UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/438/Add.2
19 December 1996

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirtieth session
Vienna, 12-30 May 1997

PRIVATELY-FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately-financed infrastructure projects

Report of the Secretary-General

Addendum

Chapter II. PARTIES AND PHASES OF PRIVATELY-FINANCED INFRASTRUCTURE PROJECTS

A. General remarks

1. The following sections discuss basic issues such as private-sector participation in public infrastructure projects and the concept of project finance, identify the main parties to those projects and their respective interests, and briefly describe the evolution of a privately-financed infrastructure project. These sections are conceived as general background information on matters that are examined from a legislative perspective in the subsequent chapters of the *Guide*.

B. Private sector and public infrastructure

2. The construction and operation of infrastructure facilities that are used by the general public or that deliver certain commodities to the general public has traditionally been undertaken by the State or by entities with a special status under national law. Entities operating public infrastructure facilities are often regarded as providers of "public utilities" or "public services", although the notions of "public utilities" or "public services" have evolved over time and vary widely among States. In some countries most types of infrastructure have remained primarily the public sector's responsibility, while in a number of countries private entities have been allowed to invest in infrastructure connected to some form of "public service" or "public utility". Where private sector investment in infrastructure is allowed, it may require a governmental authorization sometimes called "licence", "franchise" or "concession".

3. During the nineteenth century, large investments were made by the private sector in the infrastructure and public utilities of many countries under various types of concessions. Significant portions of the world's railways, electricity and telecommunications networks were originally developed by the private sector. In some countries, concessionaires were given an exclusive right to develop and operate infrastructure facilities and to establish rules for their use by the public, while elsewhere the State retained some form of regulatory control in that respect.

4. Private investment in infrastructure declined significantly in the course of the twentieth century, when the execution of large-scale projects was largely undertaken by governmental entities and financed with public funds or debt in the form of loans obtained from national or foreign banks or international financial institutions. In some countries, this trend was accompanied by an expansion of the notions of "public services" or "public utilities" so as to cover a number of activities thus far carried out by the private sector. Special public entities were often established by national Governments and were given exclusive concessions within given territories.

5. A different development has taken place in recent years, as budgetary and financial constraints faced by the public sector in both developing and developed countries have led a number of States to devise alternatives to public funding for meeting expanding demands for infrastructure projects. Private sector financing is being increasingly called upon for the development of public infrastructure, and in some countries it has become an integral part of governmental programmes for the modernization or expansion of infrastructure. A variety of alternative arrangements for infrastructure development has evolved, ranging from transactions where the infrastructure is built and operated by private entities for an agreed period, but is eventually transferred to the Government, to situations where the infrastructure is privately owned and operated.

6. The large scale of modern infrastructure projects, complex financing techniques and the multiplicity of parties involved make infrastructure projects considerably more elaborate than traditional privately-financed infrastructure projects. Modern privately-financed infrastructure projects are usually developed under the "project finance" modality, which is briefly examined below.

C. The concept of project finance

7. "Project finance" is a financing modality in which the repayment of loans taken by the borrower is primarily assured by the revenue generated by the project, rather than by other guarantees given or obtained by its sponsors. To that end, the project's assets and revenue, and the rights and obligations relating to the project, are independently estimated and are strictly separated from the assets of the project sponsors. Due to the absence or limited role of personal guarantees or securities provided by the project sponsors, project finance is said to be "non-recourse" or "limited recourse" financing.

8. Debt capital usually represents the main source of funding for infrastructure projects implemented under the project finance modality. It is obtained in the financial market primarily by means of loans extended to the project sponsors or the project company by commercial banks, typically using funds which originate from short to medium-term deposits remunerated by those banks at floating interest rates. Consequently, loans extended by commercial banks are also subject to floating interest rates and have normally a maturity term shorter than the project period. The risks to which the lenders are exposed in project finance are considerably higher than in traditionally secured transactions, even more so in the case of infrastructure projects where the security value of the physical assets involved (e.g. a road, bridge or tunnel) would rarely cover the total financial cost of the project, given the lack of a "market" where such assets could be easily realized. Therefore, lenders are seldom ready to commit the large amounts needed for infrastructure projects solely on the basis of a project's expected cash flow or assets. Indeed, infrastructure projects are often financed on a basis which, while primarily relying on the project's cash flow and assets, with recourse to the project company, reduces the lenders' exposure by incorporating a number of back-up or secondary security arrangements and other means of credit support provided by the host Government, project sponsors, purchasers or other interested third parties.

