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Summary record of the 657th meeting
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Chairman: Mr. Renger .... (Germany)

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Privately financed infrastructure projects (*continued*)

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The meeting was called to order at 9.35 a.m.

Privately financed infrastructure projects (*continued*) (A/CN.9/458 and Add.1-9)

Chapter VI. End of project term, extension and termination (*continued*) (A/CN.9/458/Add. 7)

General remarks and extension of the project agreement (*legislative recommendation 1 and paras. 2-4*)

1. **Mr. Wallace** (United States of America) said that the text seemed to be insufficiently focused on privately financed infrastructure projects and was in fact a general discussion of a wide range of relevant remedies. Moreover the language used by professionals was not always employed.

2. There should be a clearer differentiation between projects that were terminated as a result of a kind of natural expiration and those that were terminated early for some reason. It should also be borne in mind that, although most concessions would have a finite term, they might well become more open-ended in the future.

3. With respect to the language of recommendation 1, he suggested that the words “provide that” in the chapeau should be amended to read “provide in the legislation that”, and that the words “the project agreement may be extended” should be amended to read “the term of the project agreement may be extended” or “the term of the concession may be extended”.

4. Some of the discussion in paragraph 3 of the notes was relevant to the discussion on the duration of the project agreement in paragraphs 64 to 67 of chapter IV (A/CN.9/458/Add.5).

5. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that the numbering of the recommendations was confusing because there was a heading with the number 3, for example, above what was presumably recommendation 4. He also thought that subparagraph (b) of recommendation 1 should be brought into line with subparagraph (a) by the addition of the words “or loss of profit” after the words “project suspension”. Moreover, not only project suspensions—decisions to suspend the project—should be covered but also project completion delays before the operational stage.

6. The expression “extraordinary work” in subparagraph (c) and in the notes should perhaps be amended to read “extra work”.

7. **Mr. Estrella Faria** (International Trade Law Branch) apologized for the confusing numbering. The heading numbers had been added by the editors following standard United Nations rules. In future, however, such double numbering would be avoided.

8. **Mr. Lalliot** (France) said that the expression “impeding events” in recommendation 1 (a) was liable to misinterpretation, at least in the French version. It must not be interpreted as including events that were consequential on the conduct of the concessionaire.

9. He agreed that the expression “extraordinary work” could be changed, but it should not apply to small-scale or inexpensive extra work.

10. While it was important to set out the principle of compensation in the guide, it might also be useful for the recommendations to state that the compensation would vary depending on whether the non-observance of a clause arose from something outside the parties’ control or was the fault of the parties, particularly of the contracting authority.

11. Turning to the notes, he said that the problem of when and under what conditions extension was acceptable was a crucial one for both the concessionaire and the contracting authority. The concept of “exceptional circumstances” referred to in paragraphs 2 and 4 of the notes was unclear, at least in the French version. It would be better to define such circumstances clearly in legislation. However, in some cases extensions were granted in the public interest.

12. He congratulated the Secretariat on the chapter, although it did contain some concepts needing further clarification.

13. **Mr. Mazilu** (Romania) said that his delegation was in favour of flexible language. Expressions such as “may wish”, “may be extended” and “may terminate” should be retained. Secondly, since all apparently agreed that the word “extraordinary” should be avoided, the Secretariat might look for another word, such as “supplementary”.

14. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) wondered whether project suspension under recommendation 1 (b) was assumed to involve loss of profit or whether compensation would be allowed irrespective of loss of profit.

15. The suggestion of the observer for Sweden to add “loss of profit” to recommendation 1 (b) would necessitate some definition of what was meant by “loss of profit

brought about by acts of the contracting authority or other government agencies".

16. **Ms. Gioia** (Italy) supported the view that it should be made clear that extension of the project agreement was something exceptional, granted only when expressly provided for by law. It should also be stressed that the list of circumstances in recommendation 1 was not exhaustive.

17. **Mr. Mazini** (Observer for Morocco) agreed with the French representative that the concept of extraordinary circumstances was hard to define for legal purposes, but provision might have to be made for the unforeseeable. In the chapeau of the recommendation, the word "unforeseeable" could be inserted before "exceptional". He suggested that subparagraphs (a) and (b) should be combined and the words "and unforeseeable" added after "exceptional" in subparagraph (c).

18. Paragraph 4 of the notes could be amended to make it clear that the circumstances in which an extension was granted had to be both unforeseeable and exceptional.

19. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that chapter VI dealt with five different situations and their consequences: (1) impeding events; (2) acts by a contracting authority or government agency; (3) termination for convenience by the contracting authority; (4) breach by the contracting authority; and (5) breach by the concessionaire. The fifth situation was of course different from the point of view of compensation, but it was important to treat all five categories consistently throughout the chapter.

