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Summary record of the 651st meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 19 May 1999, at 9.30 a.m.

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

Contents

V.00-50747 (E)

The meeting was called to order at 9.40 a.m.

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

Chapter II. Project risks and government support (*continued*) (A/CN.9/458/Add.3)

1. **The Chairman** said that, following the debate at the previous meeting, it had been agreed in informal consultations that the Commission would request the Secretariat, when reviewing the legislative guide, to ensure that the text was as concise as possible. A decision on the desirability of inserting a paragraph emphasizing the differing functions of the legislative recommendations and the notes would be taken at a later date. If he heard no objection, he would take it that the Commission wished to proceed in that manner.

2. *It was so decided.*

Section C. Government support (paras. 25-56)

3. **Mr. Massey** (Observer for Canada) thought that paragraph 34 went into too much detail. For example, the recommendation in the sixth sentence that incentives should not be removed for the lenders to arrange for the continuation of the project raised as many questions as it answered. One might perhaps say instead that such an approach should be considered in certain instances.

4. Regarding paragraph 36, it was not quite clear why a Government should make it clear that it was not offering a guarantee if it in fact had no liability in law.

5. **Mr. Wiwen-Nilsson** (Observer for Sweden) thought that the concern that had been voiced on the question of restrictions on subsidies under European law was not in the second sentence of paragraph 31.

6. **Mr. Phua Wee Chuan** (Singapore) thought that paragraph 26 should perhaps be adapted in line with the decision taken at the previous meeting to amend legislative recommendation 2 to cover forms of support other than financial support.

7. **Mr. Choukri Sbaï** (Observer for Morocco) said that the warning contained in the last sentence of paragraph 28 might be interpreted as casting doubt on Governments' ability to manage their own affairs, and should be deleted.

8. **Mr. Mazilu** (Romania) said his delegation shared the concerns expressed regarding paragraph 36 and the question of implied guarantees. The paragraph should be drafted in a more flexible way.

9. **Mr. Kashiwagi** (Japan) said that in the countries of Asia there was often an erroneous assumption that if the Government participated in a project it would therefore take responsibility for all consequences thereof. Paragraph 36 had an important role to play in dispelling that assumption.

10. Paragraph 41 (a) raised a problem in that, in many Asian countries, in a spate of privatizations, obligations assumed vis-à-vis project companies by public entities under "off-take" agreements had been transferred to private companies that then declined to honour them.

11. Lastly, regarding the assertion in paragraph 44 that risks of exchange rate fluctuations were considered to be ordinary commercial risks, very large fluctuations of the exchange rate in some countries had recently led Governments to help project companies whose revenue was generated in local currency to repay funds borrowed in foreign currencies. Exchange rate fluctuations brought about by extreme economic upheavals should perhaps be regarded as a kind of political risk.

12. **Mr. Wallace** (United States of America) said that paragraphs 28 and 29 were an improvement on previous drafts, but could be further improved. Governments should also be warned of the overexposure that might result from guaranteeing too many projects, and advised of the wisdom of keeping proper records.

13. The problem concerning paragraph 36 was in part a matter of drafting, and could perhaps be partially resolved by replacing the word "releasing" in the last sentence with a word such as "excusing".

14. Lastly, he requested clarification of the reference in paragraph 56 to the advisability of reviewing possible limitations to the project company's freedom to enter into contracts for the operation of ancillary facilities.

15. **Mr. Lalliot** (France), referring to paragraph 29, said that local authorities in France had sometimes taken on unduly onerous commitments, and the paragraph rightly emphasized the seriousness of that problem. As had been pointed out, paragraph 31 accurately reflected concerns of States bound by European law. The same point was relevant to paragraphs 39, 51 and 52.

16. He proposed a drafting change to paragraph 26 and corrections to the French version of paragraph 41 (c) (third

sentence) and paragraph 42 (fourth sentence), as well as of the heading preceding paragraph 43.

