of the proposal can be carefully studied.

10. Malaysia observes that even though the recommendations are commendable, in practice they may hinder the expeditiousness of the process. Codifying the procedures for negotiation would entail the whole process becoming rigid and cumbersome. This may not be conducive to a good business environment.

Content of the concession contract

11. The draft model legislative provisions set forth recommendations on the content of the concession contract that include, inter alia, the nature and scope of work, the extent of exclusivity, the concessionaire's obligations, remedies available and termination.

12. Malaysia notes that all the recommendations are useful and have been put into practice.

13. However, Malaysia observes that model provision 40 stipulates that concessionaires are entitled to a revision of the concession contract in the event of changes in economic or financial conditions or changes in legislation. Malaysia is of the view that this provision would burden the contracting State. No compensation should be given to concessionaires in the event of a change in economic or financial conditions, as these circumstances are part of the commercial risks that the concessionaires have to take. Similarly, no compensation should be given to concessionaires in the event of changes in legislation, as this would restrict the Government's decision-making process.

14. Malaysia also observes that model provision 44, subparagraph (a), dealing with termination of the concession contract, stipulates that the contract may be terminated if it is reasonably expected that the concessionaire is no longer able or willing to fulfil its obligations. Although the test for reasonableness appears to be an objective test, it is very much a question of facts and can be disputed. Insolvency, serious breach or otherwise are given as instances when a party is unable or unwilling to perform its obligations. The word "serious" breach is often the bone of contention and for the purpose of avoidance of doubt it is suggested that the contract should identify and specify which provisions are material in the breach and would lead to termination. Likewise the words "or otherwise" are vague and open-ended.

15. Model provision 49, dealing with dispute settlement, would be clearer if it included options for the settlement of disputes so that the enacting State could then consider which mode to adopt in its legislation.

Whether the model provisions and the Guide are two related but independent texts or whether they both should be combined as a single text

16. Although the Guide was a useful reference for States wishing to establish a legal framework favourable to private investment in public infrastructure, it was thought that a more concrete guide in the form of model legislative provisions or a model law dealing with specific issues would be desirable. To that end, the model provisions were drafted. Malaysia further notes that the Guide complements the model provisions well. The model provisions are not exhaustive and only provide for the core provisions. Perhaps this is intended to be so, as it would give parties flexibility and more room to manoeuvre. Malaysia is of the view that the model provisions and the Guide should be read together as a single text.

17. Both documents would provide a more complete and comprehensive text. However, this issue is only secondary, as the primary issue is still whether it is necessary to have these provisions enacted as legislation. Transparency, fairness and accountability can still be achieved by having a guideline or manual.

Turkey

Turkey is of the view that in order to ensure best use of the draft UNCITRAL model legislative provisions on privately financed infrastructure projects for those States willing to make use of them, the letter and spirit of the provisions should be duly interpreted taking into account the legislative recommendations contained in the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. Furthermore, Turkey believes that the draft model provisions and the legislative recommendations should be combined in a single text containing all model legislative provisions and those legislative recommendations on which no model provision has been drafted, in order to produce a comprehensive compilation of all the relevant texts for ease of use.

B. Intergovernmental organizations

Asian Development Bank

1. The draft model provisions are the outgrowth of UNCITRAL's earlier work in this area on the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, which was published in 2001. Though UNCITRAL has worked through a large panel of experts on the draft model provisions, representing very significant amounts of work, this is the first time the draft model provisions have been made available for comment. The cover letter from the Secretariat requests "specific comments ... on the individual provisions so as to facilitate the preparation of the analytical commentary that will be submitted to the Commission". Given the short time available to the Asian Development Bank to comment on such a significant piece of legislative architecture, the Bank is not in a position to make an exhaustive review, but would like to make the following observations.

Concessions

2. As the introduction to the draft model provisions makes clear, the UNCITRAL Working Group began by working on a specific phase of infrastructure projects, namely, the selection of the concessionaire. However, it expanded its mandate to other important areas, namely, construction and operation, termination and dispute resolution.

Comments on specific provisions

Model provision 18. Circumstances authorizing award without competitive procedures

Subparagraph (a)

3. This provision would be highly desirable to facilitate the rapid installation of urgently needed infrastructure that has been long neglected. For example, a country that ignores power generation for many years might need to rapidly install a large number of small power plants for peaking purposes by means of the abbreviated procedure described here, while it requires larger plants to be awarded by means of the competitive bidding described earlier in the draft model provisions.

Unsolicited proposals

4. These provisions generally provide much-needed guidance to legislatures that want to establish some basic rules for this controversial area.

Model provision 23. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights

5. This provision specifies that the contracting authority may publish a description of the essential elements of an unsolicited proposal in order to solicit other proposals for the project. Paragraph 4 concludes that, in the event many proposals are then made, the contracting authority shall then request the proposals to undergo the full competitive bidding process of draft model provisions 10-17.