20. It might be better to replace the expression "under exceptional circumstances" in the chapeau by "under specified circumstances".

21. **Mr. Moreno Ruffinelli** (Paraguay) said that his delegation, like others, was concerned at the imprecision of the expression "extraordinary work". He proposed amending the expression to read "extraordinary work necessary for the purpose of the contract".

22. He was also concerned at what would happen if a concessionaire became insolvent. He thought that paragraph 20 of the notes needed some amendment in that regard.

23. **The Chairman** said that paragraph 20 would be taken up later.

24. **Mr. Wallace** (United States of America) said that "amortize" was a technical term and perhaps not the right word to use in recommendation 1 (c). He also wondered if the title of the chapter should not be changed to "Duration and termination".

25. **Mr. Phua Wee Chuan** (Singapore) agreed with the Italian representative that extending the term of the project agreement should be the exception rather than the norm. Perhaps one should first state the general principle and then the exception.

26. With regard to recommendation 1 (b), which read "To compensate for project suspension brought about by acts of the contracting authority or other government agencies", he observed that if a concessionaire was unable to obtain a licence from a government agency, perhaps for failure to satisfy safety regulations, that should not justify an extension. The notes on recommendation 1 (b) should explain that not all acts of the contracting authority or government agency would give rise to extensions.

27. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) suggested that subparagraphs (a) and (b) of recommendation 1 be combined to read "to compensate for the loss of profit incurred by project suspension".

28. **Mr. Choukri Sbaï** (Observer for Morocco) suggested that the chapeau should be redrafted along the following lines: "The host country may wish to provide that the project agreement may be extended under extraordinary circumstances and in exceptional cases such as:".

29. **Mr. Zanker** (Australia) said that the chapeau of regulation 1 had rightly been criticized as vague. Chapter V (A/CN.9/458/Add.6) referred to exempting circumstances such as natural disasters preventing the concessionaire from carrying on the work; in such cases, the host country might wish the project agreement to be extended not so much to compensate for project suspension or loss of profits as to allow the project to be completed by the existing concessionaire. Similarly, project suspension brought about by acts of the contracting authority or other government agency did not really constitute an exceptional circumstance. A project might be suspended, for example, because new environmental legislation had been introduced, requiring additional permits. Again, the issue might not be one of compensation but of the need to complete the project.

30. Finally, regarding "extraordinary work required", that might mean extra work needed that would result in the concessionaire's having to make a substantial additional outlay. However, with some drafting changes most of the concerns raised could be accommodated in the recommendation.

31. **Mr. Wen Xian-Tao** (China) said that in his delegation's view the concept of extension should be separated from that of suspension. Extension would be reasonable to allow the concessionaire to recoup losses incurred because of *force majeure* or of acts of the contracting authority or government agencies.

32. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that recommendation 1 provided for the possibility of extension as an alternative to an increase in prices or direct payments from a contracting authority. The reference to acts of the contracting authority or other government agencies obviously meant cases in which there was no fault on the part of the concessionaire. "Impeding events" meant *force majeure*, when neither party was responsible. It was true that in contracting practice not all such situations involved compensation, but that was not what the recommendation stated either. The Secretariat's approach was therefore correct: there was merely a need to clarify the language.

33. **Mr. Mazilu** (Romania) endorsed the views of the representatives of Italy and Singapore and the observer for the Republic of Korea. The recommendation should be taken as an exception and not a rule.

34. **Mr. Gill** (India) said that his delegation too was concerned by the vagueness of the expression "exceptional circumstances" in the chapeau of the recommendation, and unhappy with the idea of compensation for project suspension. That would open the door for a concessionaire to sue for compensation if inspectors suspended work on a project which was not up to the standard prescribed by the contract. Nor was the expression "impeding events" very clear.

35. **The Chairman** said that "impeding events" would not cover the concessionaire's normal operational risks.

36. **Mr. Lalliot** (France) said that the principle should be that a project had a fixed duration, any extension being exceptional. The circumstances justifying an extension might consist of an act by a party or an event outside the parties' control. In the case of a situation attributable to the concessionaire, there could be no question of compensation. In the case of an act of the contracting authority, there should be full compensation, which might take the form of extension and perhaps also of financial compensation. In the case of an act by a third party, there should be compensation but not necessarily full compensation. In the case of *force majeure*, there need not be compensation but there might be an extension, at the discretion of the authorities.

37. He agreed that the question of compensation should not be confused with the question of extension.

38. **Mr. Estrella Faria** (International Trade Law Branch) said that there was no intention to suggest that there should be an extension to allow for circumstances attributable to an act of the concessionaire.