9. In addition to debt, capital is also provided to infrastructure projects in the form of equity. Equity capital is obtained in the first place from the project sponsors or other individual investors interested in taking stock in the project company. However, such equity capital normally represents only a portion of the total cost of an infrastructure project. In order to obtain commercial loans or to have access to other sources of funds to meet the capital requirements of the project, project sponsors and individual investors have to offer priority payment to the lenders and other capital providers, thus accepting that their own investment will only be paid after payment of those other capital providers. Therefore, project sponsors, as the main promoters of the project, assume the highest financial risk. At the same time, projects sponsors will hold the largest share in the project's profit, once the initial investment is paid.

10. Other complementary sources of equity capital may include investment funds and other so-called "institutional investors" such as insurance companies, mutual funds or pension funds. These institutions normally have large sums available for long-term investment and may represent an important source of additional capital for infrastructure projects. They may provide capital in the form of debt or equity participation via investment funds. Normally, institutional investors do not participate otherwise in the development of the project or the operation of the facility. Their main reasons for accepting the risk of providing capital to infrastructure projects are the prospect of remuneration and the interest in diversifying investment.

D. Parties to the project

1. The host Government

11. For a number of reasons, the host Government plays a crucial role in the execution of privately-financed infrastructure projects. The host Government normally identifies the project pursuant to its own policies for infrastructure development, establishes its specifications and conducts the process that leads to the selection of the project sponsors. Furthermore, throughout the life of the project, the host Government may need to provide various forms of support - legislative, administrative, regulatory and sometimes financial - so as to ensure that the infrastructure is successfully built and adequately operated. Finally, in a typical "build-operate-transfer" project, the host Government becomes the ultimate owner of the facility.

12. The host Government has a legitimate interest in ensuring that the project is properly executed and that the construction works meet the specifications. Thus, national laws often spell out in some detail the right of the Government to monitor the execution and operation of the project, a task that might involve governmental officials at different offices and ministries, and which requires an adequate level of coordination among them. For that purpose, some countries have found it helpful to appoint a specific agency, committee or officer invested with the authority to coordinate all monitoring procedures in connection with the project.

13. The host Government also has an interest in receiving high quality infrastructure that will benefit the national economy by the provision of needed goods (e.g. electricity, gas), services (e.g. water treatment, waste removal) or the facilitation of transport and trade (e.g. harbours, roads, tunnels). Additionally, the host Government might be interested in creating employment opportunities for local workers, or gaining advanced technology related to the project. Those objectives are often reflected in the pertinent legislation in provisions concerning technology transfer or preferences for companies that undertake to hire local personnel.

14. Another objective pursued by the host Government may be to achieve a more efficient management of public infrastructure, since private companies are believed to operate more cost-effectively than public entities. However, the host Government remains ultimately accountable for the project and will therefore be interested in ensuring that the infrastructure is operated in a manner consistent with the overall policy of the country for the sector concerned. Issues affecting the general public, such as quality of services and level of tariffs, are of particular concern for the

host Government. Thus, the host Government may wish to retain the right to exercise some form of control over the operation of the project, sometimes through a special regulatory body.

