



# General Assembly

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## United Nations Commission on International Trade Law

Thirty-second session

### Summary record of the 648th meeting

Held at the Vienna International Centre, Vienna, on Monday, 17 May 1999, at 2 p.m.

*Chairman:* Mr. Renger ..... (Germany)

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*The meeting was called to order at 2.15 p.m.*

**Election of officers** (*continued*)

1. **Mr. Zinevich** (Russian Federation) nominated Mr. Mazilu (Romania) for one of the Vice-Chairman posts.

2. *Mr. Mazilu (Romania) was elected Vice-Chairman by acclamation.*

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

*General remarks on the draft legislative guide (continued)*

3. **Mr. Choukri Sbaï** (Observer for Morocco) said that his delegation regarded the draft legislative guide on privately financed infrastructure projects as ready for finalization in plenary. Particularly in view of the financial constraints with which the Organization was faced, it was against the proposal made at the previous meeting that the draft guide should be considered further in the framework of a working group.

4. **Mr. Chan Wah Teck** (Singapore) said that his delegation shared the reservations expressed by other delegations as to the wisdom of referring the draft guide to a working group. However, at the close of the session the guide could perhaps be submitted to a group of experts for their comments, which could then be taken up at the next session.

5. His delegation was of the view that, as currently drafted, the guide was rather too long. It must be borne in mind that the guide was specifically intended for use by those Governments wishing to enact legislation enabling them to benefit from private financing of infrastructure projects at the lowest possible cost. If the guide sought to address other needs, its usefulness to Governments would be significantly lessened.

6. His delegation had several suggestions for maximizing the benefits to Governments. First, as it stood, the guide implicitly assumed that Governments would wish to enact only one piece of complex legislation. It might well be, however, that they would choose to incorporate the guide's recommendations in a number of different pieces of legislation, some of them involving constitutional amendments. Governments should thus be offered a number of policy options, rather than one single means of achieving a given effect. It should also be borne in mind

that different sets of options would be appropriate to different systems of government.

7. The guide should also draw more heavily on the experience of countries that had succeeded in obtaining private financing for infrastructure projects at low cost. It might be desirable to include, as an annex to the guide, clauses taken from legislation adopted by such countries, to which other countries could refer as models.

8. There might also sometimes be no need for legislation; in some cases, the best model for privately funded infrastructure projects might be some contractual mechanism. Governments should be provided with advice enabling them to determine whether the legislative or the contractual route offered them the best means of establishing an infrastructure.

9. **The Chairman**, summing up the general discussion, said that all members appeared to regard the documentation submitted as a solid basis upon which the Commission could proceed. Some delegations regarded the guide as too long, while others favoured adding new chapters or splitting existing chapters. He would now invite the Commission to take up consideration of the draft chapters.

*Introductory chapter: introduction and background information on privately financed infrastructure projects*  
(A/CN.9/458/Add.1)

10. **Mr. Estrella Faria** (International Trade Law Branch) said that the discussion of an earlier draft of the introduction (A/CN.9/444/Add.1) was reflected in paragraphs 23-49 of the Commission's report on the work of its thirty-first session (A/53/17). In response to suggestions made in that debate, the Secretariat had shortened section A, dealing with the purpose and scope of the guide, and had redrafted section B, on the terminology used. Section C, on forms of private sector participation in infrastructure projects, was essentially unchanged; and section D, on financing structures and sources of finance for infrastructure projects, had undergone only minor amendments. Section E, on the main parties involved in implementing infrastructure projects, had been shortened to avoid repetition, and, for the same reason, the section of the previous draft dealing with phases of privately financed infrastructure projects had been deleted altogether.

11. Chapter II of the previous year's draft (A/CN.9/444/Add.3), dealing with sector structure and competition, had been dispensed with. The section dealing with infra-

structure operation had been moved to the new chapter V, while other portions had been moved to section F of the introductory chapter.

12. **Mr. Mazilu** (Romania) recalled his comments made at the previous meeting regarding the need for a separate introduction and suggested that document A/CN.9/458/Add.1 should be entitled “Scope, definitions and background information on privately financed infrastructure projects”. The draft itself was an improvement on the previous version.

13. **Mr. Choukri Sbaï** (Observer for Morocco) thought that in paragraph 2 the reference to “the reader” should be replaced by a reference to “States, businessmen and investors”. In paragraph 7, which referred to “public” and “private” infrastructure, the semi-public sector should also be mentioned.