6. A proponent would be unlikely to go through the effort and cost implied by draft model provision 21, paragraph 2, if it might lose the project to other proponents precisely because of its hard work in preparing a feasibility study. This will be contrary to the most often cited reason for setting up a process for accepting unsolicited proposals in the first place, namely, that speed might be needed for a particular type of project (for example, small water-treatment or sewerage projects). The Asian Development Bank recommends that the Working Group consider specifying that only unsolicited proposals of below a certain size may be considered, perhaps measured by a total project cost figure. The contracting authority or another agency would periodically set that figure. The contracting authority would then conduct abbreviated cost and value comparisons to verify the merit of the proposal, followed by appropriate public hearings as required by law.

Model provision 45. Termination of the concession contract by the concessionaire

7. A number of concessionaires have recently pulled out of projects as a result of their own difficulties or change in business orientation. Model provision 45 would prohibit the concessionaire from terminating the contract in such circumstances,

which is highly desirable. In some cases, the contracting authorities have been left with no readily available alternate concessionaire and, despite reasonable planning, face a very desperate situation with respect to the infrastructure that the project was intended to supply. The Asian Development Bank recommends that the Working Group consider an additional subparagraph (d) along these lines:

“(d) The concession contract shall specify damages payable by a concessionaire to the contracting authority in the event the concessionaire terminates the concession under other circumstances, including but not limited to the concessionaire’s own financial difficulty, change in business orientation or the uneconomical nature of the project.”

8. Please note the typographical error in footnote 14.

European Bank for Reconstruction and Development

1. The European Bank for Reconstruction and Development would like to congratulate the Working Group for developing model legislative provisions that address in a constructive way many of the issues fundamental to facilitating the financing of infrastructure concessions. In particular, the Bank is especially pleased to see the clarity and transparency of the process developed for selecting concessionaires. In addition and consistent with its approach of encouraging flexibility with respect to the terms of concession agreements, the Bank is pleased to see an approach that is not over-prescriptive in defining what must be contained in a concession agreement and that further permits, as the parties may agree, the application of foreign law and arbitration.
2. The European Bank for Reconstruction and Development further commends the Working Group for explicitly including a section regarding the grant of security to lenders and a mechanism that would permit, subject to the consent of the contracting authority, the substitution of a concessionaire.
3. However, in this regard, there are three areas of the draft model legislative provisions where greater clarity might be offered.
4. Firstly, as noted above, model provision 42 indicates that a contracting authority may agree with lenders to the concessionaire on the substitution of a new entity upon breach by a concessionaire. It is not entirely clear from this wording whether such agreement may be put in place in advance, such as through a direct agreement. Further, it may not seem entirely clear from the model legislative provisions whether a contracting authority may enter into a more general direct agreement with lenders to, for example, acknowledge the grant of security or provide for other provisions that may be important to secure financing for such concession.
5. Secondly, and related to the previous point, it is noted that model provision 36 generally suggests that the assignment or pledge of the concession agreement is not permissible without the consent of the contracting authority. While many of the concerns of lenders in having security over the concession agreement might be adequately addressed through the proposed possibility of substitution rights mentioned above, there may be rights of the concessionaire under a concession agreement with respect to which lenders will want a first ranking security interest, such as, for example, termination of payments, if any. It also generally facilitates

financing for lenders to be able to confirm that they have security over the main asset in concession financing, that is, the concession agreement, even if such security is subject to the rights of the contracting authority under such concession agreement. Accordingly, it is suggested that concessionaires should be permitted to assign their rights in a concession agreement as security for loans from financiers, but also to terminate the concession agreement if, by virtue of any such foreclosure, a substitute entity did not meet the criteria agreed with the contracting authority.

6. Thirdly, it is noted that the shareholders of the concessionaire are permitted under model provision 35 to pledge their interests in the shares of the concessionaire. However, it is not entirely clear how the permission of such security interplays with model provision 37, which prohibits changes in control.

7. Finally, it is gratifying to note that the Office of the General Counsel of the European Bank for Reconstruction and Development now formally refers to the UNCITRAL Legislative Guide as a benchmark of best internationally accepted standards. This will be the case for assessments of concession laws throughout 27 countries of the Bank's operations and also in developing a concession-related page on the Bank's web site.

International Finance Corporation

1. The proposed draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects is an important piece of work for member countries of the International Finance Corporation. The Corporation is pleased to have been given an opportunity to comment upon it. Given the time constraints, a brief review has been made of the legislative recommendations only and the following comments are based on the experience of the Corporation.

