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**RE: UNCITRAL Model Legislative Provisions on Privately Financed  
Infrastructure Projects**

Set forth below are the comments of the Committee on Project Finance of the Bar Association of the City of New York on the Draft Addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Project. This report has been approved by the Bar Association of the City of New York.

Introductory Comment.

The stated purpose of the Legislative Guide is "to assist in the establishment of a legal framework favourable to private investment in public infrastructure" (Introduction, paragraph 4). We have purposely highlighted the word favourable to emphasize that as

originally envisioned the Legislative Guide was to recommend, in a balanced manner, legal frameworks which would attract foreign private capital to developing countries.

In general, the desired balance is maintained in the Draft Addendum but in some places it seems to us that the specific language has moved away from the goal of making affirmative recommendations for the attraction of foreign private capital toward a recitation of options, or of measures that the host government may or may not wish to adopt, as if it were a matter of free choice. In some respects discussed below, the affirmative recommendations contained in the Legislative Guide which we believe are favorable to the attraction of foreign capital have been softened, and certain other provisions have been added which we believe are unfavorable to that goal.

Our comments in Part I of this memorandum will be directed to those provisions of the Draft Addendum to the Legislative Guide which concern "Construction and Operation of Infrastructure", which is Part III of the Draft Addendum. These are where the principal provisions of the Legislative Guide concerning financing are located. However, we note that Model Provision 1, Preamble, mentions the attraction of foreign private capital only in the context of transparency, fairness, sustainability and the elimination of "undesirable" restrictions on foreign private investment. We believe that Model Provision 1 would be improved if the first "WHEREAS" clause were more in line with the second sentence of the "Foreward" and paragraph 4 of the Introduction to the Legislative Guide, and accordingly recommend that the first "WHEREAS" clause be expanded to read as follows:

"WHEREAS, the [Government] [Parliament] of \_\_\_\_\_ considers it desirable to establish a legislative framework favorable to private investment in public infrastructure; and

WHEREAS, the [Government] [Parliament] of \_\_\_\_\_ considers it desirable to promote and facilitate the implementation of privately financed infrastructure projects by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions in private sector participation in infrastructure investment, development and operation;"

Our comments in Part II of this memorandum are directed to those provisions of the Draft Addendum to the Legislative Guide which concern "Selection of the concessionaire", which is Part II of the Draft Addendum.

In response to the inquiry of the Secretariat in its cover note, we would favor retaining the text of the Addendum as a separate document, because of our concern that a combination of the two may result in a less coherent and expansive survey of the field for host governments and their advisors than is contained in the initial Legislative Guide. Much substance could be lost in combining the two documents. In any event, the proposed combined document may take some time to prepare and adequate time for review and comment should be allowed.

#### Comments on Draft Model Legislative Provisions

References are to the Model Provision numbers contained in the Draft Addendum.

#### Part I

Model Provision 28, Contents of the Concession Contract. This provision would benefit by including some reference to each of the model provisions which concern the contents of the concession contract. Otherwise some model provisions of significance may appear to be subordinated.

Model Provisions 34, Financial Arrangements, omits some useful portions of Legislative Recommendations 47 and 48 which, in our view, should be restored. Legislative

Recommendations 46, 47 and 48 called for the concessionaire to be able to collect tariff or user fees (46), for the law to set forth mechanisms for periodic and extraordinary adjustments to such tariffs or fees (47) and for the contracting authority to be empowered to make direct payments to the concessionaire as a substitute for, or addition to, service charges paid by end users (48). Of these three only 46 is preserved. But 47 and 48 are of considerable commercial importance and should be retained.

Related footnote 40 drifts off into a discussion of how some countries handle issues relating to tariff-controls. However, the text fails to suggest what would be best for the attraction of private foreign capital. We recommend dropping this footnote.

Model Provision 35, Security Interests, appears to dilute the affirmative recommendations contained in Legislative Recommendation 49 in important respects, including whether or not the concessionaire should have the right to create security over the project assets which it owns, project company shares, and receivables, notwithstanding any law to the contrary, by stating that restrictions may appropriately be included in the project agreement (see footnote 41). This problem could be cured by dropping the "subject to" clause and footnote 41.

Model Provisions 39 and 40, Compensation for Specific Changes in Legislation and Revisions of the Concession Contract, appear to be softened from Legislative Recommendation 58, in that Model Provision 39 limits the circumstances under which the concessionaire is entitled to compensation for changes in law to laws of specific application to the infrastructure facility and no longer refers to the possibility of a change in compensation due to changes in economic or financial conditions. We favor the language of Legislative Recommendation 58 in this area because it leaves more flexibility for negotiations between the parties.