2. Project sponsors and project company

15. The bulk of the investment in the project, in terms of money, supplies and labour, is made in the construction, expansion or renovation of the infrastructure. Thus, the group of project sponsors usually includes construction and engineering companies and suppliers of heavy equipment interested in becoming the main contractors or suppliers of the project. Those companies will be intensively involved in the development of the project during its initial phase, and their ability to cooperate with each other and to engage other reliable partners will be essential for a timely and successful completion of the works. However, by the very nature of their business, construction companies and equipment suppliers may not be at ease with a long-term equity participation in a project. Therefore, they will often seek to involve a company with experience in the operation and maintenance of the type of infrastructure being built. The presence of such a company may be encouraged by the host Government as an assurance that the technical feasibility and the financial viability of the project in all its phases, and not only during the construction period, have been adequately considered.

16. For the project sponsors it is important to have a return on their investment commensurate with the amount of risk they assume. Besides commercial aspects, such as the level of revenue that the project is expected to generate, the legal security afforded to investments in the host country will play an important role in the decisions of prospective project sponsors to invest in a given project. In particular, the sponsors will seek to obtain assurances that their investment will be protected from confiscation or dispossession; that they will be able to convert into foreign currency the revenue earned in local currency; and that they will be able to repatriate or take abroad their profits and residual investment after the expiry of the project term. They may, therefore, look for corresponding assurances from the host Government.

17. The desire to limit their liabilities to the amount of their equity investment normally leads the project sponsors to establish a limited liability company (such as a stock company) with juridical personality, assets and management of its own for the specific purpose of carrying out the project. Sometimes, the shareholders of the project company may also include “independent” equity investors not otherwise engaged in the project (usually institutional investors, investment banks, bilateral or multilateral lending institutions, sometimes also the host Government or a State-owned corporation). The participation of private sector investors from the host country is sometimes required by the national law.

18. The project company will have the overall responsibility for the project and will establish a number of contractual arrangements with construction contractors, equipment suppliers, the operation and maintenance company and other contractors, as required for the implementation of the project. The project company normally becomes the vehicle for raising the financial means required in addition to the equity contributed by the sponsors.

3. Lenders and international financial institutions

19. Due to the magnitude of the investment required for a privately-financed infrastructure project, loans are often organized in the form of "syndicated" loans with one or more banks taking the lead role in negotiating the finance documents on behalf of the other participating financial institutions, mainly commercial banks. Commercial banks have considerable experience in project finance and, together with the project sponsors, they normally devise instruments that suit the needs of a particular project. Commercial banks are sensitive to the need for preserving the project company's payment capacity, and often show flexibility in respect of extensions of loans or renegotiation of their terms. At the same time, however, commercial banks insist on minimizing their exposure to completion, commercial, political or other project risks.

20. Before agreeing to finance the project, the lenders usually review carefully the economic and financial assumptions of the project so as to assure themselves of its feasibility and commercial viability. Subsequently, arrangements will be made to limit as much as possible the risk of default. One is the priority payment of commercial debts before any other sources of capital are paid, i. e. before payments are made to other creditors or dividends are distributed to equity investors or project sponsors. Also, the lenders usually demand security in the form of mortgages, fixed or floating charges over all the assets of the project, assignments of future receivables arising from the operation of the project, automatic deposit of an agreed part of those proceeds into a blocked account (often outside the State where the project is located), governmental guarantees, or the ability to appoint a substitute in the event of default or inability of the project company to perform its obligations. The greater the amount of security the laws of the host country allow, the greater is the likelihood that financing will be available for the project at a more favourable rate. The possible role of national legislation in this respect is discussed in chapter VI, "The project agreement" [yet to be drafted].

21. International financial institutions and export credit agencies may also play a significant role in privately-financed infrastructure projects. A number of projects have been co-financed by the World Bank, the International Finance Corporation, or by regional development banks. The participation of international financial institutions or export credit agencies may facilitate the project sponsors' task of raising funds in the international financial market by providing commercial banks with protection against a variety of political risks, including, *inter alia*, the failure of the host Government to make agreed payments, to make available sufficient foreign exchange or to grant necessary regulatory approvals. International financial institutions may also play an instrumental role in the formation of "syndications" for the provision of loans to the project. Some of those institutions have special loan programmes under which they become the sole lender of record to a project, acting on its own behalf and on behalf of participating banks and assuming the responsibility for processing disbursements by participants and for subsequent collection and distribution of loan payments received from the borrower.

