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Note by the Secretariat

Draft model legislative provisions 27 to 50

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[Note to the Working Group: Unless otherwise indicated, all references in the footnotes and in the notes below the headings of the draft model legislative provisions are to recommendations and chapters of the Legislative Guide.]

III. Construction and operation of infrastructure

Model provision 27. Contents of the concession agreement

[*see recommendation 40 and chap. IV, paras.1-11*]

The concession agreement shall provide for such matters as the parties deem appropriate, including:

(a) The nature and scope of works to be performed and services to be provided by the concessionaire [*see chap. IV, para. 1*];

(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire's rights under the concession agreement [*see recommendation 5*];

(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project [*see recommendation 6*];

(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with [*model provision 29*] [*see recommendation 42 and draft model provision 29*];

(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with [*model provisions 30-32*] [*see recommendations 44 and 45 and draft model provisions 30-32*];

(f) The remuneration of the concessionaire, in particular and as appropriate, the concessionaire's right to charge, receive or collect tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of those tariffs or fees; and any payments, if any, that may be made by the contracting authority or other public authority [*see recommendations 46 and 48*];

(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility [*see recommendation 52*];

(h) The extent of the concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users [*see recommendation 53 and draft model provision 37*];

(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other

reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements [*see recommendation 54 (b)*];

(j) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations [*see recommendation 54 (a)*];

(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled [*see chap. IV, paras. 73-76*];

(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons [*see recommendation 56*];

(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project [*see recommendation 58 (a) and (b)*];

(n) Remedies available in the event of default of either party [*see recommendation 58 (e)*];

(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession agreement owing to circumstances beyond its reasonable control [*see recommendation 58 (d)*];

(p) The duration of the concession agreement and the rights and obligations of the parties upon its expiry or termination [*see recommendation 61*];

(q) The manner for calculating compensation pursuant to [*model provision 46*] [*see recommendation 67*];

(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire [*see recommendations 41 and 69 and draft model provisions 28 and 48*].

Model provision 28. Governing law

[*see recommendation 41 and chap. IV, paras. 5-8*]

The concession agreement is governed by the law of this State [unless otherwise provided in the concession agreement].¹

¹ Legal systems provide varying answers to the question as to whether the parties to a concession agreement may choose as the governing law of the agreement a law other than the laws of the host country. Furthermore, as discussed in the Legislative Guide (see chapter IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 5-8), in some countries the concession agreement may be subject to administrative law, while in others the concession agreement may be governed by private law (see also Legislative Guide, chap. VII, "Other relevant areas of law", paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the execution of an infrastructure project (see generally Legislative Guide, chap. VII, "Other relevant areas of law", section B).

Model provision 29. Organization of the concessionaire

[see recommendations 42-43 and chap. IV, paras. 12-18]

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*this State*], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statutes and by-laws and significant changes therein shall be set forth in the concession agreement.

Model provision 30. Ownership of assets²

[see recommendation 44 and chap. IV, paras. 20-26]

The concession agreement shall specify, [where necessary and] [as] appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. The concession agreement shall in particular identify which assets belong to the following categories:

(a) Assets, if any, that the concessionaire is required, as appropriate, to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the concession agreement;

(b) Assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

(c) Assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the concession agreement.

Model provision 31. Acquisition of project site

[see recommendation 45 and chap. IV, paras. 27-29]

1. The contracting authority or other public authority under the terms of the law and the concession agreement shall [obtain] [make available to the concessionaire] or, as appropriate, assist the concessionaire in obtaining such rights related to the

² Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see “Introduction and background information on privately financed infrastructure projects”, paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 20-26). Irrespective of the host country’s general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the concessionaire’s ability to create security interests in project assets for the purpose of raising financing for the project (*ibid.*, paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the concessionaire.

project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the execution of the project shall be carried out in accordance with [*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*] and the terms of the concession agreement.

Model provision 32. Easements³

[*see recommendation 45 and chap. IV, para. 30*]

The concessionaire shall [have] [be granted] the power to enter upon, transit through, do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project [in accordance with (*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*)].

