



USAID SECTOR REFORM AND UTILITY COMMERCIALIZATION

Haiti Caracol Power Utility

Transaction Support

Leading Practices and Language in PPP Concessions and
Applicability to Caracol Power Utility

Deliverable #13

June 2017

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Prepared for: USAID/Haiti

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TABLE OF CONTENTS

Abbreviations.....	5
Executive Summary	6
Partnership Tender Structure	7
Concession Responsibilities and Obligations	7
Private Partner Responsibilities	8
Government Obligations	8
Caracol Concession Structure	9
Concession Contract Scheme – Principal Concepts	9
Risk Allocation Between Concessionaire and Contracting Authority	9
Minimum Requirements in PPP and Concession Contracts.....	10
Conditions Precedent to Agreement Coming Into Force	10
Duration	11
Allocation of Responsibilities Between the Parties.....	11
Sub-Contracting Versus Assignment	12
Financing	12
Operation of the Utility	12
Billing and Fee Collection From the Users.....	13
Environmental and Social Requirements	14
Compliance With Law and Change in Law.....	14
Insurance	15
Arbitration	16
Risk Mitigation Tools	16
Partial Risk Guarantees.....	16
Political Risk Insurance	17
Next Steps	17
Appendix A: Structure of the Caracol Power Utility Concession	19
Appendix B: Concession Contract Main Provisions.....	21
Appendix C: Long-Term Energy Sector Contract Examples.....	23
Description of Sample Contracts	23
TITLE 1 - General Provisions	24
TITLE 2 - Relations Between Granting Authority & Concessionaire	24

TITLE 3 - Concession Assets.....	25
TITLE 4 - Financial Provisions	27
TITLE 5 - Controls Exercised By Granting Authority	29
TITLE 6 - Final Provisions.....	29

ABBREVIATIONS

CPU	Caracol Power Utility
GOH	Government of Haiti
ICSID	International Centre for Settlement of Investment Disputes
IFI	International Financial Institution
MIGA	Multilateral Investment Guarantee Agency
MTPTC	Ministère des Travaux Publics, Transports et Communications
MEF	Ministry of Economy & Finance
NRECA	National Rural Electric Cooperative Association
PPP	Public-Private Partnership
PPSELD	Pilot Project for Sustainable Electricity Distribution
PRG	Partial Risk Guarantee
REOI	Request for Expressions of Interest
RFP	Request for Proposals
SRUC	Sector Reform Utility Commercialization
SONAPI	Société Nationale des Parcs Industriels
UCG-PPP	Unité Centrale de Gestion des Partenariats Public-Privé
USAID	U.S. Agency for International Development

EXECUTIVE SUMMARY

The purpose of this report is to describe some of the important considerations for the development of a Public Private Partnership (PPP) concession contract. The report describes the main provisions and clauses included in such contracts in accordance with global leading practices and relates such examples to the Caracol Power Utility (CPU) Project. Four successfully executed and publicly available global power sector concession contracts are referenced (Appendix C). These contract examples have been provided to Government of Haiti (GOH) counterparts.

The U.S. Agency for International Development (USAID) designed the Sector Reform and Utility Commercialization (SRUC) Program to support utility commercialization by enhancing the financial viability and long-term sustainability of electrical utilities around the world. The majority of the work under SRUC has been undertaken directly with power utility companies, to promote the adoption of private sector market models. In the case of Haiti, SRUC has offered transaction support assistance to the Government of Haiti (GOH) as they work to locate and form a public private partnership (PPP) for the CPU in Northern Haiti.

This report is organized to reflect leading practices in the following areas:

1. Summary of the conceived private **Partnership Tender Structure for the CPU**, as accepted by the GOH.
2. Summary of the **Concession Responsibilities and Obligations** to be assumed by the private partner and the GOH, with further details in **Appendix A**.
3. **Concession Contract Schema** - the most detailed section of the report, referencing specific clauses that should be considered for inclusion into the concession contract (clauses required under Haitian PPP law can be found in **Appendix B**).
4. **Risk Mitigation Tools** for consideration in drafting the concession contract; in the case of Caracol such mitigation tools will probably be negotiated between the concessionaire and potential guarantors or financiers.
5. Conclusions and **Recommended Priorities**.

In addition, a full outline of an example power sector concession contract with sections mapped to four different active and publicly available power sector concession contracts can be found in **Appendix C**.

PARTNERSHIP TENDER STRUCTURE

The GOH has identified a 30-year concession as the favored public-private partnership model for the CPU. In this model the private partner will bear the financial and operational risk of running the CPU in exchange for full rights to any resulting profits. The GOH is in the process of launching a tender to attract and retain a private partner, or consortium of partners, to manage the CPU over the long term. The tendering process will include five main stages:

- Release of the Request for Expressions of Interest (REOI) by the GOH;
- Expression of interest submitted by potential concessionaires; selection of pre-qualified bidders by GOH;
- Release of the Request for Proposals (RFP) by GOH to prequalified bidders;
- Submission of proposals by pre-qualified bidders; and
- The selection of a winning bidder by the GOH.

After a winning bidder has been selected, a period of contract negotiation between the private partner, or consortium of partners, and the GOH will ensue. Once an agreement has been reached, the concessionaire will assume responsibility for the CPU over the course of a three month transition period. The winning bidder will be supported in this transition by the current plant operator, National Rural Electric Cooperatives Association (NRECA).

CONCESSION RESPONSIBILITIES AND OBLIGATIONS

By selecting a concession, GOH has decided to allocate the majority of the investment risk and reward to the eventual private partner. Technical responsibilities will be elaborated in detail in the agreed upon concession contract, which will describe the obligations, risks and benefits relevant to all contractual parties. A preliminary description of both parties' high level responsibilities is as follows¹.