4. Other capital providers

22. Capital providers other than commercial banks and international financial institutions may include "institutional investors" such as insurance companies, mutual funds, pension funds or investment funds. Under the terms of their investment, those other capital providers are usually entitled to priority payment of principal and interest, or priority dividend payment, before dividends

are distributed to the project sponsors and other shareholders of the project company. They will often have the right to receive periodic reports and financial statements. In the case of institutional investors holding preferential shares or debentures, they will enjoy other rights available to them under the laws of the country where the project company is established or where the shares or debentures were issued, which may include any of the following: the right to be collectively represented by an agent; the right to be consulted on and to approve certain changes in the statutes of the project company; a preferential right to amounts distributable on liquidation.

23. One additional group of potential capital providers may be Islamic financial institutions. Those institutions operate under rules and practices derived from the Islamic legal tradition. One of the most prominent features of banking activities under Islamic rules is the absence of interest payments, and consequently the establishment of other forms of consideration for the borrowed money, such as profit sharing or direct participation of the financial institutions in the results of the transactions of their clients. As a consequence of their operating methods, Islamic financial institutions may be more inclined to considering direct or indirect equity participation in a project than other commercial banks. At the same time, Islamic financial institutions would give emphasis to reviewing economic and financial assumptions of projects for which financing is sought and would follow closely all phases of its implementation.

5. Construction contractors and suppliers

24. Often one or more of the companies that conclude contracts with the project company for the construction of the infrastructure facility or the supply of equipment are also sponsors of the project.

25. The construction contractor or contractors will usually assume responsibility for the design of the facility and caretaking of it through all stages of construction until its physical completion. Their main interest will be to be able to complete the works within the agreed schedule and within the original cost estimate. So as not to incur delay in the construction works, the contractors will desire access to necessary supplies (e.g. cement, fuel, steel, electricity, water) and will seek assurances that they will be allowed to import into the country all equipment and materials they might require. They will also be concerned with their ability to hire local and international personnel of their choice. Like the project company, the foreign construction contractors and suppliers will expect to be able to convert into foreign currency and transfer abroad any revenue earned in local currency.

6. Operation and maintenance company

26. Among all contractors retained by the project company, the contractor or contractors responsible for the operation and maintenance of the infrastructure facility are the ones with the longest lasting involvement in the project. The operating company in particular will be in a singular position, as the task of operating the facility will place it in direct relation with its customers and will expose the operating company to public scrutiny. For those reasons, the operating company’s viewpoint as regards the assessment of the economic and financial viability and profitability of the

project may differ from the viewpoint of the other project sponsors and, therefore, it may be valuable to obtain the input of the prospective operating company at the early stages of the project.

27. Possible methods of paying for the operation and maintenance of the infrastructure may vary from lump-sum payments to cost-plus methods, in which the variable portion above and beyond the recovery of costs may be either a fixed sum, a percentage of the cost or a share in the revenue of the project. Combinations of any of those methods are also common. The project company will normally establish some form of control mechanism over the operation of the facility (e.g. audit rights and cost review) so as to ensure that the operating costs are kept as much as possible within original estimates. Where the reimbursement of costs is subject to a maximum ceiling, the interest to reduce cost will be shared with the operating company.

28. The performance by the operation and maintenance company is normally subject to standards of quality that may derive from many different sources, including the law, the project agreement, the operation and maintenance contract or the instructions or guidelines issued by the competent regulatory body. In addition to that, a number of other requirements may be contained in legislation such as labour or environmental law. The operation and maintenance company is thus usually required to provide performance or surety bonds, and to purchase and maintain adequate insurance, including casualty insurance, workmen's compensation insurance, environmental damage and third party liability insurance.

29. The operation and maintenance company will need clear operating requirements and regulations and will seek to obtain assurances from the project company or the host Government that it will be able to operate and maintain the facility without undue interference. Potential conflicts with the host Government may arise as a result of changes in national laws or regulations that impose higher standards for the operation of the facility, or in the course of the exercise by the Government of its monitoring rights.