17. **Ms. Nikanjam** (Islamic Republic of Iran) questioned the term "sovereign guarantees" in heading *(d)* before paragraph 40. The guarantees referred to came under private law.

18. **The Chairman** said that "sovereignty" might indeed imply State immunity.

19. **Mr. Darcy** (United Kingdom) said it should be made clearer in paragraph 36 that equity itself was the real risk element of the financing package. Losing public money on a privately financed project would have serious political consequences. The point might be made that equity participation involved transferring a share of project risks back to the public sector.

20. **Mr. Wallace** (United States of America) said that the representative of the Islamic Republic of Iran had raised an interesting point concerning the heading before paragraph 40. Guarantees at the operational level might be provided by ministries or municipalities, whereas those relating to expropriation and foreign exchange would probably come from central government.

21. **Ms. Gioia** (Italy) said that the example of provisions clarifying the limits of governmental involvement given in parentheses at the end of paragraph 36 was inappropriate. All agreements providing for the exclusion of any partner from participating in either the losses or the profits of a company were deemed null and void in Italian law. While attention should be drawn to the problem of implied guarantees, the example should be dropped.

22. He agreed that it was important that the notes should point out that some recommendations might be in conflict with obligations under international agreements in the field of competition.

23. **Mr. Choukri Sbaï** (Observer for Morocco) endorsed previous speakers' remarks regarding international agreements. In 1992 Morocco had enacted a law based on an UNCITRAL model law, and the law excluded from the jurisdiction of the State certain contracts covered by provisions of international agreements.

24. **Mr. Mazilu** (Romania) supported the remarks of the Iranian and United States representatives regarding the heading before paragraph 40.

25. **Mr. Estrella Faria** (International Trade Law Branch) said that a question had been asked by the United States representative concerning paragraph 56. To give an example, when a toll road was being constructed and a special concession was needed for establishing services on adjoining land owned by the Government, the existence of a law requiring that concession to be awarded through competitive bidding procedures might cause a problem. The paragraph could be clarified. In view of the Commission's request that the text of the guide should be made more concise, however, the Secretariat would welcome further suggestions as to material that could usefully be deleted.

26. The linguistic problems to which the representative of France had drawn attention would be taken care of by the Secretariat. As to the term "sovereign guarantees", it was one borrowed from the jargon of international financial institutions, and referred to guarantees provided by an entity possessing legal personality under public international law. The Secretariat would welcome suggestions as to an alternative way of referring to such guarantees.

27. **Mr. Mazilu** (Romania) said it was hard to see how the text of chapter II could be made any more concise without sacrificing essential material. The term "sovereign guarantees" was indeed used in international financial institutions, but a more appropriate term should be used in the guide.

28. **The Chairman** said that one possible solution might be to use the term "government guarantees" in the heading and to explain in the text that such guarantees were often referred to as "sovereign guarantees".

29. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that, having regard to the distinction between civil law countries and common law countries, "State guarantees" might be a better term than "government guarantees".

Section D. Guarantees provided by international financial institutions (paras. 57-67)

30. **Mr. Choukri Sbaï** (Observer for Morocco) welcomed the reference in paragraph 66 to arbitration as a dispute resolution mechanism. Reference should also be made to the UNCITRAL Model Law on International Commercial Arbitration.

31. **The Chairman** said that the question of settlement of disputes was dealt with *in extenso* in chapter VIII.

32. **Mr. Lalliot** (France) noted that French public law did not recognize the concept of arbitration, except in certain clearly defined circumstances.

Section E. Guarantees provided by bilateral institutions (paras. 68-70)

33. **Mr. Wallace** (United States of America) thought that the reference in paragraph 68 to export credit agencies should be expanded to include national development agencies such as his own country's Overseas Private Investment Corporation (OPIC).

34. **Mr. Wiwen-Nilsson** (Observer for Sweden) said he was not sure that the expression "bilateral institutions", in the title of section E, was the correct term. Export credit agencies were national, not bilateral institutions.