¹ A full description of the GOH's planned structure for the CPU concession can be found in **Appendix A, "Structure for Concession of the Caracol Power Utility."**

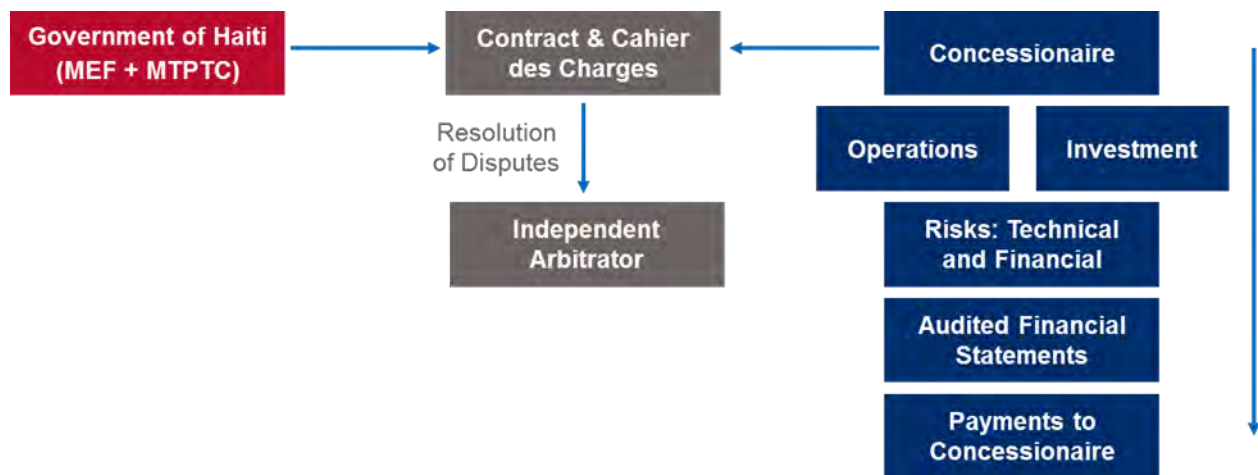
PRIVATE PARTNER RESPONSIBILITIES

As currently envisaged by the GOH, the private partner will be responsible for providing safe and reliable service to the current service area subject to the terms agreed in the Cahier de Charges. The private partner will be required to offer 24-hour per day electricity to clients in served communes and in the Industrial Park. The private partner will be responsible for capital investments, operation and maintenance of the plant, while assuming the financial and operational risks that these activities entail. The private partner will control generation, transmission, distribution, and collection within the agreed upon service area for the 30-year term of the concession. The private partner will also be responsible for contracts with third parties, as required, to develop, finance, construct or rehabilitate infrastructure, or to buy or sell power from other generators or distributors. The private partner will be required to continue expansion in currently served communes (Caracol, Limonade, Terrier-Rouge, Trou-du-Nord, and Sainte-Suzanne) and expand service to Fort-Liberté. In addition to assuming financial and operational risks, the private partner will hold decision authority over the sources of new generation capacity when investment in new generation is needed. The private partner will be granted options for a designated period of time to expand the transmission and distribution network to additional service areas.

GOVERNMENT OBLIGATIONS

The GOH intends to grant to the concessionaire the use of existing assets for the term of the concession. The private partner will own any new and replacement assets in which it invests until the end of the 30-year concession, at which time the concessionaire will grant such assets to the Government in exchange for payment by Government for the assets' depreciated value (if the concession contract is not extended). The GOH also proposes to monitor the safety and environmental standards for the CPU during the 30 year concession.

CARACOL CONCESSION STRUCTURE



CONCESSION CONTRACT SCHEME – PRINCIPAL CONCEPTS

Deloitte proposes to use leading practice examples from similar international utility concessions to derive broad guidelines relevant to the proposed Caracol concession contract. The concepts and examples that follow have been selected due to their industry and host-country relevance, but should be carefully considered within the island's local context, due to the unique political, economic and industry characteristics of Haiti.

RISK ALLOCATION BETWEEN CONCESSIONAIRE AND CONTRACTING AUTHORITY

The concession contractual scheme usually implies that financial, operational and commercial risks are borne by the concessionaire, except in case of force majeure or other risks that should be borne at least in part by the contracting authority. Accordingly, certain risks, such as the expropriation by the GOH of private assets impacting the CPU Project (political risk) are usually assumed by the contracting authority and host government. Other risks such as the rise of inflation having some detrimental consequences on the private operator's expected income (exchange rate risk) may be shared between the entities based on some agreement between the concessionaire and contracting authority. In the case of the CPU, inflation risks have been

mitigated by a) setting tariffs in US Dollars and billing in Haitian Gourde equivalents, and b) adjusting tariffs quarterly according to a formula reflecting US Dollar inflation and changes in fuel costs. Ultimately, risks are allocated between the public authorities and concessionaires based upon the generally accepted axiom that the risks identified in PPP Projects should be allocated to the party which is the most able to assess, control and manage such risks.

MINIMUM REQUIREMENTS IN PPP AND CONCESSION CONTRACTS²

Leading practices in PPP legislation and regulations generally require the inclusion of specific provisions to govern the following:

- Contract scope of work and responsibilities
- Terms and conditions according to which the contract shall be performed by the parties to the contract
- Terms of payment and modalities of remuneration of the concessionaire
- Obligations and liabilities between the contracting authority and the private operator with respect to the performance of the contract
- Conditions that may lead to exoneration or exemption of responsibilities (force majeure, adverse economic conditions) to be included in the PPP contract
- Conditions of early termination of the contract and related compensation
- Settlement of disputes and mechanisms of dispute resolution

The Draft PPP Bill accepted by the MEF is in line with international leading practices and provides viable minimum-standard clauses for insertion into PPP agreements as minimum requirements. A full list of these clauses are found in **Appendix B, “Concession Contract Main Provisions.”**

CONDITIONS PRECEDENT TO AGREEMENT COMING INTO FORCE

² A sample list of concession contract clauses is can be found on the World Bank web site <https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos>

The conditions to be fulfilled for the performance of the parties' contractual obligations and the start of the contract term should be specified. They should include – where applicable -- the approval of the competent authorities, the obtaining of various permits, the licenses and authorizations required for the contract implementation, the issuance of guarantees, and the conclusion of financial agreements as well as the elements required for the start of the contract.