Model provision 33. Financial arrangements

[*see recommendation 46 and chap. IV, paras. 33-51*]

The concessionaire has the right to charge, receive or collect tariffs or fees for the use of the facility or the services it provides. The concession agreement shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [in accordance with the rules established by the competent regulatory agency].⁴

³ The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 30-32). The alternative wording offered within the first set of square brackets in the model provision is intended to reflect those options.

⁴ Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the Legislative Guide as “tariffs”, may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, “Project risks and government support”, paras. 30-60). The cost at which public services are provided is typically an element of the Government’s infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of “reasonableness”, “fairness” or “equity (see chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 36-46).

Model provision 34. Security interests

[see recommendation 49 and chap. IV, paras. 52-61]

1. Subject to any restriction that may be contained in the concession agreement,⁵ the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

(a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;

(b) A pledge of the proceeds and receivables owed to the concessionaire for the use of the facility or the services it provides.

2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is not permitted by the law of [*this State*].

Model provision 35. Assignment of the concession agreement

[see recommendation 50 and chap. IV, paras. 62 and 63]

Except as otherwise provided in [*model provision 34*], the rights and obligations of the concessionaire under the concession agreement may not [, in whole or in part,] be assigned to third parties without the consent of the contracting authority. The concession agreement shall set forth the conditions under which the contracting authority [may] [shall] give its consent to an assignment of the rights and obligations of the concessionaire under the concession agreement, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire's technical and financial capability as necessary for providing the service.

Model provision 36. Transfer of controlling interest⁶ in the concessionaire

[see recommendation 51 and chap. IV, paras. 64-68]

Except as otherwise provided in the concession agreement, a controlling interest in the concessionaire may not be transferred to third parties without the

⁵ These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.

⁶ The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than fifty per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.

consent of the contracting authority. The concession agreement shall set forth the conditions under which consent of the contracting authority [may] [shall] be given.

Model provision 37. Operation of infrastructure

[see recommendation 53 and chap. IV, paras. 80-93 (for paragraph 1) and recommendation 55 and chap. IV, paras. 96-97 (for paragraph 2)]

1. The concession agreement shall set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

- (a) The modification of the service so as to meet the demand for the service;
- (b) The continuity of the service;
- (c) The provision of the service under essentially the same conditions for all users;
- (d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

2. [The concessionaire shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.]

Model provision 38. Compensation for specific changes in legislation

[see recommendation 58 (c) and chap. IV, paras. 122-125]

The concession agreement shall set forth the extent to which the concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the concession agreement has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared to the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the service it provides.

Model provision 39. Revision of the concession agreement

[see recommendation 58 (c) and chap. IV, paras. 126-130]

Variant A

1. Without prejudice to [model provision 38], the concession agreement may further set forth the extent to which the concessionaire is entitled to request a revision of the concession agreement with a view to providing compensation in the event that the cost of the concessionaire's performance of the concession agreement has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared to the costs and the value of performance originally foreseen, as a result of:

- (a) Changes in economic or financial conditions; or
- (b) Changes in legislation or regulation other than those referred to in [model provision 38].

2. [Except as otherwise provided in the concession agreement] a request for revision of the concession agreement pursuant to paragraph 1 may not be granted unless the economic, financial, legislative or regulatory changes:
- (a) Occur after the conclusion of the contract;
 - (b) Are beyond the control of the concessionaire; and
 - (c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the project agreement was negotiated or to have avoided or overcome their consequences.
3. The concession agreement shall establish procedures for revising the terms of the concession agreement following the occurrence of any such changes.

Variant B

Without prejudice to [*model provision 38*], the concession agreement may further set forth the extent to which the concessionaire is entitled to request a revision of the concession agreement with a view to providing compensation in the event that the cost of the concessionaire's performance of the concession agreement has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared to the costs and the value of performance originally foreseen, as a result of changes in economic or financial conditions or changes in legislation or regulation other than those referred to in [*model provision 38*].

