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Report of the Working Group on Privately Financed Infrastructure Projects on the work of its fourth session

(Vienna, 24-28 September 2001)

Contents

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the fourth session of the Working Group on Privately Financed Infrastructure Projects (previously named Working Group on Time-Limits and Limitations (Prescription) in the international sale of goods).

2. The Working Group, which was composed of all States members of the Commission, held its fourth session in Vienna from 24 to 28 September 2001. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, Honduras, Hungary, Iran (Islamic Republic of), Italy, Japan, Morocco, Russian Federation, Spain, Sweden and United States of America.

3. The session was attended by observers from the following States: Bosnia and Herzegovina, Czech Republic, Ecuador, Indonesia, Lebanon, Namibia, Nigeria, Pakistan, Philippines, Portugal, Republic of Korea, Saudi Arabia, Slovakia, Syrian Arab Republic, Turkey and Venezuela.

4. The session was also attended by observers from the following international organizations: United Nations Industrial Development Organization, Organisation for Economic Cooperation and Development and Southeast European Cooperative Initiative.

5. The Working Group elected the following officers:

Chairman: Tore Wiwen-Nilsson (Sweden)

Rapporteur: Judit Kónia (Hungary)

6. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.I/WP.27); the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, with a view to possible use of the legislative recommendations contained therein as a basis for its deliberations, and the report on the Colloquium on Privately Financed Infrastructure: Legal Framework and Technical Assistance, held in Vienna from 2 to 4 July 2001 (A/CN.9/488: see para. 13 below).

7. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects.
5. Other business.
6. Adoption of the report.

II. Deliberations and decisions

8. The Working Group started its work on the drafting of core model legislative provisions in the field of privately financed infrastructure projects, pursuant to a decision taken by the Commission at its thirty-fourth session (Vienna, 25 June-13 July 2001).[1]

9. The Secretariat was requested to prepare draft model legislative provisions in the field of privately financed infrastructure projects, based on those deliberations and decisions, to be presented to the fifth session of the Working Group (Vienna, 9-13 September 2002)[2] for review and further discussion.

III. Possible addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

A. General remarks

10. At its thirty-third session (New York, 12 June-7 July 2000), the Commission adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at that session and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the Secretariat was authorized to finalize in the light of the deliberations of the Commission.[3] The Legislative

Guide has since been published in all official languages.

11. At the same session, the Commission also considered a proposal for future work in that area. It was suggested that, although the Legislative Guide would be a useful reference for domestic legislators in establishing a legal framework favourable to private investment in public infrastructure, it would nevertheless be desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues.[4]

12. After consideration of that proposal, the Commission decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-fourth session. In order to assist the Commission in making an informed decision on the matter, the Secretariat was requested to organize a colloquium, in cooperation with other interested international organizations or international financial institutions, to disseminate knowledge about the Legislative Guide.[5]

13. The Colloquium on Privately Financed Infrastructure: Legal Framework and Technical Assistance was organized with the co-sponsorship and organizational assistance of the Public-Private Infrastructure Advisory Facility (PPIAF), a multi-donor technical assistance facility aimed at helping developing countries improve the quality of their infrastructure through private sector involvement. It was held in Vienna from 2 to 4 July 2001.

14. At its thirty-fourth session, the Commission took note with appreciation of the results of the Colloquium as summarized in a note by the Secretariat (A/CN.9/488) and agreed that the proceedings should be published by the United Nations. The Commission further recommended that the Secretariat, in coordination with other organizations, undertake initiatives to ensure widespread knowledge of the Legislative Guide.

15. Various views were expressed as to the desirability and feasibility of further work of the Commission in the field of privately financed infrastructure projects.

16. There was wide support for the view that there was a significant demand for model legislation providing for more specific guidance, especially in developing countries and in countries with economies in transition. In that connection, it was suggested that the Legislative Guide should be implemented by way of drafting a set of core model provisions dealing with some of the substantive issues identified and dealt with in the Guide. It was pointed out that, while the Guide was in itself a valuable product to assist domestic legislators in the process of enacting or reviewing legislation in that field, the effectiveness of that process would be significantly increased if model legislative provisions were available. It was also noted that the prompt undertaking of such further work would take advantage of the vast and significant expertise gathered throughout the process that led to the adoption of the Guide and would allow it to be easily and effectively achieved within a reasonable amount of time. Finally, it was further observed that there was no inconsistency between undertaking such further work, on the one hand, and undertaking efforts to promote knowledge and dissemination of the Legislative Guide, on the other.

