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Summary record of the 653rd meeting
Held at the Vienna International Centre, Vienna, on Thursday, 20 May 1999, at 9.30 a.m.

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

Contents

V.00-50759 (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 III. Selection of the concessionaire (continued) (A/CN.9/458/Add.4)

Direct negotiations (legislative recommendations 14 and 15 and paras. 95-100) (*continued*)

1. **The Chairman**, summarizing the discussion so far, said that there was a clear understanding that in very exceptional circumstances there was recourse to direct negotiations, rather than procurement procedures, in the context of privately financed infrastructure projects. In view of the fact that no list of circumstances warranting direct negotiations could be exhaustive and of the agreed need for brevity in the legislative guide, he suggested that the examples should be removed from recommendation 14 and retained in paragraph 99 of the notes only, subject to some rewording of the recommendation itself. He further suggested the deletion of the contentious reference to a lack of experienced personnel or of an adequate administrative structure (recommendation 14 (e)). The substance of recommendation 14 (f), on the other hand, should be included in the notes.

2. **Mr. Choukri Sbaï** (Observer for Morocco) said that, like French law, Moroccan law recognized direct negotiations, but as an exception and with guarantees to safeguard transparency and objectivity and against abuse or corruption, as provided for in paragraph 99. The intention was to give guidance to Governments in producing new legislation and developing legislation in addition to measures already in use in various countries. Among the important circumstances warranting direct negotiations that needed to be mentioned was where national security and the need to safeguard secrecy of information were involved. Other important circumstances were cases where there was only one source capable of providing the required service, where it had not been possible for projects to be completed, where there was only one bidder and where urgent work was required, such as the maintenance of highways, rivers or coastlines. Not all the existing provisions in various national legal systems need be covered in detail in the guide.

3. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said he was in favour of keeping recommendation 14 (e), since the lack of experienced personnel was a real problem for some Governments, and hiring appropriate personnel was not always easy, particularly for a developing country. Although he agreed that such an exception left room for abuse, the same could be said of any of the exceptional situations listed. It was up to the Government to decide what measures to take to prevent and minimize abuse and to recognize the need for and benefits of competitive procedures.

4. **Mr. Wallace** (United States of America) suggested that those concerns might be met by explaining the problem in the narrative part of the notes in paragraph 99, but removing that contingency from the exceptions listed under the recommendation.

5. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said that there should be very strong and clear reasons for deleting a listed exception, since that might be seen as narrowing the scope for government authorities to engage in direct negotiations in certain circumstances. A compromise might be to retain recommendation 14 (e) while elaborating on the explanations in the notes so as to restrict the possibility of abuse.

6. **The Chairman** reiterated his suggestion to remove all the examples listed in the recommendation and to retain only the chapeau. The chapeau could be expanded to include a reference to the need to take all necessary measures to prevent abuse.

7. **Mr. Lalliot** (France) said that moving the list to the notes would not make it less exhaustive. Moreover, it required a very substantial effort on the part of France to accept the Chairman's suggestion, since the view that direct negotiations should be an exception to a general rule calling for competitive procedures was contrary to French legal tradition, and the situation was worsened if subparagraphs (a) to (f) were deleted. Furthermore, the word "only" in the chapeau of recommendation 14 was superfluous; it would be sufficient to say "direct negotiations may be resorted to in exceptional circumstances" with an exhaustive list of circumstances given. Recommendation 14 should be seen in conjunction with recommendation 16, which strengthened all the provisions in the guide relating to transparency, including transparency in direct negotiations. If the examples listed under recommendation 14 were deleted, recommendation 16 would appear disproportionately detailed. In a spirit of compromise, however, he would agree to the proposal to remove subparagraphs (a) to (f) from the recommendation, expanding upon them in the notes. He still had serious

misgivings, however, about the reference to a lack of experienced personnel.

8. **Mr. Lortie** (Observer for Canada) said he shared the views of the representative of France about the compromise suggested by the Chairman. There were always exceptions to a rule and, since the Commission's primary objective was to harmonize the law, examples should be offered to avert the risk of seeing a proliferation of exceptions that might depart from that objective. He agreed with the substance of the subparagraphs under recommendation 14, with the possible exception of subparagraph (e).

9. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said that he could accept the Chairman's compromise solution, and also pointed out that the chapeau of the recommendation indicated that direct negotiations might be resorted to only in exceptional circumstances which "may include ...", making it clear that the ensuing list was not exhaustive.