7. Insurers

30. Privately-financed infrastructure projects involve a variety of risks pertaining to the construction and operational phases of the project and which may well exceed the capacity of the project company, the host Government, the lenders or the contractors, to absorb. Thus, obtaining adequate insurance against such risks is essential for the viability for a privately-financed infrastructure project. Typically, an infrastructure project will involve casualty insurance covering its plant and equipment, third party liability insurance, and workmen's compensation insurance. Other possible types of insurance include insurance for business interruption, interruption in cash flows, and cost overrun insurance. Those types of insurances are usually available at the commercial insurance markets, although the availability of commercial insurance may be limited for certain force majeure risks (e.g. war, riots, vandalism, earthquakes, hurricanes) which one or more of the parties will need to absorb. For some categories of risks, such as political risks, the project may require guarantees provided by international financial institutions, such as the World Bank or the International Financial Corporation, or by export credit agencies.

E. Phases of execution

31. Privately-financed infrastructure projects evolve through a number of phases from the initial identification of the project and the selection of the project sponsors, the conclusion of the project agreement and related instruments, the execution of the construction or modernization works to the operation of the infrastructure facility and possibly the transfer of the project to the host Government.1/

1. Identification of the project

32. With the possible exception of projects that result from unsolicited proposals by the private sector, it is normally the host Government that identifies projects to be carried out in order to meet the national needs for infrastructure development. From a legislative perspective, two important questions for the development of the project will normally have to be considered at this early stage, namely, what type of private sector involvement is sought for the project and who is authorized to act on behalf of the host Government.

33. One of the initial steps taken by the host Government in respect of a proposed infrastructure project is to conduct a preliminary assessment of its feasibility, including economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility. It is also important at this stage to assess the technical feasibility of the project as well as its environmental impact. The preliminary conclusions reached by the host Government at this stage will play a crucial role in conceiving the

---

1/ This section discusses selected issues that arise in connection with different phases of a privately-financed infrastructure project. For more information, including an analysis of economic, financial and management issues, the reader is advised to consult general literature on the subject, such as the UNIDO BOT Guidelines.

type of private sector involvement that is sought for the implementation of the project, for instance, whether the infrastructure facility will be owned by the host Government and temporarily operated by the private entity, or whether the facility will be owned and operated by the private entity. The choice of the modality of private sector participation will be significant for a series of legal issues commonly dealt with in the legislation, such as the procurement of land (see chapter V, "Preparatory measures", paras. 1-15) and ownership of the infrastructure facility and related assets (see chapter VI, "The project agreement" [yet to be drafted]).

34. Following the identification of the future project, it is for the host Government to establish its relative priority and to assign human and other resources for its implementation. At that point, it is desirable that the host Government review existing statutory or regulatory requirements relating to the operation of infrastructure facilities of the type proposed with a view to identifying the main governmental bodies that have to give approvals, licences or authorizations or which have to be otherwise involved in the project. Depending on the importance and level of authority assigned to the project, the host Government, at that stage, may wish to designate an office or agency for the purpose of coordinating the input of other offices and agencies concerned and monitoring the issuance of licences and approvals (for further consideration of this issue, see chapter V, "Preparatory measures", paras. 38-44).

2. Selection of project sponsors

35. Once a project has been identified, its viability and feasibility have been assessed, and the need or interest for private financing have been confirmed, the host Government will turn to the selection of the project sponsors by using methods prescribed in the relevant legislation. Often, the selection method involves competitive tenders or proposals submitted by a selected number of candidates which have met the relevant prequalification requirements (for a discussion of legislative issues relating to the choice of a selection method and process, see chapter IV, "Selection of the project sponsors" [yet to be drafted]).