In the context of the CPU transaction the GOH will need to determine a definitive list of permits, approvals and other authorizations required for the proper implementation of the project, plus the relevant authorities from which such documentation can be obtained (municipalities, Ministry of Public Works, Ministry of Economy and Finance, an eventual regulatory authority, Committee of the Commission Nationale des Marchés Publics etc.).

DURATION

The effective date of the partnership contract, the duration of the contract, the terms of its potential extension, and the conditions for the transfer of works, assets and equipment from the concessionaire to the contracting authority, where applicable, should be specified in the contract. The partnership duration period should coincide with the amortization period of the investments or the financing mechanisms used, in accordance with the terms laid out in the Haitian draft PPP Bill and other relevant PPP legislation. Such provisions also set conditions for the transfer of assets at the end of the contract.

ALLOCATION OF RESPONSIBILITIES BETWEEN THE PARTIES

The nature of the tasks assigned to each of the parties and the modalities of their implementation should also be specified in the partnership contract. The operating conditions of the delegated service including responsibilities of the private operator, arrangements for the execution and delivery of the service, the form and nature of the operator's relations with the users would be specified in the partnership contract. The partnership contract could also specify additional service requirements, if there are any. In exchange for meeting these service requirements, the concessionaire would earn certain rights relating to the concession area. Examples of these types of rights to be addressed in the contract include:

- Right to provide electricity to designated service areas
- Right to finance, manage, operate, maintain, and develop infrastructure

A discussion of leading practices for the allocation of responsibilities between the GOH and the eventual private partner can be found in **Appendix A, “Structure of the Caracol Power Utility Concession”**. Example and template clauses that set contractual responsibilities of power sector concessionaires’ can be found in **Appendix C, Title 2, Relations between the Granting Authority and the Concessionaire**.

SUB-CONTRACTING VERSUS ASSIGNMENT

In some cases a concessionaire may need to subcontract services to meet a portion of its responsibilities under the Concession Agreement. Thus the ability of the concessionaire to subcontract should be clearly defined. Typical leading practices would be that the concessionaire would not be permitted to enter into agreements that may likely materially affect or assign its concession rights without the authorization of the contracting authority. The concessionaire’s agents or subcontractors would typically be enabled to provide services, provided that such services do not constitute a delegation or assignment of the concessionaire’s material rights or obligations under the contract.

References available in **Appendix C, Title 2, Relations between the Granting Authority and the Concessionaire**.

FINANCING

Leading practice is that the concessionaire should be solely responsible for obtaining the financing required to develop activities related to the project in order to comply fully and in a timely manner with its contractual obligations. Therefore, to remunerate shareholders and lenders, the contract should specify conditions for payments of dividends, interest, and loan principal. For example, guarantee conditions by government authorities should also be addressed in the contract, where applicable.

Reference various examples in **Appendix C: a) Title 4, Financial Provisions, Section 2: Conditions for fund transfers; and b) Title 3, Concession Assets**.

OPERATION OF THE UTILITY

Leading practice would be for the concessionaire, at its own cost, to be responsible for the management, operation, maintenance and repair of the CPU during the operation period. The

concessionaire would also typically be responsible for keeping the CPU in a good operating condition and operate the facility in a safe and stable manner. The technical standards to which the concessionaire must conform should be specified in the body of the contract or in a cahier des charges in an applicable annex. When managing the concession, the concessionaire would typically require certain rights in order to deliver on the responsibilities laid out in the contract. For example, the leading practices suggest that the concessionaire should have full rights to:

- Enter into contracts for the supply of materials and services
- Appoint and remove an operating and maintenance contractor, if any, or other consultants and professional advisers
- Purchase replacement equipment and spare parts
- Appoint, organize and direct staff, manage and supervise the CPU
- Establish and maintain regular inspection, maintenance and overhaul procedures
- Do all other things required for the running of the CPU within the operating parameters and the provision of electricity supply services

Such rights are typically what is required to give investors confidence that they are adequately empowered to manage the concession, and to earn a return on their investment.

Reference examples in **Appendix C**, *Title 3, Concession Assets*, Section 6: Service standards.

BILLING AND FEE COLLECTION FROM THE USERS

Leading practice would be for the concessionaire to be responsible for designing, operating, and maintaining a system for issuing and collecting bills. This includes billing customers on a regular basis for services provided in the preceding bill period. Typical terms would be that the concessionaire would not be able to charge higher amounts than the customer category tariffs approved by the GOH, although disconnection of customers for non-payment would be allowed.

In setting tariffs, the GOH needs to balance the interests of investors and consumers in an economically efficient manner. This should be achieved by making sure that the concessionaire has a reasonable opportunity to produce revenues that are sufficient to (i) earn a reasonable return on capital invested in the project and (ii) cover the fixed operating costs of the project.

Reference examples in **Appendix C**: a) *Title 3, Concession Assets*, Section 5: Conditions for the provision of services to users; and b) *Title 4, Financial Provisions*, Section 3: Tariffs and fixed fees.

