

A Critical Review of the Proposed Palestinian Concession Law



PALESTINE ECONOMIC POLICY RESEARCH INSTITUTE

2005



Palestine Economic Policy Research Institute

A Critical Review of the Proposed Palestinian Concession Law

2005

The Palestine Economic Policy Research Institute (MAS)

Founded in Jerusalem in 1994 as an independent, non-profit institution to contribute to the policy-making process by conducting economic and social policy research. MAS is governed by a Board of Trustees consisting of prominent academics, businessmen and distinguished personalities from Palestine and the Arab Countries.

Mission

MAS is dedicated to producing sound and innovative policy research, relevant to economic and social development in Palestine, with the aim of assisting policy-makers and fostering public participation in the formulation of economic and social policies.

Strategic Objectives

- ♦ Promoting knowledge-based policy formulation by conducting economic and social policy research in accordance with the expressed priorities and needs of decision-makers.
- ♦ Evaluating economic and social policies and their impact at different levels for correction and review of existing policies.
- ♦ Providing a forum for free, open and democratic public debate among all stakeholders on the socio-economic policy-making process.
- ♦ Disseminating up-to-date socio-economic information and research results.
- ♦ Providing technical support and expert advice to PNA bodies, the private sector, and NGOs to enhance their engagement and participation in policy formulation.
- ♦ Strengthening economic and social policy research capabilities and resources in Palestine.

Board of Trustees

Ismail Al-Zabri/ Chairman, Hassan Abu-Libdeh, Heba Handoussa, Maher El-Masri/ Secretary, Muneeb Masri, Nabeel I. Kassis /Deputy, Rima Khalaf, Salam Fayad, Samer Khouri / Treasurer, Nabeel Kadoumi, Samir Abdullah (Director General).



Palestine Economic Policy Research Institute

A Critical Review of the Proposed Palestinian Concession Law

2005

A Critical Review of the Proposed Palestinian Concession Law

This study was prepared by Palestine Economic Policy Research Institute-MAS research team, particularly by the following researchers:

Researcher: Dr. Anis Fauzi Qassim: Advocate. Anis Fauzi Qassim for Legal Consultancies, Jordan.
Dr. Firas Melhim: Assistant Professor of Law, BirZeit University

Reviewers: Dr. Samir Abdullah, Director General- MAS
Dr. Basim Makhool, Research Coordinator- MAS

Editorial Assistants: Dr. Wael Abu Saleh (Arabic)
Simon Boas (English)

Layout: Lina Abdallah

Funding: This Study was funded by The International Development Research Centre-IDRC and the Ford Foundation.

Palestine Economic Policy Research Institute (MAS)
Jerusalem and Ramallah

2005

©2005 MAS

Foreword

Concessions are properly created when the market economy fails to produce certain goods and services, such as electricity to a town or a railway between cities, or produces too many suppliers of them. The government then interferes and violates the rules of the market economy by granting certain investors and not others the exclusive right to produce these goods or services for a limited period, against payment of a fixed sum of money to the government. Concessions entail rights and duties involving the interests of the public, the government and the investors, and it has become necessary to enact a law governing the process of granting and supervising such agreements. It is also necessary to establish an independent body to guarantee a balance of interests between the various concerned parties, including the public interest of assuring a clean environment and the preservation of heritage, public values and national culture.

This study, prepared at the request of the Economic Committee of the Palestinian Legislative Council, aims to examine the validity of the Concessions Law and the extent to which it contains proper and effective restrictions that prevent granting concessions without adequate political and economic justification. It seeks to assure they are awarded on a competitive and transparent basis and in a manner that benefits the public interest. It also examines the extent to which the draft law includes a proper legal framework for supervisory bodies to prevent exploitation of the agreement, such as through arbitrary increases in prices, deterioration in quality, or ignoring the requirements of environment protection.

We hope this study constitutes a valuable addition to the store of knowledge which will help policy makers to fulfill their mission of creating a competitive environment for economic and developmental activities in the Palestinian territories. MAS extends its gratitude to the members of the Economic Committee of the Palestinian Legislative Council for their desire to benefit from the research work and studies of MAS, and for hosting and sponsoring the workshop organised to discuss the present study. We also thank Dr.