39. It was clear that an extension could serve as a means of compensation in various kinds of situation. One situation to which reference have been made related to acts by government authorities other than the contracting authority, in which case there might be compensation but not full compensation. There was also the question of events beyond the control of both parties; in such cases there might be no compensation due but the Government or contracting authority might consider an extension appropriate. Those points would be taken into account in a new draft.

40. He asked whether the Commission agreed with the suggestion made to combine subparagraphs (a) and (b) of the recommendation. Such a solution might make it difficult to reflect the different situations that could arise.

41. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said that the question was whether the Commission wished to exclude compensation for loss of profits in the situation covered in subparagraph (b).

42. **Mr. Lalliot** (France) thought that, for reasons already given, it would be better not to merge subparagraphs (a) and (b).

43. **The Chairman** said that that seemed to be the general view.

44. **Mr. Estrella Faria** (International Trade Law Branch) said that, in the light of the discussion, it might be preferable not to refer in the recommendation to the concept of compensation.

The meeting was suspended at 10.55 a.m. and resumed at 11.15 a.m.

Termination by the contracting authority (legislative recommendations 2 and 3 and paras. 5-23)

45. **Mr. Darcy** (United Kingdom) said that in recommendation 2 (c) the words "for the contracting authority's convenience" were too vague and open to possible abuse: they should be amended to include the words "in exceptional circumstances".

46. In the same subparagraph, the words “subject to payment of fair compensation to the concessionaire” also needed reconsideration. “Fair” was a highly subjective and controversial concept, and he proposed it should be omitted. Indeed the whole question of compensation was highly controversial and in the interests of making progress he suggested that the detailed technical discussion be deferred to a later stage.

47. **Ms. Gioia** (Italy) agreed that the first part was too vague.

48. **Mr. Wallace** (United States of America), referring to recommendation 3 (a), suggested that, at least in the notes, the colloquial word “cure” should be mentioned. Similarly, the notes to recommendation 3 (b) should refer to “step-in” rights.

49. Regarding paragraph 5 of the notes, did the reference to “careful consideration” in the penultimate sentence mean consideration in the formulation of the legal standards or consideration when the standard was actually applied to a given situation?

50. In paragraph 8, the expression “direct agreement” needed definition, if only in the planned glossary.

51. While the discussion beginning in paragraph 10 was useful, it was unclear how it fitted in a legislative guide. Indeed, the whole relationship between the recommendations on termination on the one hand and legislation on the other was unclear.

52. In paragraph 13, the verb “parry” did not seem appropriate in a legal context. In the penultimate sentence of the same paragraph, the expression “potential breach of agreement” was odd if “serious default” had already occurred. He also wondered how the statement in the last sentence of paragraph 13 that “the procedures should be without prejudice to the contracting authority’s right to step in to avert the risk of disruption of service by the concessionaire” related to the lender’s right to step in.

53. In paragraph 16 (c), the expression “as provided in the project agreement” seemed out of place when speaking of statutory obligations.

54. In paragraph 18, the violations mentioned in subparagraph (d) were perhaps covered by subparagraph (a). Secondly, there should perhaps be a reference to regulatory bodies in subparagraphs (a) and (b). Thirdly, it was unclear what distinction was intended between “suspension” and “interruption” in subparagraph (b). Fourthly, a distinction was perhaps needed between more and less serious infringements in subparagraph (e).

55. In paragraph 21, there were intermediate possibilities such as assignment and step-ins that might be mentioned in addition to the auctioning of the right to exploit the concession.

56. Regarding the third sentence of paragraph 23, it should be borne in mind that there was a difference between termination for convenience during a three- or four-year construction period, for example, and termination for convenience during a 30-year concession. Lastly, he assumed that the possibility of termination for convenience would be provided for in the legislation.

57. **Mr. Lalliot** (France) wondered whether the case provided for in subparagraph (b) of recommendation 2 was not already implicitly covered under subparagraph (a).

58. With regard to the expression “fair compensation” in subparagraph (c), legal systems varied and the French delegation would prefer the word “fair” to be replaced by “full”. He shared the doubts about subparagraph (c) expressed by the representative of Italy.

59. Regarding recommendation 3 (a), it should be made clear that the additional period granted represented prior notice of possible subsequent sanctions (as was suggested in paragraph 13 of the notes).

60. In paragraph 7 of the notes, the reference to possible unilateral termination by government agencies should be supplemented by a statement that such termination could also be ordered by a court.

61. Paragraph 9 recommended that termination should normally require a final finding by a dispute settlement body. However, the length of dispute procedures might make it essential for the contracting authority to be able to terminate at its discretion. He would prefer some wording recognizing the principle of unilateral termination, but only on strict conditions preserving all the rights of both parties.