ENVIRONMENTAL AND SOCIAL REQUIREMENTS

In addition to compliance with environmental and social requirements under Haitian Law, many development financial institutions may require compliance with the IFC or IDB Environmental and Social Performance Standards.³ In addition, a number of commercial banks require compliance with the Equator Principles⁴. It is important to note that failure to address environmental risks associated with a project's technology may result in sanctions by local authorities. Environmental considerations may also affect the ability to access financing.

References available in **Appendix C, Title 3, Concession Assets**, Section 6C: Service standards, Environmental clause; and Section 6B: Service standards, Obligation to engage current Haitian employees.

COMPLIANCE WITH LAW AND CHANGE IN LAW

Leading practice would be for the operator to be obliged to comply with all applicable GOH legislation. The cost of complying with legislation which is current or foreseen at the time of the contract should be built into the concession terms, and therefore remain the responsibility of the operator. That said, given the long-term nature of most PPP arrangements, the operator may not be able to include all future costs at the time of entering into the contract, especially those arising from changes in laws or regulations. As such, leading practice would be for the contract to address who should be responsible for costs arising from changes in law, and how such costs should be funded. Changes in law⁵ or regulation that significantly and adversely affect the execution of the concession may require the contracting authority to directly remunerate the concessionaire.

³ http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC

⁴ <http://www.equator-principles.com/>

⁵ The concept of Change in Law has evolved to include (i) the introduction of new law, (ii) modification of existing law, and/or (iii) changes in the interpretation of law by any court, tribunal, governmental entity or other authority which has applicable jurisdiction or regulatory oversight with respect to the project or the concessionaire. "Applicable Law" in this context should be defined to cover a broad range of legislative, statutory and regulatory instruments, orders, guidelines etc.

Changes to GOH tax law could also severely impact project revenues, and cause the CPU concession to become economically unviable. Such changes may come in the form of alterations to tax rates, the creation of a new classes of tax, or the removal of relevant tax benefits. The consequences of a change in tax may: (i) increase or decrease project costs; (ii) increase or decrease the maintenance and operation costs; and (iii) increase or decrease the revenues expected by the project company.

Reference available in **Appendix C, Title 6, Final Provisions**, Section 10: Financial responsibility of the government if the contract is modified by law or regulation.

Additional leading practice examples of this type of contractual language can also be found on the World Bank's PPP website⁶.

INSURANCE

Insurance is an area of project finance that is often left to the end of negotiations, with little attention given to it. Availability of insurance, levels of coverage and applicable deductibles will, however, have an impact on the risks being taken by the authority, the concessionaire and the lenders. As such, it should be central to negotiations. Insurance is not necessarily the optimal solution for dealing with each risk that may arise, and it may also not even be possible or economically feasible to obtain insurance for certain risks. It is, however, important to note that while some generalizations can be made about the insurances required for utility operations, each PPP opportunity will require specific insurance coverage tailored to the risks inherent to that particular project.

For example, leading practice would be for the concessionaire, at its own expense to obtain and maintain in force insurance to cover risks such as:

- Construction risk insurance
- Property insurance for significant assets
- General liability insurance

⁶ <https://ppp.worldbank.org/public-private-partnership/overview/practical-tools/checklists/change-of-law>

- Workmen's compensation insurance

References available in **Appendix C, Title 3, Concession Assets**, Section 11: Responsibility of the concessionaire for insurance.

ARBITRATION

If a disagreement between the parties cannot be resolved within a designated period (e.g. 60 days), then leading practice is for an arbitrator to be engaged in accordance with the contract. Haiti has ratified the ICSID Convention (International Centre for Settlement of Investment Disputes). Therefore, if the concessionaire is an international party, the contract should specify that the ICSID Convention will apply and that the dispute should be referred to the ICSID. If the concessionaire is a Haitian entity, then leading practice would be for the independent arbiter to be identified in the contract.

Examples of arbitration clauses are identified in **Appendix C, Title 6, Final Provisions**, Section 2: Dispute settlement.

RISK MITIGATION TOOLS

Many international financial institutions (IFIs) provide risk mitigation products in the form of guarantees (e.g., risk guarantees and credit guarantees) as well as risk insurance (e.g., political risk insurance). Guarantees and risk insurance products can cover the failure of the public sector party to meet specific obligations within a PPP project. By mitigating critical government performance risks for private investors, IFI risk mitigation products are useful tools to enhance the bankability of PPP infrastructure projects.⁷ IFI's will have to be confident in the terms of the concession contract if they are to support the project with guarantees of financing.

PARTIAL RISK GUARANTEES

Partial Risk Guarantees (PRGs) offered by multilateral development banks are also used as risk mitigation instruments in developing markets. PRGs can be especially useful where there are

⁷ <https://ppp.worldbank.org/ppp/financing/risk-mitigation-mechanisms-products/guarantee-and-risk-insurance-ifis/guarantee-and-risk-i>

concerns about the ability of a state-owned buyer (or “sovereign”) to meet their contractual obligations under a given project. PRGs will typically give partial credit protection to private lenders in circumstances where the state-owned buyer, or the State itself, fails to meet such payment obligations. The list of trigger events for PRGs is restricted to political risk events, including the non-honoring of a financial obligation by a sovereign - up to and including any failure to repurchase assets at the end of a PPPs period of performance. PRGs effectively transfer these risks to third-party multilateral institutions which are better able to accommodate them. The World Bank Group, for example, provides partial risk guarantee products that can be used to guarantee the repayment of both project loans by the concessionaire, and the obligation to reimburse a bank that has issued a letter of credit on behalf of an offtaker.

POLITICAL RISK INSURANCE

The Multilateral Investment Guarantee Agency (MIGA) and national export credit agencies also play an important role in providing forms of credit enhancement for power projects in developing markets. MIGA provides political risk insurance, primarily to support equity investments and shareholder loans to projects in emerging economies.