10. **Mr. Choukri Sbaï** (Observer for Morocco) agreed with the compromise suggested by the Chairman, and with the point made that the list in question was not exhaustive. It must be borne in mind that the Commission was seeking to help Governments improve their legislation or adopt new legislation, and was not drafting a model law, a convention or an agreement. It was generally agreed that transparency, objectivity and combating corruption were of the utmost importance. There were specific provisions in Moroccan law for safeguarding transparency and objectivity in direct negotiations. The approval of a higher authority must be obtained and the reasons for resorting to direct negotiations must be stated in a document.

11. **Mr. Zanker** (Australia) said that the United States representative had made a persuasive case for reducing recommendation 14, if not deleting it altogether, the point being that the paramount principle that should govern negotiations for the award of privately financed infrastructure projects should be the application of competitive procedures, together with a need for a high degree of transparency. To open up a range of exceptions seriously limited the application of that principle. Legislators in every country could, and did, introduce exceptions to a set procedure when difficulties arose. The fact that recommendation 14 was seen as overriding French juridical tradition was no justification for dispensing with particular provisions or retaining them. After all, it was not unusual for concepts to be introduced in international negotiations that were at variance with the juridical tradition of one country or another and, in the case in question, the Commission was merely giving guidance. In the interests of finalizing consideration of the document, he could accept the wording of the text as now proposed.

12. **The Chairman** said that Member States had different legislative cultures, and that the legislative guide was in no way intended to compel any of them to change their laws or to exclude any special provisions they might have. However, direct negotiations, where they were authorized under the law, were usually the exception.

13. **Mr. Lalliot** (France) said, in response to the representative of Australia, that it was one thing to accept waivers to a general principle of law in the course of a contractual negotiation, but an altogether different matter to accept something contradicting a basic principle in a guide of the kind now being discussed, and he was entitled to express his reluctance to do so. He stressed that it was on an altogether exceptional basis that he was agreeing to the wording of the recommendation as now proposed, since it was quite alien even to the underlying philosophy of French law.

14. **Mr. Estrella Faria** (International Trade Law Branch) said that the Commission was endeavouring to develop a compromise that would not necessarily mirror any country's particular legal system but might be acceptable at the international level. As the proposal now stood, the examples of circumstances that might warrant direct negotiations would be removed from recommendation 14 to the notes, which would describe what the host country might include in its own law. It was logical that, if a country did specify such circumstances, the list would in that particular case be exhaustive. With regard to recommendation 14 (e), the reference to a lack of experienced personnel would be difficult to incorporate into a national law. It could, however, be included in the notes as an explanation of considerations that States must bear in mind when introducing a list of exceptions into their domestic legal system.

15. When the Commission discussed recommendation 16, it might wish to consider combining it with recommendation 14 in some way.

16. **Mr. Mazilu** (Romania) and **Mr. Choukri Sbaï** (Observer for Morocco) supported the latter suggestion.

Measures to enhance transparency in direct negotiations (legislative recommendations 16 and paras. 101-107)

17. **Mr. Wallace** (United States of America) suggested that a new subparagraph should be added to the recommendation to provide for publication of the award. A further provision should be included requiring a written justification wherever there was a divergence from competitive principles, bearing in mind that, under the Model Law, justification was required for any unusual or exceptional procedure. He was not challenging the thrust of paragraph 101, which was descriptive, but the statement that "in some countries, procurement laws allow contracting authorities virtually unrestricted freedom to conduct negotiations as they see fit" might be misunderstood as an endorsement, and should be qualified.

18. **Ms. Gioia** (Italy) said that recommendation 16 should be redrafted, since there was an inconsistency between the title of the recommendation and the content, which extended to matters beyond measures to enhance transparency, such as measures to maintain confidentiality. The notes in paragraph 107, too, were not altogether consistent with the content of the recommendation.

19. **Mr. Darcy** (United Kingdom) said that the term "direct negotiations" rather than "negotiations" should be used consistently throughout the recommendation and accompanying notes. He also suggested adding another subparagraph to the recommendation requiring that the project agreement, perhaps with the exception of commercially confidential information, should be open to public inspection.

20. **Mr. Mazini** (Observer for Morocco) said that a justification, or statement of the reasons, for rejecting a proposal should be required. Secondly, he wished to express doubts regarding the correctness of the term "*concessionnaire*" in the French version, in the context of competitive procurement proceedings.