17. After considering the different views that were expressed, the Commission agreed that a working group should be entrusted with the task of drafting core model legislative provisions in the field of privately financed infrastructure projects. The Commission was of the view that, if further work in the field of privately financed infrastructure projects was to be accomplished within reasonable time, it was essential to carve out a specific area from among the many issues dealt with in the Legislative Guide. Accordingly, it was agreed that the first session of such a working group should identify the specific issues on which model legislative provisions, possibly to become an addendum to the Legislative Guide, could be formulated.[6]

B. Consideration of topics for possible draft model legislative provisions on the basis of the legislative recommendations contained in the Legislative Guide

18. The Working Group noted that the purpose of its work was to review the legislative recommendations

contained in the Legislative Guide with a view to formulating more concrete guidance in the form of model legislative provisions dealing with specific issues, with a possible further focus on chapter III, "Selection of the concessionaire". The first task of the Working Group was therefore to identify the issues on which such guidance might be useful.

19. The Working Group heard various suggestions of topics that might usefully be addressed in model legislative provisions, including the following: the authority to award concessions in the host country; the nature of the concession (i.e. whether exclusive or not) and its duration; measures to ensure effective administrative coordination among the various governmental agencies involved; procedures to select the concessionaire; authority to provide governmental support or guarantees to the project; key provisions dealing with the construction and the operational phases of the project; provisions intended to remove statutory obstacles to the implementation of privately financed infrastructure projects; provisions aimed at facilitating the financing of infrastructure projects; dispute settlement mechanisms for the various phases of the project; governing law of the project agreement, including the issue of which branch of the laws of the host country should govern the agreement (i.e. whether administrative law or general contract law); and duration, extension and termination of the project agreement, including compensation arrangements.

20. It was suggested that, when considering topics on which model legislative provisions should be drafted, the Working Group should not aim at formulating provisions that prescribed the contents of the project agreement. Rather, the Working Group should have as its primary objective the formulation of model legislative provisions that enabled the use of private financing for infrastructure development without being overly prescriptive in respect of the contractual arrangements between the various parties concerned.

21. The Working Group welcomed those suggestions and observations. Generally, it was pointed out that most of those topics were already covered in the Legislative Guide. The Working Group agreed that it should use the legislative recommendations as the basis for its deliberations. It also agreed that it should begin its work by the legislative recommendations dealing with the selection of the concessionaire and revert thereafter to the other topics covered in the Guide.

Chapter III. Selection of the concessionaire

General considerations

Recommendation 14

22. The text of the recommendation was as follows:

> "The law should provide for the selection of the concessionaire through transparent and efficient competitive procedures adapted to the particular needs of privately financed infrastructure projects."

23. The Working Group agreed that it would be useful to formulate a model legislative provision that stated the general principles that should preside over the process leading to the selection of the concessionaire. Whether a substantive provision was needed in that regard, or whether that idea should be expressed in a preambular paragraph to the model legislative provision, was a question to which the Working Group decided to revert at a later stage, once an initial draft had been prepared by the Secretariat.

24. By way of a general comment, it was pointed out that chapter III of the Legislative Guide contained an extensive set of legislative recommendations and detailed notes thereon. In that connection, the question was raised as to whether it was recommended that the host country adopt specific legislation dealing with the procedures for selecting the concessionaire and, if so, how such provisions would relate to general legislation on government procurement.

25. In response, it was noted that the purpose of the legislative recommendations was to assist the host country in developing rules specially suited for the selection of the concessionaire. The recommendations were concerned with the particular needs of privately financed infrastructure projects and differed in many respects from general rules on government procurement, such as those contained in the UNCITRAL Model Law on Procurement of Goods, Construction and Services ("the UNCITRAL Model Procurement Law"). The legislative recommendations were not intended to replace or reproduce such general

rules on government procurement, and it was for each host country to decide in which manner they could best be implemented. For example, a State might wish to enact special legislation or regulations dealing only with the selection of the concessionaire, or might incorporate some of them into general legislation on privately financed infrastructure projects, with cross-references, as appropriate, to other legislation dealing with matters not covered in the recommendations (such as administrative and practical arrangements for conducting the selection proceedings).