Foreword

Other laws affecting private infrastructure projects and judicial systems

2. The last paragraph should also refer to tax, banking, foreign exchange and bankruptcy laws and regulations as being areas that are not addressed by the Guide but have an impact on privately financed infrastructure projects. The accompanying commentary should encourage Governments to authorize regulators to implement practical and straightforward regulations and procedures to implement the law. For example, the system for converting and repatriating foreign exchange must be simple and fast. The last paragraph of the Guide should also state that the experience, transparency and predictability of court systems are also essential. Finally, the paragraph should encourage Governments to reconcile inconsistencies with other conflicting laws and regulations. For example, does the concession law of a country supersede the tax laws or laws relating to government contracts?

Specific provisions

Foreign bidders

3. The Guide, model provision 7, provides that there may be instances in which domestic bidders are preferred and that is acceptable as long as the requests for proposals clearly so provide. The International Finance Corporation supports the

accompanying commentary, which describes the issues surrounding these types of preferences and how to provide alternatives to foreign bidding.

Parliamentary approval

4. Although the Guide does not appear to address parliamentary approvals, perhaps the provisions relating to the authority of the contracting authority should specify the scope (ideally limited) of the issues that would require parliamentary approval.

Governing law and dispute resolution/immunities/language

5. Model provision 29 provides that the concession contract is governed by the law of the State unless otherwise provided in the concession contract. Although this leaves some flexibility to provide for foreign governing law, many countries have laws that prohibit or restrict foreign governing law or, as a practical matter, object to foreign governing law. This can have an impact on the mobilization of foreign investors and lenders, in particular coupled with the comments on dispute resolution in the next sentence. The commentary should encourage Governments to ensure that their law permits foreign governing law, even in contracts involving a governmental entity.

6. Model provision 49 provides that the parties may specify the dispute settlement mechanisms in the concession contract. This would presumably mean that they can specify international arbitration rules or foreign courts. However, many countries are neither party to treaties with multiple other countries for the enforcement of foreign judgements, nor are they party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The commentary should urge Governments to consent to international arbitration and to adopt or become parties to the relevant treaties.

7. It is also important for the Government to have laws permitting it to waive its immunities with respect to these dispute resolution procedures and the relevant awards or judgements. Some countries' laws prohibit or restrict such waivers of immunity. This might be covered in the commentary.

8. The Guide should expressly provide that the language of the concession contract may be English.

Ownership and assignment of assets and security

9. Model provisions 31 and 35 address ownership of assets and the security that may be taken over such assets, and state that security over public assets may not be taken where the creation of security is prohibited by law. Governments should re-examine the rationale of and reconsider broad prohibitions of this type, and try to narrow such prohibitions or provide flexibility to the contracting authority to deviate from those prohibitions.

Compensation for specific changes in legislation and changes in economic circumstances

10. Model provisions 39 and 40 provide that the concessionaire may be entitled to compensation in the event the cost of performance "has substantially increased" or

the value it receives is “substantially diminished” as a result of a change in law or broader economic situations. This language is broad and vague and could lead to disputes in the future.

Temporary takeover of project

11. Model provision 41 provides that there may be circumstances in which the contracting authority may temporarily take over the operation of the project. The International Finance Corporation has found that there are sometimes provisions in concession contracts permitting the contracting authority (usually governmental) to take over the assets permanently and to step into the shoes of the concessionaire with respect to the financing documents. This can be a problem for institutions like the Corporation. Ideally, the recommendations would encourage only temporary takeovers and flexibility in insisting on being entitled to take over the financing agreements, perhaps subject to lenders’ consent.

Equilibrium clause

12. Model provision 45 states that the concessionaire may not terminate the concession contract except under narrow circumstances, as opposed to saying that the concessionaire may terminate in certain circumstances. This is unusually restrictive and the opposite of the spirit of a concessionaire entering into the project. In any event, the concession contract should ideally also permit the concessionaire to terminate for extended force majeure or at least governmental force majeure and for a change in law that invalidates the contract.

General comments

Concessions only

13. The Guide could usefully cover structures other than concession-based infrastructure contracts. For example, many of the provisions and principles apply to the awarding of independent power projects to private companies, but without a concession.

Negotiating teams

14. Perhaps as important as addressing the recommended legislative provisions, countries should address the practical impediments to doing business in their countries. As an example, although the authority of contracting authorities is addressed, countries should be urged to have teams within their ministries authorized and empowered to negotiate and agree to provisions in the concession contracts. It often happens that ministers themselves insist on being involved in negotiations and decisions, which can significantly delay implementation of projects. Although this is not something that can be added per se to the law or regulations, it is important.

International transaction counsel

15. Governments are urged to seek advice from experienced international transaction counsel to represent their interests in these transactions. Technical assistance funding may be available from various multilateral institutions to finance such advice.