National export credit agencies also can be used to protect lenders and/or equity investors against certain specified political risk events. It is worth noting that national export credit agency coverage is typically tied to exports from the country of the relevant agency; thereby suggesting that an underlying project would have to have a significant percentage of export content to qualify for such risk insurance. Akin to a PRG, these products enable project risks to be externalized to a third party that is better able to accommodate them, thereby lowering overall investor risk to a level that allows the project to proceed.

NEXT STEPS

The concession contract will be the most complex element of the proposed CPU tender documentation. A draft should be distributed upon – or soon after - release of the Request for Proposals from pre-qualified candidates. Prospective concessionaires will be focused on a) their assessment of the economic potential of the CPU opportunity, and b) the contractual conditions to which the concessionaire and its government partner will be required to abide. The contract will

have to give reasonable confidence to the investor that the contractual conditions will be respected for the proposed 30-year term of the concession.

Because of the complexity of the concession contract, USAID has decided that it will contract an international law firm to provide outside counsel and review to the GOH. In the meantime, the GOH has begun to draft the concession contract, well ahead of the scheduled release of the Request for Expressions of Interest (July 2017) and the RFP (September 2017). A draft version of **Appendix C “Long-Term Energy Sector Contract Examples”** and the referenced documents were shared with the GOH in May. Explaining the role and value of leading PPP and power concession practices to the GOH, as it develops the CPU concession contract, continues to be a priority of the Deloitte Team.

During the period after release of the RFP, the GOH will be need to be prepared to respond to questions on the draft contract from pre-qualified candidates. Leading practice would be for the responses to all questions to be made available to all candidates. After the winning bidder is selected, final contract negotiations should typically take up to six weeks, although the fundamental principles announced in the RFP cannot be contested. When all terms are finalized, the concessionaire will then take charge of the CPU upon the effective date of the contract.

APPENDIX A: STRUCTURE OF THE CARACOL POWER UTILITY CONCESSION

Leading practice points for formal consideration within the Request for Proposals of pre-qualified candidates and in the concession contract:

- Term: 30 years
- Service area: Caracol Industrial Park plus five currently served communes plus Fort Liberté Commune.
- Concessionaire responsible for operations, maintenance, and new capital investments. Concessionaire will own such financed assets until termination of concession.
- Concessionaire responsible for replacement of existing assets at their maturity, most significantly, replacement of existing generation capacity in 2032.
- Concessionaire accepts all financial risks.
- No subsidies from Haitian government or donors.
- Concessionaire has operational decision authority, for example, capital investments, power source for new generation capacity, sub-contracting.
- Government monitors technical obligations to be reflected in the *cahier des charges* and imposed penalties according to contractual terms. For example, continuity of service; 24-hour electricity to clients; voltage stability; billing standards.
- Remuneration of GOH: Annual lease payment for use of existing assets (proposed criterion of competitive tender, subject to final agreement by GOH).
- Independent arbitration (according to ICSID Convention in the case of international investors). Contract enforcement issues have been a major focus, as reflected in this and other provisions.
- Base tariffs in US\$ accepted by GOH December 2016 remain in force for term of concession, subject to:
 - o Quarterly adjustments according to changes in inflation and fuel costs, or
 - o Any mutually agreed future change in base tariffs or the adjustment formula. Either party to the contract may request such changes if at least five years have passed since the most recently accepted base tariff and adjustment formula. If the two parties do not agree to changes within two months of the initial proposal, then an independent arbiter (as identified in the contract for a designated period, e.g. ten years) will be engaged to resolve the differences between the parties on the

revised tariff structure. The party proposing changes will be responsible for the expenses charged by the arbiter.

- Subject to approval by Société Nationale des Parcs Industriels (SONAPI), land for solar power will be reserved in the Industrial Park (~ 20 hectares) should -- within a designated number of years (e.g. five) - the concessionaire elects to expand generation capacity.
- Concessionaire will be protected from future changes in law or regulation that may likely adversely affect its return on investment. GOH would be required to remunerate any consequent damages.
- Concessionaire benefits from all profits, with rights to payment of dividends. (If international entity, right to currency exchange and repatriation.) Annual audited financial statements will be required.
- Service area expansion options for a designated decision period (e.g. two years), in communes of Ouanaminthe, Ferrier, and Quartier Morin. Economic assessment and decision is the responsibility of the concessionaire. *No subsidies will be offered.* If option accepted, then service must be initiated within a designated period. (Cap Haïtien is a potential option to be granted in the future but not recommended as an option in the contract or tender.)
- Upon termination of the concession, assets will revert to GOH. Concessionaire will be remunerated for the depreciated value of assets in which it invested. (Of course there may be a mutually agreed extension of the concession, as is often the case in other countries.)

