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United Nations Commission on International Trade Law
Thirty-second session

Summary record of the 655th meeting
Held at the Vienna International Centre, Vienna, on Friday, 21 May 1999, at 9.30 a.m.

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

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V.00-50969 (E)

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

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

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

Transferability of shares of the project company (legislative recommendation 10 and paras. 56-63) (*continued*)

1. **Mr. Wallace** (United States of America), recalling the question raised by the representative of France at the previous meeting about the need for paragraph 61, requested the Secretariat to review the wording of that paragraph, which was indeed somewhat complicated.

Duration of the project agreement (legislative recommendation 11 and paras. 64-67)

2. **Mr. Wallace** (United States of America) said that the notes in paragraphs 64 to 67 did not adequately reflect important issues relating to project duration such as policy matters and re-bidding, which were dealt with more amply in chapter VI, "End of project term, extension and termination". He was not suggesting a reorganization of the chapters, but felt it important, for the benefit of readers, especially legislators, to add cross-references, preferably in the recommendation itself.

3. He also questioned the assumption that all concessions should have a limited duration. Build-operate-transfer (BOT) contracts were in their infancy, and there was no knowing whether, in future, policy makers would automatically assume that such concessions should be of such limited duration.

4. **The Chairman** said that chapter VI had been drafted after chapter IV, and that it would be preferable to defer a final decision on the matter until there had been a substantive discussion on subsequent chapters.

5. **Ms. Nikanjam** (Islamic Republic of Iran) drew attention to the recommendation in paragraph 67 that the contracting authority might be authorized to agree to "longer" concession periods. The word "longer" was unclear.

6. **Mr. Al-Zaid** (Observer for Kuwait) said that a possibility would be to fix an initial duration for the project agreement and provide that it could be extended for a similar period.

7. **Mr. Zanker** (Australia), quoting paragraph 200 of the Commission's report on its thirty-first session (A/53/17), said that the recommendation as now drafted appeared to reflect the Commission's considerations at that session. The second sentence of paragraph 67 to which the representative of the Islamic Republic of Iran had referred should be read in conjunction with the first sentence. However, like the representative of the United States of America, he was not convinced of the need to recommend that there should be legislation on time limits. The matter could be left to be dealt with in the contract between the contracting authority and the concessionaire.

8. **Mr. Choukri Sbaï** (Observer for Morocco) said that the text was balanced as it stood, since paragraph 64 made it clear that it was open to any country to stipulate the duration of a concession in the project agreement, in the light of project needs, and that some countries had laws establishing time limits whereas others did not.

9. **Mr. Wiwen-Nilsson** (Observer for Sweden) thought that the appropriate place for the recommendation and accompanying notes on duration of the project agreement was in chapter VI, whose title could be amended to read: "Duration of project term, extension and termination".

10. **The Chairman** said it was his understanding that that had been the case in an earlier version of the draft guide but that the Commission had requested the removal of the section on duration. The matter would be further discussed when the Commission considered chapter VI.

11. **Mr. Lalliot** (France) said that, although he had no strong feelings about the appropriate place for the recommendation, it was an important provision that should feature somewhere in the legislative guide, and if it was considered an essential contractual provision it could logically be included in chapter IV. In the legislation familiar to him, the principle of providing for a reasonable duration was laid down by law and the application of that principle, namely the specific duration, was stipulated in the contract. He would be very reluctant to recommend or even mention the possibility of perpetual concessions, which had existed in the nineteenth century and had had prejudicial economic consequences by allowing for monopoly-type situations.

12. **Mr. Wen Xian-Tao** (China), stressing the importance of the recommendation on duration, said that in China, where the land belonged to the State, the use of the land was governed by a contract between the concessionaire and the State in which the right to use the

land, and notably the duration of the concession, had to be precisely stipulated.