62. The mention in paragraph 13 of the lenders’ “right of substitution” should be amended to take account of the fact that such a right did not exist in some legal systems.

63. He shared the views of the United States representative on paragraph 16 (c).

64. Paragraph 18 required more precision with respect to what constituted “serious” failure in subparagraph (a) and “non-excusable suspension or interruption” in subparagraph (b). Subparagraph (d) seemed to cover the same ground as subparagraph (a) and was perhaps redundant.

65. He suggested that the words “exceptional situations” in the fifth sentence of paragraph 23 should be replaced by the word “cases”, since the remainder of the sentence made the point clear. The last sentence of paragraph 23 could also be misleading.

66. He proposed certain linguistic changes in the French version of the notes.

67. **Ms. Nikanjam** (Islamic Republic of Iran) expressed concern on the issue of insolvency. Recommendation 2 (b) should be amplified to make it clearer—for example, by stating that insolvency could be declared only by the Government.

68. She also had doubts as to whether recommendation 3 (a) was correctly located.

69. **Mr. Choukri Sbaï** (Observer for Morocco) proposed that recommendation 3 (b) should be amended by replacing the words “to appoint a substitute concessionaire” by “to propose the appointment of a substitute concessionaire”.

70. He agreed with the French representative regarding the need to mention the role of courts.

71. **Mr. Wiwen-Nilsson** (Observer for Sweden) suggested the deletion of the fourth sentence of paragraph 7, which in certain situations might be dangerous.

72. In paragraph 13, there was perhaps a confusion between “right of substitution” and “step-in rights”.

73. Concerning paragraph 14, he doubted whether “failure to secure the required financial means” should come under the heading of “serious default” and whether obtaining licences or permits could be a condition for the entry into force of the project agreement.

74. He suggested adding the word “serious” before “failure” in subparagraphs (a) and (b) of paragraph 16, and wondered why the words “as provided in the project agreement” appeared in subparagraph (c) but not in subparagraph (a) or (b).

75. **Mr. Zanker** (Australia) suggested that recommendation 2 (c) might be deleted so as not to encourage unilateral termination, irrespective of the question of compensation.

76. On recommendation 3 (b), it was unclear to him how a concessionaire’s lenders and sureties could remedy the consequences of concessionaire’s default without appointing a substitute concessionaire, since lenders and sureties would not be able to carry out the work. Some redrafting was perhaps needed.

77. It would be useful to clarify paragraphs 5 to 9 of the notes. Paragraph 9 indicated that “it is generally advisable to provide that the termination of the project agreement should in most cases require a final finding by the dispute settlement body ...”. But paragraph 8 began: “Provisions concerning termination should therefore be brought into line with the remedies for default provided in the project agreement”. What if the project agreement did not provide for a decision by a dispute settlement body? It was not clear whether the recommendations concerned the project agreement or the statutory framework.

78. He also had some doubts about the discussion relating to serious default. Different approaches might be needed to default before the beginning of construction, during the construction phase during the operational phase. Paragraph 14 was confusing in that it referred to elements necessary before the concession existed and before the concessionaire could even get started.

79. Treatment of the question of insolvency would also depend on the stage at which insolvency occurred. If it occurred during the operational phase, a question arising would be who should be considered the owner of the property involved in the project, and what would happen if the assets were needed so that services could continue to be provided.

80. **Mr. Kashiwagi** (Japan) said that he would prefer recommendation 2 (c) to be retained but “fair compensation” amended to read “full compensation”.

81. He endorsed the Australian representative’s remarks on recommendation 3 (b).

82. **Mr. Gross** (Germany) suggested that the recommendations and notes could be simplified by drawing attention to the three most important matters for lenders, only two of which were dealt with in the text. The first issue for lenders was that when a termination was imminent they should have the right of consultation with the contracting authority. The second issue, which was mentioned in the text, was the need for a “cure” period. The third was the issue of step-in rights.

83. Those three considerations should be mentioned in the legislative recommendations, but it was not necessary to go into the technical issues in detail.

84. **Mr. Choukri Sbaï** (Observer for Morocco) suggested that the second sentence of paragraph 19 be reworded to say that it might be advisable to design effective mechanisms to combat corruption and bribery and to give the concessionaire the opportunity to file

complaints against unlawful demands or threats by government officials.

85. **Mr. Lalliot** (France) said that the purport of recommendation 3 (b) was somewhat unclear. It seemed to refer to the right of substitution, although, as he had pointed out, that right did not exist under all legal systems.

The meeting rose at 12.30 p.m.