APPENDIX B: CONCESSION CONTRACT MAIN PROVISIONS

PPP Contract - Minimum Requirements under the Haitian Draft PPP Bill	
Any partnership contract shall contain the following clauses: (a) its duration; (b) the conditions under which the risk sharing is established between the public entity and the counterparty; (c) the performance objectives assigned to the contracting authority or the technical, commercial and environmental specifications, standards and standards to which the contracting partner is required to comply with, in particular with regard to the quality of services, and quality of works and Equipment, the conditions under which they are made available to the public entity; (d) the identity of the project management team responsible for designing the works and the monitoring of their implementation when the contract of partnership entrusts the contracting partner with all or part of the design; (e) the conditions of validity and entry into force of the contract; (f) the procedures for obtaining the permits, licenses and authorizations necessary for the performance of the contract; (g) the legal status of the contracting partner and, where appropriate, the conditions for the establishment of the project company, signatory of the partnership contract; (h) the modalities of the remuneration of the contracting partner and the conditions under which the investment, operating and financing costs and, where applicable, the income that the contracting partner may receive, are taken into account and distinguished for its calculation. Be authorized to acquire by operation of the estate, works, equipment or intangible	(k) the obligations of the contracting party whose object is to ensure compliance with the allocation of works and equipment to the public service for which the contracting authority is responsible and compliance with public service requirements; (l) warranties, covenants, promises of securities and other securities to be provided by the parties to the contract; (m) the monitoring by the public authority of the performance of the contract, including compliance with performance objectives, obligations relating to technology transfer, training and employment of the workforce and the conditions under which the contracting party relies on other undertakings for the performance of the contract; (n) the obligation imposed on the contracting party, where subcontractors are used for the construction of works and equipment, to provide a guarantee of the payment of their services; (o) the provisions applicable in the event of non-compliance with the obligations of the other party, in particular failure to comply with the conditions under which the parties to the partnership contract may renegotiate or terminate the terms of the partnership agreement, in accordance with a schedule determined by an amendment or, failing that, by a unilateral decision of the contracting authority, in particular to take account of changes in public service requirements, technological innovations or changes in financing conditions obtained by the contracting party; (p) the control exercised by the contracting authority on the partial or total assignment of the contract;

property in the course of activities which are not subject to public service obligations and which do not prejudice it; (i) the reasons for and changes in the remuneration of the other party during the contract term (j) the timing and terms of payment of the counterparty's remuneration, including the conditions under which each year: i. the sums due to the contracting party are paid to it by the contracting authority, or ii. the contracting party shall pay a royalty calculated on the operating revenues of the work or service provided and the methods for calculating its remuneration directly from operating income; iii. the sums for which the contracting party is liable for penalties or penalties shall be paid to the contracting authority, knowing that the latter may, where appropriate, be compensated with the sums owed to the contracting party by the contracting authority; (k) pricing arrangements and tariff	(q) the conditions under which, in the event of default by the contracting party, the continuity of the public service is ensured, in particular when the contract is terminated; (r) where applicable, the arrangements for the transfer to the public body of works or equipment in accordance with the terms of the partnership contract; (s) the obligation under the partnership contract to subscribe insurance to cover the risks incurred by the contracting party; (t) the conditions under which environmental and social impact assessments and the procedures for the protection of the environment and of the Haitian cultural heritage are carried out; (u) the consequences of the anticipated or non-anticipated termination of the contract, in particular with regard to the ownership of works, equipment or intangible property and, where appropriate, the compensation due; (v) The procedures for the prevention and settlement of disputes and the conditions under which it may, where appropriate, be submitted to arbitration, in compliance with Haitian law.
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APPENDIX C: LONG-TERM ENERGY SECTOR CONTRACT EXAMPLES

The purpose of this appendix is to provide the GOH with examples of international leading practices for contracting long-term concessions in the electricity sector. The example contracts and clauses are intended to facilitate contract drafting by the Ministries of Finance and Public Works, and generally focus on those contractual elements to be addressed in the CPU Contract (excepting some clauses uniquely applicable to the Haitian context). Four concession contracts are referenced in the context of the contract outline prepared by the Ministries for the planned 30-year Caracol Power Utility concession. Three of the concessions – like Caracol -- include generation, transmission, and distribution – while the fourth is solely for generation.

Disclaimer

This outline is based on contracts for similar concession structures, the team expects a contract outline to include the following types of information. Note this outline is based on our knowledge of international leading practice for power sector concession contracts and should not be considered as absolute authority with respect to the final contract document.

DESCRIPTION OF SAMPLE CONTRACTS

1. **Port-Vila, Vanuatu, 15-year concession contract of 1986, with amendments of 1990 and 1997.** The latter extended the concession by 20 years, and the term and service area have subsequently been further extended. The private concessionaire, UNELCO, was established in 1939, the year of its first concession; the principal owner is Engie (former Gaz de France Suez). Port Vila has a reliable 24-hour electricity supply.
2. **Tonga Power Ltd., contract of 2008, a concession of indefinite term.** The concessionaire provides reliable 24-hour electricity. Prior to 2008, Tonga Power struggled to provide positive returns, but subsequently has achieved reasonable returns on investment.
3. **Tanna Island, Vanuatu, 20-year concession contract of 2002.** UNELCO -- also the concessionaire in this case – provides reliable electricity to the served areas.
4. **Haut-Katanga Province, Democratic Republic of Congo (DRC), 30-year hydraulic generation concession of 2016.** While this is a new concession, the outcomes of which of

course cannot yet be determined, the contract has the advantages of being in French, in a civil law country, and with many terms relevant to the planned Caracol contract.

The draft contract outline below has been prepared by GOH pursuant to consultations.

TITLE 1 - GENERAL PROVISIONS

1. Introduction and definitions

2. Severability

- Tonga Power Concession – Section 19.3, Page 27
- Tanna, Vanuatu Concession – Article 16.05, Page 10

3. Object of the agreement

- Port-Vila, Vanuatu Concession – Section 1, Page 2
- Tonga Power Concession – Article 1, Page 8
- Tanna, Vanuatu Concession – Article 1, Page 3
- DRC Hydro Concession – Article 2.1-2.2, Page 2

Including:

Concession service area

a. Communes currently served, plus obligation to expand to Fort Liberté

- Tanna, Vanuatu Concession – Article 20, Sections 79-86, Page 13

b. Options to add other communes

- Port-Vila, Vanuatu Concession – Specifications, Section 7, Page 26

i. Options : Ouanaminthe, Ferrier, Quartier Morin

ii. Decision Making Period

4. Intuitu personae (nature of the agreement)

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

TITLE 2 - RELATIONS BETWEEN GRANTING AUTHORITY & CONCESSIONAIRE

- Port-Vila, Vanuatu Concession – Section 1.2-1.3, Page 3
- DRC Hydro Concession – 2.3-2.6, Pages 2-3 & Article 3, Pages 3-6
- Tonga Power concession – Article 19.9, Page 29