13. **Mr. Estrella Faria** (International Trade Law Branch) said that the issue of duration was dealt with in chapter IV and the issue of extensions in chapter VI. The intention in chapter IV was to say that it might not be necessary to provide for statutory limitations of duration, although it was recognized that they did exist in some countries and that there might be policy reasons for that. In paragraph 67, the second sentence did not relate to the possibility of extension after the end of the project period, but to the possibility for the contracting authority, when awarding the project or drafting the request for proposals, to be allowed flexibility in providing, on a case-by-case basis, for a duration longer than the normal statutory maximum, if a statutory limitation existed. The French translation of that sentence appeared to be clearer than the English original, and the Secretariat would try to improve the wording of the latter.

14. **Mr. Choukri Sbaï** (Observer for Morocco) suggested that the final sentence of paragraph 65 should be transposed to the end of paragraph 67.

15. **Mr. Wallace** (United States of America) said that he would like to revert to a general point that he had raised concerning chapter IV. Section B (paragraphs 9 to 67) of the notes on the legislative recommendations bore the heading "Core terms of the project agreement", and then stated in paragraph 9 what the core provisions of project agreements appeared to be. Which provisions were essential and which were peripheral was a matter of judgement. There were a number of important contractual provisions that were dealt with in other chapters, notably chapter V, "Infrastructure development and operation", and chapter VI, "End of project term, extension and termination", but also chapter VII, "Governing law", and chapter VIII, "Settlement of disputes". He therefore suggested that, without changing the structure of the legislative guide, there should be either a separate recommendation or an introductory paragraph drawing attention to those other provisions which were important parts of the project agreement.

16. **Mr. Lalliot** (France) agreed with the representative of the United States. Given the diversity of legal systems, it was difficult to draw the line between what was fundamentally important and what was not. There should at least be some cautionary wording, in a paragraph or a note, to draw attention to important provisions contained elsewhere in the legislative guide. It was an issue to be borne in mind when discussing subsequent chapters.

17. **The Chairman** agreed that the point should be borne in mind.

Proposal for an additional introductory paragraph to the legislative guide

18. **The Chairman** drew attention to a proposal that was being submitted by the observer delegation of the Republic of Korea, following informal contacts with other delegations, for an additional explanatory paragraph to be included in the chapter entitled "Introduction and background information on privately financed infrastructure projects" (A/CN.9/458/Add.1).

19. **Mr. Estrella Faria** (International Trade Law Branch) read out the proposal, explaining that it had not been translated and circulated in the official languages.

20. After a brief procedural discussion in which **Mr. Mazilu** (Romania), **Mr. Choukri Sbaï** (Observer for Morocco), **Mr. Lalliot** (France) and **Mr. Herrmann** (Secretary of the Commission) took part, **the Chairman** suggested that the proposal should be circulated in the form of a conference room paper in all the United Nations languages.

21. *It was so decided.*

Chapter V. Infrastructure development and operation (A/CN.9/458/Add.6)

22. **Mr. Wallace** (United States of America) said that he would like to make some general, preliminary points. The title of the chapter might be amended to read: "Infrastructure development, construction and operation; remedies". Another point was that it would be useful to specify more consistently in the notes that the host country might wish to make legislative provision for the matter discussed.

23. Turning to legislative recommendation 1 (a), he said that the expression "enter into contracts" apparently referred to what was elsewhere called "subcontracting". Should one perhaps speak of "subcontracts"?

24. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that there seemed to be some inconsistency in the wording of the various recommendations, with some of the subparagraphs referring to what should be included in the project agreement and others not. He wondered whether that was intentional.

25. In recommendation 1 (a), the word "public" should perhaps be deleted before "works". Recommendation 1 (b) should be expanded to cover other contracts of importance to the contracting authority.

Subcontracting (legislative recommendation 1 and paras. 2-4)

26. **Mr. Lalliot** (France) questioned the accuracy of the statement in the penultimate sentence of paragraph 3 of the notes that there might no longer be a compelling reason of public interest for prescribing to the concessionaire the procedure to be followed for the award of contracts. A provision prescribing procedures in that regard had in fact been adopted by the States members of the European Union in 1993. He therefore proposed the deletion of that sentence.

27. Secondly, here would be an appropriate place to deal with the question of subconcessions, referred to at an earlier meeting.

28. **Ms. Nikanjam** (Islamic Republic of Iran) said she had difficulty with the last sentence of paragraph 3, according to which statutory rules on government operation of infrastructure facilities could discourage potential investors.