Model Provision 42, Substitution of Concessionaire, is less helpful than Legislative Recommendation 50 in that in this draft the contracting authority “may”, rather than “should”, agree with financing parties on standards for substitution of the concessionaire. This is an important issue for lenders to these projects. We favor the restoration of the prior language.

Model Provision 45, Termination of the Concession Contract by Concessionaire, appears to reduce the rights of the concessionaire to terminate to acts or omissions of the contracting authority such as those referred to in Model Provision 28 (h) and (i) generally. By contrast, Legislative Recommendation 64, paragraph (b), helpfully allowed termination by the concessionaire for orders or acts of the contracting authority, unforeseen changes in conditions or acts of other public authorities. This language should be restored.

Model Provision 48, Wind-Up and Transfer Measures, reduces the force of Legislative Recommendation 66, which required criteria for establishing compensation to the concessionaire for assets transferred upon expiry or termination of the project agreement, by dropping out the provision for compensation. In our view, this Model Provision would be improved if this provision were restored.

## Part II

Model Provision 6, Purpose and procedure of pre-selection, would be improved if in 3(b) the words “or operated” were added after “... to be built or renovated.”

Model Provision 8, Participation of consortia, would be improved if it did not presumptively bar a member of a losing bidding group from joining another bidder group, so long as such joining was disclosed to all parties and otherwise acceptable and so long as no bidder could, at any one time, be a member of more than one bidding group. For example, a bidder may have signed on with a group that can't get required financing – but now desires instead to join another bidding group. This may be beneficial to all parties concerned. We

believe this recommendation is not inconsistent with Legislative Recommendation 16, but rather expands upon it in a useful way.

Model Provision 12.2(a), (b), and (c), Bid securities, appears to us to have increased the recommended remedies of the contracting authority with regard to forfeiture of bid security as compared to Chapter III, paragraph 62 of the Legislative Guide. Paragraph 62 merely states that it is advisable for the request for proposals to indicate any bid security terms. The expanded provisions of this Model Provision with regard to bid security forfeiture are not, in our view, well considered. For example, there is now a provision authorizing forfeiture of a bidder's security if the bidder fails to enter into final negotiations (subparagraph 2(b)) or fails to formulate a best and final offer (subparagraph 2(c)). We think it is entirely appropriate to ask a bidder to forfeit its bond if it backs out of an accepted deal (which (d) and (e) address), but if a bidder does not wish to formulate a "best and final offer", it should not be compelled to do so at risk of losing its bid security, nor should it be compelled to enter into "final negotiations". In our view, such standards lack a sufficient level of objectivity in the context of the often prolonged and complicated negotiations of these projects and may have the effect of chilling the willingness of bidders to bid.

Model Provision 17, Final negotiations, in the last sentence goes beyond Legislative Recommendation 27 (but a similar provision is contained in paragraph 84 of the Legislative Guide) and is not, in our view, advisable. We see little reason why the contracting authority should bar itself from re-starting discussions with a bidder who was earlier rejected. It may be that such a bidder was putting forth proposals which the contracting authority thought (at first) "out of market". But, for various reasons, it may transpire that the contracting authority cannot complete negotiations with another bidder, and may wish to try again with those very

same bidders previously rejected. Once again the complexity and prolonged nature of negotiations in these projects makes a more flexible provisions desirable, in our view.

Model Provision 24, Confidentiality of negotiations, goes beyond Legislative Recommendation 36 in stating that all “communications” with bidders will be confidential. This problem could be adequately addressed by adding the phrase “with appropriate exceptions” at the end of the second sentence.

Model Provision 28, Contents of the concession contract, should also, in our view, address: 1) the available enforcement mechanisms if any public user of the infrastructure facility does not pay for the goods/services rendered; 2) allocation of risk for undisclosed defects in facilities to be rehabilitated; and 3) allocation of risk for undisclosed environmental conditions for facilities to be operated or renovated by the concessionaire. Practitioners have observed the importance of these subjects.

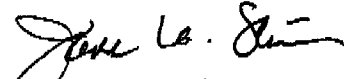
#### Conclusion

The Legislative Guide and the Addendum will serve as useful tools to local governments and their advisors in attracting foreign private capital in infrastructure projects. If it were possible to have another stage of this effort, we think it would be most helpful to focus on sector or type of infrastructure so that the recommendations can be made more substantive, and less procedural and formalistic, in nature.

We hope these comments are helpful to you. Please contact Martin D. Jacobson (Simpson Thacher & Bartlett, 212-455-7023, email: [mjacobson@stblaw.com](mailto:mjacobson@stblaw.com)) or Robert L.

Vitale (Cadwalader, Wickersham & Taft LLP, 212-504-6464, email: [robert.vitale@cwt.com](mailto:robert.vitale@cwt.com)) to discuss this report.

Sincerely yours,

  
Jane Wallison Stein  
Chair