1. Principal commitments of the concessionaire

- Tonga Power Concession – Section 2, Pages 9-11
- DRC Hydro Concession – Article 4, Pages 7-11

2. Commitments of the granting authority

- Tonga Power Concession – Section 9, Pages 17-18
- DRC Hydro – Article 5.6, Pages 10-11

TITLE 3 - CONCESSION ASSETS

1. Assets assigned to the concessionaire for the term of the contract

A. Power plan

- o Port-Vila, Vanuatu Concession – Section 2.4 -2.8, Page 3

B. Distribution lines

- o Port-Vila, Vanuatu Concession – Section 4, Pages 4-5
- o Tanna, Vanuatu Concession – Section 2.01, Pages 3-4

2. New generation, transmission, and distribution assets

- Port-Vila, Vanuatu Concession – Sections 5 and 6, Pages 6-8
- Tanna, Vanuatu Concession – Article 8.1-8.2, Page 6
- Tanna, Vanuatu Concession – Article 2.02-A-B, Page 4

A. Investment responsibilities of the concessionaire

- o Port-Vila, Vanuatu Concession – Section 7, Pages 8-9 & Section 4-12, Page 4
- o Tonga Power Concession – Section 8, Pages 16-17

B. State of assets until contract expiration

- o Tanna, Vanuatu Concession – Article 8, Page 6

3. Rental of land in Caracol Industrial Park

- Port-Vila, Vanuatu Concession – Section 3, Pages 3-4
- DRC Hydro Concession – Article 5.3, Page 8

A. For generation plant and offices

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

B. For solar generation option

- i. ____ hectares
- ii. Option period: ____ years
- iii. Term of concession if option accepted

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

4. Cost and financing of additional construction work

- Port-Vila, Vanuatu Concession – Section 7, Pages 8-9

- DRC Hydro Concession – Article 14, Page 14
- 5. Conditions for the provision of services to users**
 - Tonga Power Concession – Sections 2, 3,4, Pages 9-13
 - Port-Vila, Vanuatu Concession – Specifications, Section 4, Page 21
 - A. Serve clients willing to pay fees and approved tariffs**

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context
 - B. New connections and meters**
 - o Tonga Power Concession – Sections 2.2, Page 9
 - C. Right to disconnect**
 - o Tonga Power Concession – Sections 2.3, Page 9
- 6. Service standards**
 - A. Technical obligations**
 - o Port-Vila, Vanuatu Concession – « Specifications, », Pages 19-35
 - o Tonga Power Concession –Schedule 1, Pages 32-37
 - o Tanna, Vanuatu Concession – Articles 17-27, Pages 1
 - B. Obligation to engage Haitians currently employed by PPSELD**
 - 1. No less than ____ years after the date of contract signing
 - 2. Exceptions in the case of serious violations by an employee

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context
 - C. Environmental clause**
 - o DRC Hydro Concession – Article 4.10 (v), Page 7
- 7. Required studies for the achievement of new construction work**
 - DRC Hydro Concession – Article 3.2.1, Page 4
- 8. Completion and putting in operation new works**
 - DRC Hydro Concession – Article 4.4, Page 6
- 9. Maintenance, repair, and replacement of assets**
 - Port-Vila, Vanuatu Concession – Section 9, Page 11
 - Tanna, Vanuatu Concession – Article 7, Page 6
- 10. Guarantees relative to construction works**
 - DRC Hydro Concession – Article 4.11, Page 7
- 11. Responsibility of the concessionaire for insurance**

A. Obligation of concessionaire to have insurance

- o Tonga Power Concession – Section 10, Page 18 & Schedule 12, Page 79
- o Port-Vila, Vanuatu Concession – Section 15.72, Page 33
- o DRC Hydro Concession – Article 9, Page 13

B. Sufficient to cover:

1. Replacement of generation capital assets
2. At least 50 per cent of replacement of the other electricity assets
3. Third party claims for property damage or personal injury

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

12. Access to works in process

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

TITLE 4 - FINANCIAL PROVISIONS

1. Provisions for financial and economic stability of the agreement

- Variations of certain financial provisions on the assumption of granting of fiscal and customs incentives to the concessionaire
- DRC Hydro Concession – Article 10.1, Page 13

2. Conditions for fund transfers

A. Dividends

- o Port-Vila, Vanuatu Concession – Section 8.2, Page 62
- o Tanna Concession – Section 16.02, 56. Page 9
- o DRC Hydro Concession – Article 3.1.2, xiii. Page 3
- o DRC Hydro Concession – Article 11.1, b. Page 13

B. Debt payment

- o Tanna Concession – Section 16.02, 56. Page 9
- o Port-Vila, Vanuatu Concession – Section 8.2, Page 62
- o DRC Hydro Concession – Article 18.3.1-2, Page 16

C. Equity

- o Port-Vila, Vanuatu Concession – Appendix 1, Page 38
- o Tonga Power Concession – Schedule 11, Sections 8-19, Pages 71-72
- o DRC Hydro Concession – Article 18.3.2, Page 16

D. Convertibility of HTG to US\$

- o Tonga Power Concession – Schedule 8, 5b. Page 63
- o Port-Vila, Vanuatu Concession – Section 14.63, Page 14
- o Port-Vila, Vanuatu Concession – Section 2.C, Page 77
- o DRC Hydro Concession – Article 11.1(c), Page 13