21. **Mr. Lortie** (Observer for Canada) said that, to meet the concerns of the representative of Italy, the title of recommendation 16 might perhaps be amended to cover the protection of confidentiality.

22. **Mr. Lalliot** (France) supported the United States suggestion to add a subparagraph requiring publication of the award, in the interests of transparency. The statement in paragraph 101 to which the United States representative had taken exception was merely a description of practice in certain countries and should not be construed as encouraging direct negotiations. The concern of the representative of Italy might to some extent be met by deleting the new title before recommendation 16. He questioned the need for recommendation 16 (g), since what it stated was self-evident. Recommendation 16 might perhaps be dealt with in the same way as recommendation 14, keeping only a general statement under the recommendation, along the lines of "The contracting authority should take all necessary measures to guarantee transparency in direct negotiations", and moving all the examples to the notes.

23. **Mr. Wiwen-Nilsson** (Observer for Sweden) expressed a concern that the emphasis on confidentiality in recommendation 16 (d), and again in recommendation 18 (d) and its accompanying commentary, might imply that the need to protect confidentiality was confined only to those situations, whereas it was generally applicable to bidding procedures. It might perhaps be made clear in the notes that it was a more general issue. The point made by the representative of the United Kingdom that, once the competitive bidding was over, the final agreement should be publicly accessible, was well taken.

24. **Mr. Mazilu** (Romania) likewise endorsed the United Kingdom proposal, for reasons of transparency. He also agreed that the title of the recommendation must be brought into line with its content.

25. **Mr. Zanker** (Australia) suggested that the title might be worded along the lines of "Procedures applicable to direct negotiations". He agreed with the representative of France that subparagraph (g) added nothing of substance. It could be replaced by the United States proposal for a new subparagraph (h).

26. **Mr. Wallace** (United States of America) said he wished to make clear that his proposal to include a reference to justification referred to justifying recourse to the less competitive method of direct negotiations, subject, of course, to the protection of confidentiality of proprietary information. The idea behind his proposal might be more appropriately expressed under recommendation 14 if recommendations 14, 15 and 16 were to be redrafted.

27. **Mr. Estrella Faria** (International Trade Law Branch) said that the point of recommendation 16 (g) might not be clear from the French version. In the English version, the emphasis was not on the selection of the proposal that best met the needs of the contracting authority, but on the need for the decision to be based on the evaluation criteria stated in advance. Possibly the most economical solution to the problem of the title of the recommendation was to delete the title, placing

recommendations 14-16 under the general title "Direct negotiations".

The meeting was suspended at 10.45 a.m. and resumed at 11.20 a.m.

28. **The Chairman** suggested that, since it was agreed that the title of recommendation 16 was inappropriate, recommendations 14, 15 and 16 should be included under a single title, the relevant notes consisting of paragraphs 95-107. The point made by the observer for Sweden regarding confidentiality could be taken care of in the notes. The Secretariat would be asked to redraft subparagraph (g) of recommendation 16.

Unsolicited proposals (legislative recommendations 17-20 and paras. 108-128)

29. **Mr. Wallace** (United States of America) endorsed the approach adopted by the Secretariat to the subject. It would be preferable to specify in recommendation 17 that unsolicited proposals should be dealt with according to a procedure explicitly established in legislation. The legislation would establish the process for taking the decision between the direct negotiations ("sole-source") approach and normal competitive procedures. In recommendation 20, it would again be useful to indicate that a notice of award should be published.

30. **Mr. Darcy** (United Kingdom) commended the Secretariat's handling of a particularly difficult issue. Recommendation 20 (b) should specify that the summary of the essential terms of the proposal to be made available to other interested parties should be limited to the outputs or public service elements of the project. That would be an additional measure to protect the confidentiality of the original proponent.

31. **Mr. Lalliot** (France) noted that recommendation 19 (a) referred to "recommendations 3 to 22 above". Perhaps that should read: "recommendations 3 to 13 above".

32. **Mr. Estrella Faria** (International Trade Law Branch), referring to the comments of the United States representative, explained that the Secretariat's understanding was that, if a contracting authority was authorized by law to entertain unsolicited proposals under exceptional circumstances, as provided for in recommendation 17, the procedure for considering such proposals would be based on those provided for in recommendations 18-20; the recommendations had been drafted in such a way as to enable a country wishing to incorporate any of those principles into its legislation to do so simply by adjusting the wording slightly. The United States representative's concern might perhaps be met by amending the first part of the recommendation to read: "The host country may wish to establish a procedure whereby, under exceptional circumstances, ...".