14. **Mr. Kovar** (United States of America) recalled his delegation’s earlier suggestion that a new, briefer introductory chapter should be drafted to precede document A/CN.9/458/Add.1. Paragraphs 54 to 59 of the document under review, giving some historical background, could perhaps be incorporated in the new introductory chapter.

15. **Mr. Mazilu** (Romania) said that what was needed was a new introduction, consisting of only two or three paragraphs, setting out the purpose of the guide.

16. **The Chairman** thought that, if the guide were to begin with a new introduction, the chapter dealing with its purpose, definitions and background should become chapter I.

17. **Mr. Kovar** (United States of America) said that the new introduction needed to make clear to legislators that they would face certain obstacles in seeking private capital for infrastructure projects, and that the guide was intended to help them overcome such obstacles by offering legislative and regulatory suggestions.

18. **Mr. Estrella Faria** (International Trade Law Branch) said that it had been in response to comments made in the Commission that the introductory remarks and background information had been merged into one chapter, which had been left unnumbered as it did not deal with the substance and contained no legislative recommendations. The United States delegation’s concerns could perhaps be accommodated by bringing forward to the beginning of the document what that delegation considered to be the essential message to be conveyed by the introduction.

19. **Mr. Lalliot** (France) felt that the introductory part of the guide should begin with paragraphs 54 to 56. However, paragraphs 57 to 82 were related to paragraphs 54 to 56. He suggested that the new introduction should consist of three parts. A first part, entitled “Historical background and evolution”, would consist of paragraphs 54 to 56, paragraphs 1 to 4 (section A), concerning objectives, and paragraphs 57 to 82. A second part, dealing with definitions, would replace the existing section B, on terminology. A third part, dealing with general information (the present sections C, D and E), would then lead up to the discussion of the substance in the subsequent chapters.

20. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said that the essence of the problem was that the introduction was too long. Sections D and E, which seemed to be educational in purpose, detracted from its impact and could be eliminated.

21. **Mr. Zanker** (Australia) supported the comments of the representative of France. The guide was excellently drafted, but would be improved by moving paragraphs 54 to 56 to the start of the introduction, and by giving rather more prominence to its subject matter, purpose and scope.

22. **Mr. Choukri Sbaï** (Observer for Morocco) supported the suggestion to place paragraphs 54 to 56 at the beginning of the introduction.

23. **The Chairman** noted that there seemed to be consensus that document A/CN.9/458/Add.1 should be restructured and its contents rearranged.

24. *It was so decided.*

#### *Section A. Purpose and scope of the guide (paras. 1-4)*

25. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that the two key sentences of the guide were the first sentence of paragraph 1 and the second sentence of paragraph 2. The guide should thus briefly set out the fundamental requirements of private investors and their lenders on the one hand, and the fundamental public interest concerns of the host country on the other.

26. The private sector wanted stability, predictability and transparency, and the avoidance of arbitrary treatment or government interference save in the public interest and subject to compensation. The public interest varied from country to country, but there was always a need to ensure continuity of services of specified quality and at a pre-determined cost or price level; there must also be assurances that safety and environmental requirements would be met at all times, and the Government must remain

in control, and be able to revoke a concession subject to compensation.

27. **Mr. Estrella Faria** (International Trade Law Branch) said it was his understanding of the Swedish suggestion that, when restructuring document A/CN.9/458/Add.1, the Secretariat should explain the purpose of the guide more fully by adding a reference to the various interests involved.

28. **Mr. Choukri Sbaï** (Observer for Morocco) said that the reference in paragraph 4 to “physical construction, repair or expansion works” further highlighted the need for paragraph 2 to speak of “States, businessmen and investors”, as he had proposed earlier.

29. **Mr. Al-Zaid** (Observer for Kuwait) asked for confirmation that the Commission had decided to exclude the two issues of privatization of State concerns and exploitation of natural resources from the scope of the guide. If that was the case, the Commission had forgone an excellent opportunity to develop guidelines in two areas of great topical significance.

30. **The Chairman** confirmed that the Commission’s decision still stood, and that the two issues were now closed.

*Section B. Terminology used in the guide (paras. 6-18)*

31. **Mr. Lalliot** (France) said that the guide contained no satisfactory definition of the two key concepts of “public infrastructure” and “public services”, because public infrastructure was defined in paragraph 6 as “physical facilities that provide public services”, while public services were defined in paragraph 9 as “services provided in connection with public infrastructure”. There seemed to be no obvious solution to the problem, because it would be difficult to make a choice among the multitudinous possible definitions of “public services”.