29. **Mr. Estrella Faria** (International Trade Law Branch) said he took the point made by the representative of France that some nuance needed to be added to the text of paragraph 3 to take account of European Union practice. The last sentence of paragraph 3 had been included at the urging of experts, to reflect business reality.

30. Regarding "contracting" and "subcontracting", the reference was really to contracting—i.e., contracts entered into pursuant to the project agreement. The drafting would be looked at.

31. As to the wording of the recommendations and the reference made in certain cases to the project agreement, he said that the Secretariat had preferred to use the formulation "provide that the project agreement should include" except where that wording did not seem appropriate, as in recommendation 1 (a).

32. **Mr. Mazini** (Observer for Morocco) said that in Moroccan legislation the overriding principle was that the concession, which covered all stages from construction to operation, was personal to the concessionaire, even if the latter had to hire subcontractors for part of the work, and that it was subject to a right of review by the public authority, since it remained a public service. He associated himself with the comment made by the representative of France about paragraph 3 of the notes; special procedures should be prescribed for any subcontracting arrangement, and there must be a right of review.

33. **Mr. Wallace** (United States of America) suggested changing the title to something like "Construction and other contracts". The current discussion demonstrated the delicate balance that had to be struck between the recommendations and the notes and how important it was for the former to capture the content of the latter, even though he appreciated the difficulties that entailed.

34. He suggested that the word "faculty" in the third sentence of paragraph 2 might be replaced by "ability" or "authority". With reference to the last sentence of paragraph 3, he said that the World Bank's policy in the matter was that there had to be either competition for the selection of the concessionaire or competition with respect to contractors. It was a possibly suspect policy, because the civil works contractor was sometimes the main shareholder in the project company.

35. He suggested that the words "excessive payments to subcontractors" in the last sentence of paragraph 4 should be preceded by the words "provision for".

36. **Mr. Wiwen-Nilsson** (Sweden) thought that the concerns expressed about the need for the contracting authority to be involved in the subcontracting might be met by expanding recommendation 1 (b) so as to cover all contracts of importance to the host country entered into by the concessionaire.

37. It was important to maintain the reservation in the last sentence of paragraph 3 of the notes. Most of the projects concerned were in fact proposed by consortia, with contractors and equipment suppliers as the major players. He could endorse the suggestion to delete the previous sentence. It might be appropriate to refer to the World Bank policy referred to by the United States representative.

38. **Mr. Mazini** (Observer for Morocco) suggested that the section should be entitled "Conditions for subcontracting". The wording of the recommendation did not conflict with practice in Morocco, but the notes appeared to favour allowing the concessionaire full freedom, which might result in a subcontract that would be inconsistent with the concessionaire's obligations under the project agreement.

39. **Mr. Lalliot** (France) said that it was often necessary for the main concessionaire to hire subcontractors, but

what must be avoided was a form of "sub-delegation" of public services, whereby the responsibilities of the initial concessionaire were devolved on a third party without the initial contracting authority keeping control of the whole contractual chain. Recommendation 1 (a) implied very weak control, requiring as it did that the contracting authority should merely be advised of the names and qualifications of the subcontractors. The problem could be solved by aligning the procedure provided for in recommendation 1 (a) with the provisions of recommendation 1 (b), along the lines suggested by the observer for Sweden.

40. He was not entirely convinced about World Bank practice in the matter, but had no strong objection to including a reference to it.

41. **Mr. Phua Wee Chuan** (Singapore) observed that, in the notes in paragraphs 2 to 4, the emphasis appeared to be on construction, whereas the recommendation seemed to advocate subcontracting in general. He wondered whether that was the intention.

The meeting was suspended at 11 a.m. and resumed at 11.30 a.m.

42. **The Chairman** asked whether there was agreement that subparagraphs (a) and (b) of recommendation 1 should be merged.

43. **Mr. Estrella Faria** (International Trade Law Branch) suggested that subparagraph (a) should be deleted and subparagraph (b) expanded to cover all major contracts entered into by the concessionaire, not just those concluded with shareholders or affiliated persons.