36. The confidence of prospective project sponsors in the viability of the project and their readiness to invest the time and funds required for preparing tenders or proposals is often influenced by their assessment of the rules governing the selection process. Prospective project sponsors might be discouraged to participate in a selection process that they perceive as unclear or cumbersome. Therefore, for Governments wishing to attract private sector investment in infrastructure it might be advisable to have procedures in place that maximize economy and efficiency in procurement, provide a fair and equitable treatment of all prospective project sponsors and ensure transparency in the selection process.2/

2/ Those are some of the objectives of public procurement set forth in the preamble to the UNCITRAL Model Law on the Procurement of Goods, Construction and Services, adopted by the United Nations Commission on International Trade Law (UNCITRAL) at its twenty-seventh session, in 1994 (printed in UNCITRAL Model Law on Procurement of Goods, Constructions and Services, with Guide to Enactment. United Nations, New York, 1995).

37. Whatever method is chosen by the host Government, the selection process for infrastructure projects is often complex and might require considerable time and entail significant cost for prospective project sponsors, thus adding to the overall cost of the project. Ensuring that documents distributed to prospective sponsors are sufficiently clear and contain all elements necessary for the preparation of their tenders or proposals is important to reduce the need for clarifications, as well as minimize the potential for complaints or disputes. Furthermore, many Governments have found it useful to provide the prospective project sponsors with a sample of the project agreement to be entered into with the selected sponsors, so that they may familiarize themselves with the obligations normally assumed by a concessionaire under the laws of the host country. The legislation plays a significant role by providing guidance to the procuring entities in the host country as to essential elements to be taken into account in all selection processes concerning privately-financed infrastructure projects.

3. Preparations for the implementation of the project

38. Following the selection of the project sponsors, a number of measures will have to be taken with a view to beginning the implementation of the project. Often, the project sponsors will establish an independent legal entity to carry out the project, and with which the host Government will conclude a project agreement. The project agreement will set forth the obligations of the parties concerning the implementation of the project. For projects as complex as infrastructure projects, it is not unusual that several months elapse in negotiations before the parties are ready to sign the project agreement. A number of factors have been reported to cause delay in the negotiations, such as inexperience of the parties, poor coordination between different governmental agencies, uncertainty as to the extent of governmental support, or difficulties in establishing security arrangements acceptable to the lenders3/ A significant contribution may be made by the host Government by ensuring appropriate coordination between all offices and agencies involved, or by identifying in advance the types of guarantees and facilities it may provide to the implementation of the project (see chapter VII, “Government support” [yet to be drafted]). The clearer the understanding of the parties as to the matters to be provided in the project agreement, the greater the chances that the negotiation of the project agreement will be conducted successfully. Conversely, where important issues remain open after the selection process and little guidance is provided to the negotiators as to the substance of the project agreement, there might be considerable risk of costly and protracted negotiations. The legislation may help the parties to achieve a timely conclusion of the project agreement by identifying essential issues that need to be dealt with therein (for further discussion of this topic, see chapter VI, “The project agreement”).

39. In addition to the conclusion of the project agreement and related instruments, the project company will also enter into agreements with the lenders for the provision of loans for the implementation of the project and will establish contractual arrangements with contractors and suppliers. Moreover, a number of other arrangements are usually made in the period immediately following the award of the project in preparation for the commencement of the construction.

3/ For a discussion of issues having an impact on achieving financial closure, see International Finance Corporation, Financing Private Infrastructure, Washington, D.C., 1996, p. 37.

Preliminary inspections of the site of the project will take place prior to the construction. The project company may also have at this stage to bring in the country the equipment and other material, as well as the personnel required for the execution of the project. Where licences are required, the host Government will be instrumental in avoiding unnecessary delays (see chapter V, “Preparatory measures”).

4. Construction phase

40. Following the satisfactory completion of the preliminary arrangements referred to above, funds may be disbursed for the implementation of the project and the construction or modernization works may begin. It is during the construction phase that most of the investment is made in the project, at a time when no revenue is yet generated by the infrastructure facility. Thus, the overall financial viability of the project is largely predicated upon a successful construction phase. Delays in the construction and cost overruns are the two main reasons of concern for all the parties involved. The lenders will insist that those risks be assumed by the project company and its contractors, of whose competence and reliability they will wish to be assured.