33. **Mr. Wallace** (United States of America) endorsed that suggestion and, drawing attention to paragraph 119, which stated that it was advisable for the contracting authority to establish transparent procedures, suggested that that paragraph should state that it would be advisable for legislation to provide for a procedure for dealing with unsolicited proposals.

34. **Mr. Zanker** (Australia) suggested that, in order to eliminate some of the uncertainties surrounding a decision as to whether a particular unsolicited proposal should be considered, it might be specified that any unsolicited proposals should be subject to the same sorts of procedures as applied to proposals submitted in response to an invitation to tender.

35. **Mr. Estrella Faria** (International Trade Law Branch) recalled that an earlier draft of the chapter had contained a somewhat more conservative approach to unsolicited proposals; however, as could be seen from paragraph 171 of the report of the Commission on the work of its thirty-first session (A/53/17), the Secretariat had been asked to formulate concrete recommendations on how to deal with such proposals. The understanding had been that a special procedure should be elaborated.

36. **Mr. Choukri Sbaï** (Observer for Morocco) said that it was important to provide for unsolicited proposals, as long as such proposals did not relate to a project for which the contracting authority had already embarked upon a selection procedure. However, to ensure the necessary transparency, a provision should be included to the effect that the contracting authority must publish a notice of an award made on the basis of an unsolicited proposal.

37. **Mr. Wallace** (United States of America) observed that paragraph 125 (b) envisaged a "margin of preference" as a possible incentive to attract unsolicited proposals. The use of a margin of preference originated in the context of procurement of goods, construction and services. Such a margin of preference worked well when applied to the price elements of a proposal, but would be difficult to apply in privately financed infrastructure projects, where non-price evaluation criteria were of great importance. There might be a system of merit points or the like, but that might not be easily applicable in practice.

38. **Mr. Estrella Faria** (International Trade Law Branch) said that it had been difficult to elicit information from the very few countries that did have a special procedure for handling unsolicited proposals. The system described in paragraph 125 (b) was that provided for in the legislation of one of those countries. Points were assigned to various evaluation criteria, and the margin of preference would be a percentage of the total rating given to one particular proposal. It might indeed be dangerous to apply a percentage margin, for instance, to the unit price for the output of the project. The description was perhaps somewhat compressed in paragraph 125 (b) for reasons of brevity, but the paragraph did point out the difficulties of the system.

39. **Mr. Mazini** (Observer for Morocco) said that the important point to be borne in mind was transparency. Unsolicited proposals were inevitable, but all bidders, whether or not they were the first to submit a proposal and whether or not the proposals were solicited, should be treated on the same footing. To confer some sort of advantage on the first bidder would be contrary to the general rule of transparency.

40. **The Chairman** agreed that unsolicited proposals were inevitable, and the purpose of the guide was to provide, in cases where the Government was willing to authorize unsolicited proposals, for maximum transparency in the procedures for handling them.

41. **Mr. Al-Nasser** (Observer for Saudi Arabia) said that in many countries, including his own, some infrastructure projects were privately financed but there was no provision for unsolicited proposals. Although he did not object to the inclusion of such recommendations in the legislative guide, they would affect only a very few countries and were unlikely to be widely followed.

42. **Mr. Estrella Faria** (International Trade Law Branch) said that there were a number of countries which had no legislation either on build-operate-transfer (BOT) arrangements in general or on selection procedures for private-sector bidders, and it had been considered useful to suggest possible procedures for selection, bearing in mind that some of those countries might wish to reserve the possibility of awarding that kind of project within the framework of unsolicited proposals. The purpose of the recommended procedures was to ensure a minimum of transparency and objectivity in the awarding of projects following unsolicited proposals.

43. **Mr. Choukri Sbaï** (Observer for Morocco) reiterated the importance he attached to the recommendations on unsolicited proposals, even for countries like his own which had no legislation on the subject. Referring to unsolicited proposals in the guide amounted to encouraging the private sector, which was a matter of great importance for third world countries in particular. After all, the guide was not legally binding and each country could decide whether or not it wished to legislate on the matter.

44. **The Chairman**, summarizing the discussion, said that the various points raised would be dealt with in the notes to the recommendations and that, bearing in mind the decision taken at the thirty-first session, the recommendations would remain as they stood, with the amendment proposed by the United States representative to recommendation 17.