44. **Mr. Choukri Sbaï** (Observer for Morocco), referring to paragraph 4, said it was his delegation's view that subcontracting must be an exception and that there must be a clear definition of the concessionaire's responsibilities. It would be preferable, in the last two sentences, to say "it would be desirable for ... to ..." rather than "... should". Furthermore, the conditions for withholding approval should be expanded to reflect the idea that there might be reasons for withholding approval other than the inclusion in subcontracts of provisions contrary to the public interest or to statutory rules, examples being a lack of qualifications, poor quality of services or technical reasons.

Construction projects (legislative recommendation 2 and paras. 5-17)

45. **Mr. Wallace** (United States of America) reiterated his earlier comment that, if the recommended provisions were to be included in legislation, that should be specified. In the last sentence of paragraph 5 of the notes, the reference to "final authorization" seemed unclear if the Government was the owner, as was implied by the term "accept". Regarding paragraph 9, the contracting authority's potential liability for defects arising from the inadequacy of the approved design or specification might extend beyond the situations referred to in the second sentence of that paragraph, which should be expanded accordingly. In the final sentence of paragraph 13, it was not quite clear when the lump-sum payments referred to—which he presumed meant payments from the Government—would be agreed to; would they be provided for in the contract documents at the time of the request for proposals, or at a later stage? In the first sentence of paragraph 15, did "final inspection and approval" mean "acceptance"?

46. In the third sentence of paragraph 16, the words "In some countries, it was found useful" should read "In some countries, it has been found useful". In the last sentence of that paragraph, he wondered about the implication of the word "immediate" in the clause "Where regulatory or liability issues are not an immediate concern for the contracting authority".

47. Regarding paragraph 17, in a BOT project the operation was not handed over to the contracting authority upon completion of the construction work. Perhaps the word "operation" in the first sentence meant "ownership".

48. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that, in recommendation 2 (b) and the corresponding note in paragraph 12, it was inaccurate to say that the contracting authority might order variations in respect of "construction terms"; "construction specifications" would be more appropriate. The last two sentences of paragraph 13 were unclear. In the last sentence, the question was not one of refinancing changes but of financing them. In paragraph 15, there was some confusion between the roles of the contracting authority and of regulatory bodies; the text implied that the contracting authority should assume a regulatory function. The same comment applied to the last sentence of paragraph 16, which should be deleted.

49. The first sentence of paragraph 17 suggested that the requirement to ensure the long-term durability of the facility applied only when the operation was handed over

to the contracting authority upon completion of the construction work. The sentence should be redrafted to make clear that it was in any case important to lay down in the project agreement the requirements for ensuring long-term durability beyond the concession period.

50. The need for limiting any suspension of the project to the time strictly necessary did not arise only in connection with the exercise by the contracting authority of its monitoring rights. He therefore suggested that the second sentence of recommendation 2 (c) should become a separate recommendation.

51. He was not convinced of the need for recommendation 2 (d) but, if it was retained, it should express the idea that acceptance of the infrastructure facility should not be denied unless the works were found to be materially incomplete or defective.

52. **Mr. Lalliot** (France) said, with reference to recommendation 2 (b), that, under French law, the contracting authority enjoyed a unilateral power to order variations, irrespective of contractual provisions. The wording of recommendation 2 (b) should be qualified to make it clear that such power was not necessarily only a contractual provision. It must also be understood that the contracting authority's inherent power of variation related to the various stages of both construction and operation. The last part of recommendation 2 (b) needed to be spelt out more clearly. The word "appurtenances" in recommendation 2 (d) had mistakenly been translated by "*dépendances*" in the French version. That and other infelicitous renderings in the French version of the section under consideration needed reviewing. He could support a reference to "material" defects as far as construction was concerned, but at some point the same idea should be extended to non-material matters relating to the operation of the infrastructure.

53. In the last sentence of paragraph 6 of the notes, the words "in privately financed infrastructure projects" seemed unnecessary and confusing, at least in the French version. The statement in the first sentence of paragraph 7 was rather too sweeping in the French version. The first sentence of paragraph 12 should be worded in broader terms, to reflect the general idea that the concessionaire would require assurances that it would not incur additional cost or liability as a result of variations required by the contracting authority, whether or not they entailed delays; the concessionaire was basically bound by the contractual obligations undertaken and should be fairly compensated for any additional requirements.