32. A different problem arose in paragraph 15 and thereafter. The words “*organisme public*”, used as the equivalent of “governmental agency”, had no meaning in French law. The term “contracting authority” (“*autorité contractante*”) might be acceptable. But the reference to “the executive branch of the Government” was also misleading in the context of French law. He proposed that the second sentence of paragraph 15 be deleted.

33. Lastly, while he had no problem with the substance of paragraph 17, he wondered whether the attempt to categorize various types of project was not already somewhat obsolete.

34. **Ms. Nikanjam** (Islamic Republic of Iran) said that her delegation would favour deleting the words “meaning and” from the first sentence of paragraph 5.

35. **The Chairman** said that, unless paragraph 15 posed similar problems in the English-language version, the terminological problem raised by the delegation of France, as well as the problem of the circular definition in paragraphs 6 and 9, could perhaps be resolved in informal consultations.

*The meeting was suspended at 3.35 p.m. and resumed at 4.05 p.m.*

*Section C. Forms of private sector participation in infrastructure projects (paras. 19-26)*

36. **The Chairman**, after inviting comments, noted that there were no comments on section C.

*Section D. Financing structures and sources of finance for infrastructure projects (paras. 27-43)*

37. **Mr. Jacobson** (United States of America) said that paragraph 27 spoke of traditional financing primarily in terms of a guarantee provided by the borrower’s shareholders. In point of fact, in traditional financing the lenders typically relied on the borrower’s established credit or on an established balance sheet, not on the availability of guarantees by shareholders.

38. The first sentence of paragraph 28 should be reworded so as to emphasize the absence of a balance sheet or an established credit to rely on as a reason for recourse to project finance. It was not so much that shareholders might be unready to provide guarantees. Paragraph 30 should be similarly amended.

39. With regard to financing sources, paragraphs 31 to 34 (headings (a), (b) and (c) identified not sources of financing but types of financing. Heading (b) covered commercial loans, but many other types of financing, such as leases, commercial paper, guarantees and insurance companies support agreements, could be used in project financing. Paragraphs 31 to 34 should thus be restructured, with heading (a) covering equity capital, heading (b) the various types of debt and heading (c) other types of financing such as leases and commercial paper.

40. Under heading (h), it might be useful to refer to the fact that export credit agencies also provided political risk coverage—indeed, that was one of their more significant roles. Reference could also be made to the Overseas Private Investment Corporation (OPIC), a United States

government institution that provided various kinds of credit support and guarantees.

41. **Mr. Lalliot** (France) recalled that the question had been raised of devoting a separate chapter to financing. Such a chapter could draw on paragraphs currently contained in document A/CN.9/458/Add.1 and also on material from chapters II and IV (A/CN.9/458/Add.3 and 5). The Commission would then have to consider what would be the fate of the remainder of chapters II and IV.

42. Paragraph 43 stated that in some cases Governments undertook to make direct payments to the concessionaire. It should, however, be recalled that, in accordance with a fundamental rule applicable not only in French law but also in the 15 States members of the European Union, the contractor undertook construction and operation at his own risk, and that accordingly public subsidies must not result in a transfer of the risk from the concessionaire to the contracting authority. Attention should be drawn to that rule, either in paragraph 43 or elsewhere in the guide.

43. **The Chairman** said that the question of drafting a separate chapter on financing would have to be considered later.

44. **Mr. Chan Wah Teck** (Singapore) said that his delegation noted the absence of any information as to what concessionaires would be looking for in a country's legal system before embarking on infrastructure projects. There was no mention, for example, of remission of profits, of the effects of restrictions on overseas entrepreneurs raising capital within the host country, or of the need to ascertain whether the country had a system allowing for foreign ownership of private property. Attention might be drawn to those issues either in the introduction or in an annex to the guide.

45. **Mr. Estrella Faria** (International Trade Law Branch) said that a few of the issues raised by the representative of Singapore had been dealt with elsewhere in the guide. Cross-references could be provided in the introduction.

46. **Mr. Wiwen-Nilsson** (Observer for Sweden) asked whether the point raised by the representative of France concerning risk transfer in the context of State aid would be addressed in the guide.

47. **The Chairman** thought that it might be wise to leave that point on one side for the time being.

48. **Mr. Massey** (Observer for Canada) said that there had been requests for reference to be made in the

introduction to issues that were dealt with in detail in later chapters. The introduction was intended simply to serve as a preface to the text and recommendations. The existing introduction acquitted itself admirably of its modest task, and required only light stylistic editing.

49. **Mr. Zanker** (Australia) supported that view. While there might be a case for mentioning in the introduction the various issues dealt with in detail later in the guide, the introduction was intended to introduce the guide, not to replace it.