Model provision 40. Takeover of an infrastructure project by the contracting authority

[*see recommendation 59 and chap. IV, paras. 143-146*]

Under the circumstances set forth in the concession agreement, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

Model provision 41. Substitution of the concessionaire

[*see recommendation 60 and chap. IV, paras. 147-150*]

The contracting authority and the entities extending financing for an infrastructure project may agree on procedures for the substitution of the concessionaire by a new entity or person appointed to perform under the existing concession agreement upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession agreement or other similar circumstances, as may be agreed by the contracting authority and the entities extending financing for an infrastructure project.⁷

⁷ The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession agreement

IV. Duration, extension and termination of the project agreement

1. Duration and extension of the project agreement

Model provision 42. Duration and extension of the concession agreement

[see recommendation 62 and chap. V, paras. 2-8]

1. The term of the concession agreement, as stipulated in accordance with [model provision 27 (p)] shall not be extended except as a result of the following circumstances:

(a) Completion delay or interruption of operation due to circumstances beyond either party's reasonable control; or

(b) Project suspension brought about by acts of the contracting authority or other public authorities;

(c) [Other circumstances, as specified by the enacting State.]

2. The term of the concession agreement may further be extended to allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the concession agreement, if the concessionaire would not be able to recover such costs during the original term.

2. Termination of the project agreement

Model provision 43. Termination of the concession agreement by the contracting authority

[see recommendation 63 and chap. V, paras. 14-27]

The contracting authority may terminate the concession agreement:

(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

(b) For reasons of public interest, subject to payment of compensation to the concessionaire, as agreed in the concession agreement;

(c) [Other circumstances that the enacting State might wish to add in the law.]

(see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority.

Model provision 44. Termination of the concession agreement by the concessionaire

[see recommendation 64 and chap. V, paras. 28-33]

The concessionaire may not terminate the concession agreement except under the following circumstances:

(a) In the event of serious breach by the contracting authority or other public authority of their obligations in connection with the concession agreement;

(b) In the event that the concessionaire's performance is rendered substantially more onerous as a result of acts of the contracting authority, unforeseen changes in conditions or acts of other public authorities and that the parties have failed to agree on an appropriate revision of the concession agreement.

Model provision 45. Termination of the concession agreement by either party

[see recommendation 65 and chap. V, paras. 34-35]

Either party has the right to terminate the concession agreement in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The parties also have the right to terminate the concession agreement by mutual consent.

3. Arrangements upon expiry or termination of the concession agreement**Model provision 46. Financial arrangements upon expiry or termination of the concession agreement**

[see recommendation 67 and chap. V, paras. 43-49]

The concession agreement shall stipulate how compensation due to either party is calculated in the event of termination of the concession agreement, providing, where appropriate, for compensation for the fair value of works performed under the concession agreement, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

Model provision 47. Wind-up and transfer measures

[see recommendation 68 and chap. V, paras. 50-62]

The concession agreement [may] [shall] set forth, as appropriate, the rights and obligations of the parties with respect to:

(a) Mechanisms and procedures for the transfer of assets to the contracting authority, where appropriate;

(b) The transfer of technology required for the operation of the facility;

(c) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

(d) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period

after the transfer of the facility to the contracting authority or to a successor concessionaire.

V. Settlement of disputes

Model provision 48. Disputes between the contracting authority and the concessionaire

[see recommendation 69 and chap. VI, paras. 3-41]

Variant A

Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession agreement [*in accordance with the law of this State*].

Variant B

The contracting authority shall be free to agree upon mechanisms for the settlement of disputes that may arise between the parties to the concession agreement, as best suited to the needs of the infrastructure project.

Model provision 49. Disputes involving the concessionaire and its lenders, contractors and suppliers

[see recommendation 70 and chap. VI, para. 42]

1. The concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.
2. The concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

Model provision 50. Disputes involving customers or users of the infrastructure facility

[see recommendation 71 and chap. VI, paras. 43-45]

[Where the concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.]