54. The reference to "extraordinary circumstances" in the second sentence of paragraph 14 was rather strong. Under French law, the power of suspension must always be motivated by the public interest but could be exercised under circumstances that were not extraordinary or exceptional within the meaning of French law. The final sentence of that paragraph seemed to imply that there might be situations of suspension for which the concessionaire might not be compensated. Compensation must be given for any form of suspension.

55. He agreed that the last sentence of paragraph 16 was unclear and should be deleted.

56. **Mr. Mazilu** (Romania) said he shared the concerns of the representatives of Sweden and France about the second sentence of recommendation 2 (d). Those concerns might perhaps be met by elaborating on the grounds given for denying acceptance. He also agreed that the last sentence of paragraph 13 needed redrafting. He supported the proposal of the United States representative to replace "it was found useful" by "it has been found useful" in the second sentence of paragraph 16.

57. **Mr. Estrella Faria** (International Trade Law Branch) said that the last sentence of paragraph 13 was intended as a warning against extensive variations that would require the concessionaire to go beyond any existing stand-by and loan facilities that it might have to cover additional costs, entailing a major revision of all refinancing arrangements. The text could be further refined for greater clarity.

58. **Mr. Wallace** (United States of America) said that his question was whether such cost increases were to have been anticipated in the original contractual document or whether they would be dealt with only when the problem arose.

59. **Mr. Choukri Sbaï** (Observer for Morocco) thought that legislative recommendation 2 (b) was too detailed and that it might be preferable simply to state that the project agreement should provide for the right of the contracting authority to order variations in the construction specifications and set forth the compensation to which the concessionaire should be entitled. Details could be covered in a supplementary agreement.

60. **Mr. Al-Nasser** (Observer for Saudi Arabia) said he agreed in substance with paragraph 12. However, the second sentence should be reworded to the effect that the project agreement should specify the compensation due to the concessionaire, as appropriate, and also the time-frame

within which the concessionaire had to implement variations ordered by the contracting authority.

61. **Mr. Zanker** (Australia) said that it was fundamental, in the chapter under consideration as indeed in others, to be clear about which recommendations were of a contractual nature and which were of a legislative nature. For example, subparagraph (c), as it stood, would mean conferring a statutory, unilateral right on the contracting authority, precluding negotiations on the matters concerned. With regard to subparagraph (a), a statutory provision requiring the contract, where appropriate, to set forth review procedures would open the door to considerable dispute between the concessionaire and the contracting authority on what the appropriate circumstances were, etc. A similar problem arose with subparagraph (b). The recommendations would be fine as recommendations about the content of contracts, but not as legislative recommendations.

62. **Mr. Estrella Faria** (International Trade Law Branch) said that the matter raised by the representative of Australia was a fundamental one. The problem was to cater for a variety of legislative traditions. It was doubtful whether a clear picture would emerge even from a lengthy discussion on the subject, and the Commission might wish to proceed with an analysis of the substance bearing that in mind. Perhaps the formulation of the recommendations themselves could take care of the problem. Some earlier chapters said simply that "the host country may wish to provide that ...", leaving the host country to decide whether it was to be provided by statute, regulation or contract.

63. **Mr. Wiwen-Nilsson** (Observer for Sweden) said that the same approach could perhaps be taken as chapter II, "Project risks and government support". Recommendation 1 there read: "The extent and nature of risks assumed by the project company and the contracting authority, respectively, should be set forth in the project agreement and related documentation. The host country may wish to consider removing unnecessary statutory or regulatory limitations to the contracting authority's ability to agree on an allocation of risks ...". Some of the existing recommendations in the chapter now under consideration might then be unnecessary.

64. **Mr. Mazilu** (Romania) supported the suggestion made by the representative of the Secretariat.

65. **Mr. Kovar** (United States of America) said that the issue again arose of the relationship between the notes and the recommendations.

The meeting rose at 12.30 p.m.