45. **Ms. Nikanjam** (Islamic Republic of Iran) suggested changing the order of recommendations 19 and 20 so that the matter of proposals involving proprietary concepts or technology would come before those which did not involve such concepts or technology.

46. **Mr. Estrella Faria** (International Trade Law Branch) explained that the reason for the order proposed was that, if it was determined that the unsolicited proposal did not involve proprietary concepts or technology, the guide recommended that the special procedure should not be pursued and that the normal selection procedures should be followed; only if proprietary concepts were involved would the special procedure be pursued.

Review procedures and record of selection proceedings (legislative recommendations 21 and 22 and paras. 129-141)

47. **Mr. Darcy** (United Kingdom) thought that, in the title and text of recommendation 22, "selection proceedings" should read "selection and award proceedings".

48. **Mr. Wallace** (United States of America) said he assumed that the Secretariat would be coordinating the content of recommendation 21 and the relevant notes with that of chapter VIII on dispute settlement. The same point applied to other chapters. He noted that recommendation 22 began with the words "The host country may wish to provide ...", whereas the recommendation in the accompanying note in paragraph 134 was stronger, it being stated that "The contracting authority should be required ..."; the stronger formulation was preferable.

49. **Mr. Lalliot** (France) said, by way of preliminary comment on a matter that would recur in ensuing chapters, that certain legal systems, including the French and European systems, provided not only for different forms of recourse but also for a "pre-contract" recourse system, which took into account the fact that review procedures were sometimes very lengthy and made it possible to stop the procedure before the contract was signed. It thus safeguarded the rights of bidders and helped avoid a situation in which the only reparation available was monetary compensation. That point could perhaps be mentioned in the notes.

50. He proposed some linguistic changes in the French version.

Chapter IV. The project agreement (A/CN.9/458/Add.5)

51. **Mr. Estrella Faria** (International Trade Law Branch) said that the chapter essentially reflected discussions at the Commission's thirty-first session, with the substantive addition of the material on financial arrangements contained in recommendations 2 and 3 and paragraphs 10-21, and a somewhat expanded section on security interests to reflect new types of security that had been established in recent legislation around the world. He recalled that some representatives had expressed the view at the current session that the section on financial arrangements should be moved to a separate chapter.

52. **Mr. Wallace** (United States of America) said, by way of general comment, that the text of the draft chapter was a commendable step forward from earlier drafts. That being said, and bearing in mind that the intention was to provide guidance to legislators, the recommendations should refer in the chapeau to the need to adopt relevant legislation. The relationship between the draft chapter and other portions of the guide might also need to be reviewed, since a number of issues discussed in chapters V, VI, VII and VIII related to matters of direct concern to project agreements. Some cross-referencing would be in order.

53. **Mr. Darcy** (United Kingdom) commended the chapter in its entirety.

54. **Mr. Lalliot** (France) said that, on the whole, the chapter was presented in a balanced and articulate manner, reflecting considerable research into different legal traditions. That was particularly true of the notes. In terms of structure, France was among the countries that would have preferred the section on financial arrangements to be moved to a separate chapter, but that did not appear to be the majority position and he would therefore not press the point. He had some misgivings about the recommendations, and noted that the French legal system did not allow for any form of security applicable to public goods, or for any form of assignment or transfer from the original concessionaire to a subsequent concessionaire, or for the transferability of the shares of the project company if such transfer resulted *de jure* and de facto in the transfer of the operation of the project infrastructure.

55. **The Chairman** said that no final decision had yet been taken about the position of the section on financial arrangements in the overall structure. The substance of the draft chapters should perhaps first be reviewed before any such final decision was made.

56. **Mr. Mazini** (Observer for Morocco) associated himself with the comments of the representative of France, particularly with regard to the assignment of a concession, for which there was no provision in Moroccan law.

57. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that, although in most legal systems, including that of his own country, concessions were not freely transferable, the purpose of the legislative guide was to facilitate the financing and implementation of projects and that problems with the assignment of concessions or restrictions on that freedom could be an impediment to project implementation; recommendations on the subject were therefore warranted.

58. **Mr. Lalliot** (France) said that there were two different approaches to privately financed infrastructure projects. One was to see them from the strict point of view of financing and the need to attract private capital. The other, more complex, approach, proceeded from the conception of such projects as a public service, which brought into play the need to guarantee a certain quality of service, for which a particular concessionaire had been selected. Any recommendation on assignment would therefore need to be very clear about the conditions for such assignment.

The meeting rose at 12.30 p.m.