3. Tariffs and fixed fees

- DRC Hydro Concession – Article 4.5, Page 6
- DRC Hydro Concession – Article 5.6, (vii) Page 10
- DRC Hydro Concession – Article 6.2-3, 5, 7-9. Page 19
- Tonga Power Concession – Schedule 2.5(a). Page 10
- Tonga Power Concession – Schedule 1.1. Page 99

A. Tariff ceilings

1. Base tariffs apply for the duration of the concession (Annex A)

- DRC Hydro Concession – Article 5.6.1, (vii) Page 10
- Tanna Concession – Article 31.01 Page 18 & Section 31.07, Page 22

2. Quarterly tariff adjustment formula

- Tanna Concession – Section 31.02 Page 19
- Port-Vila, Vanuatu Concession – Section 7.3, Pages 57-60
- Tonga Power Concession – Schedule 5, Section C, Pages 44-46

i. Inflation

- Tonga Power Concession – Schedule 15 d-g, Page 48
- Tonga Power Concession – Schedule 11, 3. Page 70

ii. Changes in fuel prices

- Tonga Power Concession – Schedule 5, Part E, Pages 47-51
- Tonga Power Concession – Schedule 10, 1.4. Page 66
- Tonga Power Concession – Step 7, 24. Page 73
- Port-Vila, Vanuatu Concession – Section 7.4. Pages 57-60

B. Fixed fees

1. Connection, disconnection, and reconnection

- Tanna Concession – Article 22. Page 15
- Tanna Concession – Article 31, 138-139, 148-150. Page 19-21
- Port-Vila, Vanuatu Concession – Section 7.3, Page 57
- Port-Vila, Vanuatu Concession – Section 2, Page 75

- Tonga Power Concession – Schedule 18, Non-Supply Revenue (a-b). Page 96
- Tonga Power Concession – Section 2.2-2.3, Page 9

2. Reflecting costs, according to the client

- Port-Vila, Vanuatu Concession – Section 5, 13-14, 18. Page 21-23
- Tonga Power Concession – Schedule 18, Non-Supply Revenue (a-b). Page 96

3. Fixed monthly fees reflecting the net present value of fixed costs, adjusted annually to reflect inflation

- Tonga Power Concession – Schedule 5, 15 (d). Page 48

4. Financial guarantees

- DRC Hydro Concession – Article 5.5.1 – 5.5.5, Pages 8-10
- Tonga Power Concession – Section 7.2(d), Page 15
- Port-Vila, Vanuatu Concession – Section 15. Page 15
- Tanna Concession – Article 11, 41. Page 7

TITLE 5 - CONTROLS EXERCISED BY GRANTING AUTHORITY

1. General control exercised by the granting authority, notably on the basis of financial reports that the concessionaire is required to submit periodically

- DRC Hydro Concession – Article 2.1-2.2, Page 2
- DRC Hydro Concession – Article 3, Pages 3-6
- DRC Hydro Concession – Article 6, Page 11-12
- Tonga Power Concession – Schedule 13, 25. Page 80-82
- Port-Vila, Vanuatu Concession – Section 16, Page 15

2. Technical control exercised by the granting authority, notably on the basis of technical reports that the concessionaire is required to submit periodically

- Tanna Concession – Article 32, 159. Page 22
- Tonga Power Concession – Section 3.1, Page 5 & Schedule 1, Pages 32-37

TITLE 6 - FINAL PROVISIONS

1. Governing law (Haitian law)

- Tanna, Vanuatu Concession – Article 51, Page 9

2. Dispute settlement

A. Recourse to the Dispute Settlement Committee of the Commission Nationale des Marchés Publics (CNMP)

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

B. Legal proceedings before a court of arbitration (ICSID) if the concessionaire is foreign, or before the Cour Supérieure des Comptes if the concessionaire is Haitian

- Port-Vila, Vanuatu Concession – Section 17, Pages 14-15
- Tanna, Vanuatu Concession – Article 13, Page 8 ; Section 16.01, Page 9

3. Contractual penalties

- Tanna Concession – Article 29, Page 18
- Port-Vila, Vanuatu Concession – Section 18.77, Pages 34-35
- Tonga Power Concession – Schedule 3, Pages 40-41

4. Termination for serious violation of contractual obligations

A. At the initiative of the granting authority

- o DRC Hydro Concession – Article 18, Page 16
- o Port-Vila, Vanuatu Concession – Article 12, Pages 13-14
- o Tonga Power Concession – Section 15.2, 15.3, Pages 23-24
- o Tanna, Vanuatu Concession – Article 9, Pages 6-7 ; 16.06-16.07, Pages 10-11

B. At the initiative of the concessionaire

- o DRC Hydro Concession – Article 18, Page 16
- o Port-Vila, Vanuatu Concession – Section 8.3.1, (a – c). Page 63

5. Date of entry in force

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

6. Term of the agreement

- Port-Vila, Vanuatu Concession – Section 10, Page 11-12
- Tanna, Vanuatu Concession – Article 11, Page 7 (sale or partial sale)
- Tonga Power Concession – Schedule 17, Pages 88-91

7. Method for calculating time limits

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

8. Force majeure

- Port-Vila, Vanuatu Concession – 8.3, Page 62-63
- Tonga Power Concession – Article 16, Pages 24-25
- Tanna, Vanuatu Concession – Section 16.03, Page 9

9. Force majeure – Expenses

- Port-Vila, Vanuatu Concession (1997) – Section 6, Page 55-56
- Tanna, Vanuatu Concession – Section 16.03, 57. Page 9

10. Financial responsibility of the government if the contract is modified by law or regulation

- DRC Hydro Concession – Article 5.5.1 – 5.5.5, Pages 8-10

11. Election de domicile

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

12. Modifications

Examples from other contracts are inapplicable to this topic and should be drafted specifically to the Haitian context

13. Notification

- Tonga Power Concession – Section 19.7, Page 28