35. **Mr. Estrella Faria** (International Trade Law Branch) said that "bilateral institutions" was another example of a jargon term borrowed from the banking industry, and denoted those institutions that worked pursuant to a bilateral agreement between the home country and the host country. The Secretariat would welcome suggestions for a more elegant term.

36. **Mr. Massey** (Observer for Canada), referring to paragraph 69 (a), said that one of the main purposes of export credit agencies was to guarantee payment when the buyer could not pay. The words "In the context of the financing of privately financed infrastructure projects" should perhaps be inserted at the beginning of the subparagraph.

37. **Mr. Mazilu** (Romania) expressed the view there was no such thing as a bilateral institution. The title of the section should be amended.

38. **Ms. Sriswasdi** (Thailand) said that technical terms were sometimes open to various interpretations. It would be useful if the Secretariat could provide a glossary of technical terms.

39. **Mr. Estrella Faria** (International Trade Law Branch) said that the Secretariat intended to produce a glossary for inclusion in the final version of the guide. The title of section E could perhaps be worded: "Guarantees provided by export credit and national development agencies".

40. **Mr. Mazilu** (Romania) said that his delegation could support that suggestion.

41. **The Chairman** said that the Commission had thus concluded its discussion of chapter II.

Chapter III. Selection of the concessionaire (A/CN.9/458/Add.4)

42. **The Chairman** suggested that, in view of the limited time it had at its disposal, when considering chapters III and IV, which were new drafts of existing chapters, the Commission should focus on the legislative recommendations and discuss any serious substantive points relating to the notes during the debate on the recommendations.

43. **Mr. Estrella Faria** (International Trade Law Branch), introducing document A/CN.9/458/Add.4, said that as a result of the debate at the thirty-first session it had been decided to expand chapter III, in particular those portions of the notes dealing with the phases of the procedure, the content of the final request and the content of proposals, and especially paragraphs 83-86 dealing with evaluation criteria and the paragraphs concerning direct negotiations beginning with paragraph 97. The Secretariat had also elaborated on the issue of unsolicited proposals, as requested at the same session.

44. The present draft of chapter III contained fewer legislative recommendations than the previous draft, and the Secretariat would welcome suggestions as to ways in which their number could be further reduced.

The meeting was suspended at 10.45 a.m. and resumed at 11.15 a.m.

45. **Mr. Darcy** (United Kingdom) said that many of the recommendations contained in chapter III seemed to be administrative or regulatory rather than legislative recommendations. Chapter III was more a procurement guide than a set of legislative recommendations.

46. **Mr. Wallace** (United States of America) endorsed those comments. The content of chapter III should perhaps be restricted to matters not covered in the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

47. **Mr. Wiwen-Nilsson** (Observer for Sweden) agreed with the United Kingdom representative that many of the recommendations did not relate to legislation. Another problem was that many issues given rather full treatment in the notes were omitted altogether from the recommendations, thus limiting their value to legislators. Recommendations 9 and 10 offered an example of that problem.

48. **Mr. Lalliot** (France) said that chapter III should not duplicate work already done by UNCITRAL in the area of

government contracts for the procurement of goods, construction and services. He reminded the Commission that France had two entirely separate sets of rules, one for government contracts and the other for the delegation of public services, or privately financed infrastructure projects. The latter should not be regarded simply as a sub-category of government contracts.

49. In accordance with French and European law, government contracts, with certain stated exceptions, were subject to strictly competitive procedures, whereas privately financed infrastructure projects fell under a different regime, combining invitation of proposals with freedom for the public authority to choose the most suitable operator. The procedure was not an arbitrary one but differed from the general public procurement procedure.

50. He would thus be very unhappy about going beyond the existing reference to the UNCITRAL Model Law on Procurement, or about reducing the length of the chapter by recourse to references to that Law or removing passages that took account of the legal tradition of France and countries with a similar legal system.

51. He proposed the addition at the end of legislative recommendation 1 of the words "without prejudice to the legal traditions of the countries concerned". He also proposed a linguistic change in the French version of the first line.