*Section E. Main parties involved in implementing infrastructure projects (paras. 44-53)*

50. **Mr. Darcy** (United Kingdom) said he was puzzled by the use of the terms "project company" and "project sponsors" in subsection 2 of section E (para. 47). The second sentence of paragraph 47 was potentially misleading, since in the United Kingdom the term "project company" referred to the private sector party, while the term "project sponsors" was used to refer to the senior project managers on the public sector side. A company participating in the joint venture would thus be referred to, not as a "project sponsor", but as a "project company". The same problem arose in paragraph 13, in the terminology section.

51. The last sentence of paragraph 47 stated that the participation of private sector investors from the host country was sometimes encouraged by the Government. It would be helpful to add that that sometimes led to a requirement for project companies to be registered, or at least incorporated, in the host country.

52. **Mr. Estrella Faria** (International Trade Law Branch) said that, if the expression "project sponsors" was confusing, it could perhaps be replaced by another term, such as "promoters". As to the last sentence of paragraph 47, the suggested reference could be added together with a cross-reference to chapter IV.

53. **Mr. Wallace** (United States of America) said that the term "project sponsors" posed no problem in American usage.

54. The second and third sentences of paragraph 49 made different points, and should thus be linked not by the words "for example" but by the word "moreover". The penultimate sentence of the same paragraph ended with a reference to inter-creditor agreements. It was at least as

usual, however, for lenders to negotiate a common loan agreement ensuring that all were subject to the same.

55. Paragraph 51, on insurers, referred to the International Finance Corporation, which he thought was a source of loans and equity rather than of insurance. It also referred to export credit agencies, which typically provided finance and export credits, but did not mention institutions such as OPIC which provided credit guarantees.

56. Lastly, consideration might be given to amending the words “outside international counsel”, in the second sentence of paragraph 52, to read “international legal counsel”, so as to emphasize the range of professional expertise available.

57. **Mr. Phua Wee Chuan** (Singapore) said that nowhere in section E was any reference made to one of the parties involved in implementing infrastructure projects—namely, the “home country”, or country of origin of the private sector investor. It might be useful to introduce that concept in paragraph 47.

58. **Mr. Estrella Faria** (International Trade Law Branch) said it would be easy to mention in a revised version of the guide that, in order to create a stable framework for investment, the home and host countries might, for example, enter into a bilateral investment protection agreement.

*Section F. Infrastructure policy, sector structure and competition (paras. 54-82)*

59. **Mr. Wallace** (United States of America) said that the statement in paragraph 66 that “some countries, in particular developing countries, might have a legitimate interest in promoting the development of certain sectors of local industry and might thus choose not to open certain infrastructure sectors to competition”, while unquestionably true, might be interpreted as prescriptive. He wondered whether the sentence could be deleted.

60. **Mr. Lalliot** (France) said that the statement in the first sentence of paragraph 61 that “monopolies (of whatever form) have been found to have negative economic effects” was historically untrue. In certain circumstances, such as those that had obtained in France just after the Second World War, certain monopolies had been at least temporarily justifiable. Furthermore, some monopolies, including so-called “natural” monopolies, could not be considered pernicious, and examples were given in paragraph 62. He thus proposed amending the first

sentence of paragraph 61 to read “Some monopolies have had negative effects”.

61. Paragraph 82 worried him for two reasons. First, the measures referred to therein were not really transitional measures. Secondly, the paragraph seemed to emphasize regimes of ownership, whereas what was important was non-discrimination and competitive conditions. The paragraph should be amended and the second sentence deleted, since the guide was not intended to deal with privatization.

62. **Mr. Choukri Sbaï** (Observer for Morocco) said that third world Governments were sometimes obliged to enter into arrangements which exhibited monopolistic features. Not all monopolies were pernicious, and paragraph 61 should be amended accordingly.

63. **Mr. Lee Yong-shik** (Observer for the Republic of Korea), responding to the remarks of the representative of the United States of America concerning the last sentence of paragraph 66, said that it might be important to retain that sentence, to make it clear that the guide was not seeking to influence Governments in considering the various options.

64. **Mr. Estrella Faria** (International Trade Law Branch), referring to paragraph 61, said that the English version of the first sentence, unlike the French version, might be interpreted as not referring to all monopolies. However, he thanked the representative of France for proposing a more flexible wording. As to the last sentence of paragraph 66, it had been inserted following a specific request by the Commission, mentioned in paragraph 105 of the report on the thirty-first session (A/53/17).

65. **The Chairman** said that the Commission had concluded its consideration of document A/CN.9/458/Add.1.

*The meeting rose at 5 p.m.*