

## **Core principles for a modern concession law (MCL)**

### **1 MCL should be based on a clear policy for Private Sector Participation.**

An overall policy/strategy promoting PSP, setting its principles, targets and describing efforts in improving the legal environment for private sector participation should exist on the level of a government approved resolution (Presidential order/decreree) or equivalent paper in the document hierarchy of a particular country.

### **2 MCL should create a sound legislative foundation for concession.**

A successful and efficient concession legal regime presumes the existence of a specific concession law (general framework single act) or of a comprehensive set of laws regulating concessions and allowing easy access to a clear, fair, predictable and stable legal environment for projects with private sector participation (“PSP”).

### **3 MCL should provide clarity of rules.**

MCL should provide for a clear definition of the scope/boundaries of application of the concession legal framework in order to limit the risk of challenge to the validity of a concession agreement. Such definition should include, irrespective of the form of PSP (concession, licence, lease, usufruct, etc) the definition of “concession”, a non-exhaustive list of sectors concerned, contracting authorities, eligible concessionaires.

### **4 MCL should provide a stable and predictable concession legal framework.**

The legal framework under which parties enter into a concession agreement, as well as the agreement’s terms, should remain stable for the duration of the agreement between the parties. A grandfathering clause providing for the applicability of the regime in force at the time the agreement was entered into should be encouraged to be included in the MCL where possible as a statutory mandatory obligation.

### **5 MCL should promote fairness, transparency and accessibility of concession rules and procedures.**

MCL should provide for the selection of a concessionaire on a transparent and, as a rule, competitive basis (with limited exceptions allowing direct negotiations). Entitlement of foreign and domestic investors to enter into any contractual relations and have necessary rights of a person in the host country should be provided for. MCL should provide for mandatory rules and also a mechanism for investors’ compensation. Rules and procedures should be available for review as well as a proposed project’s details and evaluation criteria. MCL should provide for development of regulatory instruments enabling the application of concessions, competitive rules for unsolicited proposals and the possibility to challenge effectively illegal awards.

**6 MCL should be consistent with the country’s legal system and particular laws.**

MCL should contain rules consistent with the country’s legislation including general framework and sector specific laws. It is essential that pieces of legislation do not contradict one other and that the application of individual acts is easily understood. Ideally, in order to avoid confusion, appropriate amendments should be made to all potentially conflicting laws, for which purpose a list of such laws requiring amendments should be put together when drafting the law [or in the decree introducing the law].

**7 MCL should allow for negotiability of concession agreements.**

Neither the concessionaire nor the contracting authority should be subject to unnecessary legal or regulatory restrictions limiting their ability to agree the extent of risks allocated between the parties. The law should clearly identify a single body responsible for (a) negotiating the terms of the agreements, and (b) implementing agreements thereafter, including monitoring the proper performance under the agreements. MCL should provide for a clear distinct division of powers of the Government and local authorities. MCL should empower the contracting authority with flexibility over the content of the concession agreements including tariffs, to make projects bankable.

**8 MCL should allow for enforceable court or arbitral determinations.**

MCL should provide for a possibility to obtain proper sanction for defaults under the applicable law, including ideally, through international arbitration and of enforcement of arbitral awards.

**9 MCL should allow for state undertakings and guarantees.**

MCL should provide for the possibility of government financial support or guarantee of the contracting authority’s proper fulfilment of its obligations. MCL and any appropriate budgetary laws should entitle the contracting authority to make long-term commitments.

**10 MCL should accommodate security interests.**

MCL should provide for the availability of reliable security instruments on the assets and cash flow of the concessionaire in favour of lenders, including “step in” right.