52. Lastly, it was somewhat surprising to read in paragraph 1 of the notes that the guide expressed a preference for the use of competitive selection procedures rather than negotiations with bidders, in line with the advice of organizations such as the World Bank and the United Nations Industrial Development Organization (UNIDO). He proposed that that wording should be replaced by the wording used in recommendation 1.

53. **Mr. Wallace** (United States of America) said he agreed with the United Kingdom representative that it would not be profitable to deal again with issues already treated in depth in the Model Law on Procurement. However, the Model Law rightly expressed a strong preference for competition, openness and transparency, and in his view the Commission would be failing the international community if it did not come out strongly in favour of open, competitive procedures in privately financed infrastructure projects.

54. Many public administration systems throughout the world were characterized by what, to speak candidly, could only be described as arbitrary and corrupt decisions. And corruption was particular likely in the area of public procurement, especially in privately financed infrastructure projects. The Commission must thus come up with a tight system. To achieve that, it was not necessary to repeat everything already set forth in the Model Law; one should focus on the problems unique to infrastructure projects. Given the extent of those problems, should the Commission fail to do its job properly in that regard he would recommend to his Government that it should not promote the project.

55. His delegation had one concern about the drafting of recommendation 1, the substance of which was excellent. The phrase "subject to the adjustments necessary to take into account ..." suggested that competitive procedures could perhaps be adjusted out of existence. A better formulation might be "tailored to" or "appropriate to".

56. **Mr. Mazilu** (Romania) proposed replacing the words "subject to the adjustments necessary to take into account" by the words "taking into account".

57. **Mr. Choukri Sbaï** (Observer for Morocco) said his delegation had some reservations regarding recommendation 1 and the preference expressed for competitive selection procedures rather than negotiations with bidders. In 1998 Morocco had promulgated a new law which, in addition to providing for transparency in the selection of concessionaires, equality of access for bidders and competitive procedures, also devoted considerable attention to the criteria applicable in negotiations, a procedure to which the guide did not attach sufficient weight. Administrations must be allowed discretion in the selection of a concessionaire.

58. **Mr. Lalliot** (France) said that the Model Law on Procurement might be appropriate for regulating transactions such as the bulk purchasing of pencils, but was rather less appropriate in the case of the construction of a motorway or a power station. As paragraph 2 of the notes indicated, some provisions of the Model Law were relevant to privately financed infrastructure projects, but a number of adaptations were required so as to take into account the particular needs of such projects.

59. He agreed with the United States representative that the underlying purpose of the guide must be to secure transparency and to avoid any risk of corruption or fraud in the selection of concessionaires and the implementation of infrastructure projects. But countries could not be expected to accept that one system of law should be applicable on their territories while a different system was

applicable to their enterprises when they worked abroad. There must be some degree of consistency between the two systems. The United States representative would not be alone in advising his Government not to promote the guide if it departed too radically from the instructions he had received. Some compromise or middle way must be found, enabling the interests and traditions of all interested parties to be accommodated.

60. Lastly, his delegation could support the proposal made by the representative of Romania.

61. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that recommendation 2 illustrated the problem to which he had referred earlier. Comparison of its five sections with paragraphs 39-56 of the notes, which took up almost five pages of text, revealed that much crucial information contained in the notes was not reflected in the recommendations. Pre-selection criteria, for instance, were accorded only the most cursory mention in recommendation 2.

62. The problem was that the notes, unlike the notes to other chapters, themselves constituted a comprehensive set of legislative recommendations, a fact which cast doubt on the value of the brief legislative recommendations to be found at the start of the chapter. He therefore suggested retaining recommendation 1 in the amended form proposed, and amending recommendation 2 to read: "The host country may wish to adopt legislative provisions which cover the following topics: (a) Preselection of bidders (see paras. 39-56) ...", etc. Such an approach, highlighting the issues and providing a reference to the substantive paragraphs in which each was dealt with, would be preferable to a somewhat arbitrary or random selection of details from the notes.