41. From the perspective of the host Government, delay and cost overruns also carry negative political implications and may undermine the credibility of the host Government’s policy on privately-financed infrastructure projects. The host Government usually requires the project company to assume full responsibility for the timely completion of the construction. Therefore, a number of provisions will be made in the project agreement, sometimes pursuant to a statutory requirement, so as to deal with the possible consequences of those situations, such as provisions on performance bonds or sureties, insurance requirements, or penalties and liquidated damages. Possible legislative approaches to dealing with these issues are considered in chapter X, “Performance issues”. Furthermore, the host Government, as well as the lenders, will want to be assured that the technology proposed for the implementation of the project has been sufficiently used and is of proven safety and reliability. They will consider with great caution any suggestion to use new or untested technologies. In any event, a number of tests may be required to be performed prior to final acceptance of the infrastructure facility.

42. Completion and cost-overrun risks will normally be allocated by the project company to the construction contractors and, for that purpose, the construction contract will normally be a fixed-price, fixed-time turnkey contract with guarantees of performance by the contractors. The contract may require the construction contractor to provide warranties that the infrastructure facility will operate to predetermined performance standards. Also, the equipment suppliers may be asked to provide extensive warranties at to the fitness of the technology provided.

5. Operational phase

43. After completion of the construction works, and upon authorization by the host Government for the operation of the facility, begins the longest phase of the project. During that phase the project company undertakes to operate and maintain the infrastructure facility and to collect revenue from the users. Conditions for the operation and maintenance of the facility, as well as quality and safety standards, are often provided in the law and spelled out in detail in the project agreement. In

addition to that, a regulatory body may exercise an oversight function over the operation of the facility, as further discussed in chapter IX, “Operational phase”.

44. For the project company, the revenue generated by the infrastructure facility is the sole source of funds for repaying its debts, recouping its investment and making profit. Therefore, one of the main concerns of the project company during the operational phase is to avoid as much as possible any interruption in the operation of the facility and to protect itself against the consequences of any such interruption. In this respect, the interests of the lenders will normally be convergent with those of the project company. Therefore, it will be important for the project company to ensure that supplies and power needed for the operation of the facility will be constantly available. Also, the project company will be concerned that the exercise by the host Government of its monitoring or regulatory powers does not cause disturbance or interruption in the operation of the facility, nor that it results in additional costs to the project company.

45. In general, the host Government, too, will be interested in ensuring the continuous provision of services or goods to the users and customers of the infrastructure facility. At the same time, however, the host Government will also have a legitimate interest in ensuring that the operation and maintenance of the facility are performed in accordance with the applicable quality and safety standards or operating rules and conditions. These aspects will be of particular concern for the host Government in respect of infrastructure facilities open to use by the general public (such as a bridge or tunnel) or of a hazardous nature (such as power plants or gas distribution facilities). The particular perspective of the host Government, which results from its being accountable to the public for the infrastructure facility, may lead to conflicts or disagreements with the project company. Thus, the importance of having in place clear rules concerning the operation of the infrastructure facility and of establishing adequate methods for settling disputes between the host Government and the project company that might arise at that phase of the project.

6. Termination of the project

46. With the possible exception of those cases where the infrastructure facility is to be permanently owned by the project company, most privately-financed infrastructure projects are undertaken for a certain period. In some projects, extensions of the project period in favour of the same project company may be possible; in other cases, the law requires instead the selection of a new concessionaire through a competitive method (a more detailed discussion of these issues is contained in chapter XI, “Expiry, extension and early termination of the project agreement”).

47. In yet other projects, such as “build-own-operate” projects, the infrastructure facility and all related assets and equipment is transferred to the host Government at the end of the project term. In those cases, the host Government will be interested in ensuring that modern technology has been transferred, that the infrastructure facility has been properly maintained, and that national personnel has been adequately trained for the operation of the facility.

* * *