Anis Fawzi Qassem and Dr. Feras Melhem for the efforts they exerted in preparing this study. Finally, our sincere thanks to the International Development Research Centre (IDRC), Canada, and the Ford Foundation whose generous support to MAS made this study possible.

Dr. Samir Abdullah
Director General

Executive Summary

Governments use a range of policies and interventions to influence economic performance and activities. These interventions affect the market in different ways and are normally motivated by market failures and a need to serve the public interest, but do not always manage to improve economic outcomes.

According to economic theory based on free market principles, monopoly practices are generally considered to reduce economic efficiency by limiting competition. However, in many countries, governments use monopolies to control selected economic sectors as part of their national economic policy. There are two kinds of coercive monopolies enforced by the government:

1. Government monopolies, (also known as state monopolies), in which government agencies are given monopoly status and competitors are prohibited from entering the market.
2. Government-regulated monopolies, in which private firms are granted monopoly status by the government and other firms are prohibited from entering the market.

This critical review deals with the proposed Palestinian Concessions Law, providing a framework for the way concessions are granted and managed in the Palestinian Territories. A concession is an official authorisation granted by the government for a firm to operate in a specific sector within a defined geographical area – national, regional or local – and for a certain period of time.

The Palestinian private sector has a long tradition of participating in financing, managing and upgrading public infrastructure through concession contracts. During the British Mandate as well as under Jordanian rule, private firms were granted concessions to provide public services and to exploit natural resources. The Palestinian National Authority continued this policy, granting several concessions for public services provision. Nonetheless, this draft law is the first attempt, and therefore an extremely important one, to create a comprehensive legal framework for the granting and regulating of concessions in the Palestinian Territories.

The issues discussed in the draft law include:

1. the grantor of the concession,
2. the sectors in which concessions can be granted,
3. the procedures applicable to granting concessions,
4. the ways of awarding concession contracts:
 - Directly, through a public tendering process, or
 - Indirectly, whereby only one company is approached.
5. the preparation and signing of concession contracts, and
6. the termination of concessions.

In the review of this draft law, MAS compared the articles to international standards, in particular the legislative guides and recommendations of the UN Commission for International Trade Law (UNCITRAL), the Organisation for Economic Cooperation and Development (OECD) and the European Bank for Development and Reconstruction (EBRD). The law was also compared to WTO regulations and to similar legislation in other countries.

The study concluded that the draft law is in line with international standards, as it provides a comprehensive framework for all types of concessions, whether national, regional or local. This is a clear improvement from previous legislation under British and Jordanian rule, which established specific laws for each concession.

The draft law presents, in a clear and concise manner, the policies, objectives and goals that Palestinian legislators want to achieve. The procedures for public tenders of concession contracts are clear and straightforward and follow the principles of transparency and equal opportunity, e.g. by allowing bidders to attend the official opening of the tenders and to appeal the decision in the courts. The easy and unambiguous tendering procedures represent one of the main strengths of this draft law, as they encourage investors to participate in the tender by reducing the costs of preparing a bid. Both local and foreign investors are invited to bid for concessions, but priority is given to Palestinian investors if the bids are equally attractive. The procedures also encourage foreign and local investors to combine their expertise and present bids jointly, as a consortium. By seeking to attract more investors to bid for concessions, the law promotes transparency and disclosure in the tendering process.

The draft law also discusses penalties and the termination of concessions due to breaches of contract or other circumstances. However, the proposed law does not deal with conflicts between the concession grantor and the concessionaire and how they should be resolved. There is a need to add a set of clear articles addressing this issue.

MAS's critical review suggested a number of modifications and improvements to the draft law, and the most important recommendations are summarised below:

1. Concessions should be divided into two main categories:
 - a. National Concessions, such as the utilisation of natural gas in the Gaza Strip and Dead Sea resources.
 - b. Local Concessions, granted for operation in municipalities.
2. Because of their importance, national concessions should be granted through the issuance of a law from the Palestinian Legislative Council, after holding a public hearing session, in order to ensure transparency and disclosure. Local concessions should be granted by a Cabinet decision, in consultation with municipalities and the Ministry of Local Government.
3. The law should involve PLC members more directly in the process of granting and managing concessions, in order to secure transparency and disclosure.
4. The law should include a discussion of the financial aspects of concessions.