63. **Mr. Al-Zaid** (Observer for Kuwait) said that selection procedures allowing for the requisite transparency were important. The UNCITRAL Model Law on Procurement had much to offer in that regard, provided that the particular needs of privately financed infrastructure projects were taken into account. Competitive procedures constituted an important means of combating corruption.

64. **Ms. Nikanjam** (Islamic Republic of Iran) said that the word "arrangements", in recommendation 2 (d), was not sufficiently strong and should be replaced by the word "measures". Her delegation also supported the amendment proposed by the representative of Romania, as well as the comments of the United States representative regarding corruption.

65. **Mr. Mazilu** (Romania) said that, as the representative of France had pointed out, an effort must be made to come up with a balanced text reflecting all the world's important legal systems and taking into account contemporary trends. Such a text would have more chance of being promoted by States.

66. **Mr. Wallace** (United States of America) said he agreed that the guide should not favour any one legal system. That being said, it was not clear how the Commission should now proceed. In his view, if the text were to begin by referring the reader to the Model Law, it would then be possible to shed a good deal of material from chapter III and to focus on those aspects of the subject that were unique to privately financed infrastructure projects. Countries would be urged to bear those issues in mind in deciding what legislative action was appropriate to their individual circumstances.

67. **Mr. Darcy** (United Kingdom) said that the UNCITRAL Model Law, albeit not perfect, existed and could not be ignored. As they stood, the legislative recommendations covered a wealth of highly contentious issues—arrangements for compensating pre-selected bidders were just one example of a principle to which some countries, including his own, could not subscribe. Perhaps the legislative recommendations should set out simply to highlight the main principles.

68. **Mr. Choukri Sbaï** (Observer for Morocco) endorsed the United States representative's remarks concerning the need to stamp out corruption, a phenomenon that existed in developing and industrialized countries alike, and to which attention was rightly drawn in paragraph 13.

69. **Mr. Chan Wah Teck** (Singapore) said that, like the United Kingdom, Singapore could not subscribe to the principle of compensating pre-selected bidders, set forth in recommendation 2 (d). Being pre-selected and assembling a bid package was part and parcel of commercial risks. Singapore would therefore have problems if the wording "The host country may wish to provide" in the chapeau to recommendation 2 were replaced by a stronger wording.

70. **Mr. Wallace** (United States of America) said that the suggestion of the observer for Sweden that the substance of the recommendations should be placed in the notes raised problems if the discussion was to focus on the legislative recommendations and not on the notes.

71. **Mr. Estrella Faria** (International Trade Law Branch) said that the suggestion of the observer for Sweden that the present legislative recommendations should be reduced to

a kind of checklist of topics would create some inconsistency with the format used in other chapters. Perhaps the Commission should proceed with reviewing the legislative recommendations and see whether they were satisfactory or whether something was missing.

72. On the question of the preference expressed in paragraph 1 of the notes, he drew attention to the following conclusion in paragraph 130 of the Commission's report on the work of its thirty-first session (A/53/17): "However, when expressing a preference for competitive selection procedures, particular care should be taken to avoid the impression that the guide excluded the use of any other procedures." The intention was not to rule out the use of other procedures reflecting the legal tradition of the country concerned.

73. **Mr. Mazilu** (Romania) said that his delegation endorsed the reservations expressed by the United Kingdom and Singaporean representatives concerning compensation of pre-selected bidders.

74. **Mr. Wiwen-Nilsson** (Observer for Sweden) said he wished to make it clear that he regarded the substance of the notes as excellent. His concern was that their excellence should not be diluted by prefacing them with legislative recommendations of a far more general nature. It should be noted, for instance, that the concern raised by the representatives of the United Kingdom, Singapore and Romania was addressed in the notes, but not in the recommendations themselves.

75. He proposed that recommendation 2 should consist of a reference to the Model Law, followed by a line-by-line treatment of the key issues.

The meeting rose at 12.30 p.m.