26. In that connection, it was suggested that the Working Group might need to consider carefully the relationship between model provisions on selection procedures and the general procurement regime in the host country. It was also pointed out that two aspects should be borne in mind by the Working Group.

27. The first was that recommendation 14 was based on the assumption that there existed in the host country a general framework for government procurement that provided for transparent and efficient competitive procedures in a manner that met the standards set forth in the UNCITRAL Model Procurement Law. The Working Group was invited to consider in due course how the model legislative provisions to be drafted should address the needs of countries that lacked such a general framework.

28. The second aspect to which the attention of the Working Group was drawn concerned the particular requirements of the selection procedures for privately financed infrastructure projects. It was pointed out that international experience had revealed some limitations of traditional forms of competitive selection procedures, such as the tendering method, when applied for the award of privately financed infrastructure projects. The model legislative provisions to be developed by the Working Group should make clear the particular nature of the selection procedures to be dealt with by them.

Pre-selection of bidders

29. The text of the relevant recommendations was as follows:

Recommendation 15

> "The bidders should demonstrate that they meet the pre-selection criteria that the contracting authority considers appropriate for the particular project, including:
>
> "(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, namely, engineering, construction, operation and maintenance;
>
> "(b) Sufficient ability to manage the financial aspects of the project and capability to sustain the financing requirements for the engineering, construction and operational phases of the project;
>
> "(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating public infrastructure."

Recommendation 16

> "The bidders should be allowed to form consortia to submit proposals, provided that each member of a pre-selected consortium may participate, either directly or through subsidiary companies, in only one bidding consortium."

Recommendation 17

> "The contracting authority should draw up a short list of the pre-selected bidders that will subsequently be invited to submit proposals upon completion of the pre-selection phase."

30. The Secretariat was requested to draft a model provision reflecting the substance of recommendation 15.

31. In respect of both recommendations 16 and 17, one view was that they contained provisions of an operational nature, as such not requiring to be addressed in the form of model legislative provisions.

32. In response, it was observed that pre-selection was a crucial phase within the context of selection of the concessionaire for privately financed infrastructure projects and that, accordingly, model legislative provisions relating thereto should be drafted. As a general remark, it was pointed out that the Working

Group should aim at drafting a comprehensive text on the selection process, capable of being used by legislators and government officers as a self-standing, self-sufficient tool for the purpose of enacting new or revising existing legislation in the area of privately financed infrastructure. Accordingly, it was agreed that any and all provisions that were felt to be critical to achieving the goals of privately financed infrastructure projects should be included in the draft text. At the same time, however, the Working Group agreed that the model legislative provisions should refrain from addressing unnecessary details that might impair the flexibility of the text.

33. In respect of recommendation 16, the view was expressed that the issue of submission of proposals by consortia could not be addressed by a single provision, since distinctions had to be drawn depending upon the kind of project at stake. It was clarified that, in the event that model legislative provisions were to be retained, they had to be drafted bearing in mind the general situation of privately financed infrastructure projects, consistent with the approach taken in the Legislative Guide.

34. In respect of recommendation 17, the suggestion to provide for the short list of pre-selected bidders to be published and notified to all parties having submitted an application for the purposes of pre-qualification was widely supported. The view was shared that such publication would enhance the transparency of the process, without prejudice however to the power of the enacting countries to address the issue of publication in the law rather than in regulations. It was recalled that notification of all parties having submitted an application to pre-qualify was also provided by article 7, paragraph 6, of the UNCITRAL Model Procurement Law.

Procedures for requesting proposals

Single-stage and two-stage procedures for requesting proposals

Recommendation 18

35. The text of the recommendation was as follows:

> "Upon completion of the pre-selection proceedings, the contracting authority should request the pre-selected bidders to submit final proposals."

36. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Recommendation 19

37. The text of the recommendation was as follows:

> "Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders when it is not feasible for it to formulate project specifications or performance indicators and contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated. Where a two-stage procedure is used, the following provisions should apply:
>
> (a) The contracting authority should first call upon the pre-selected bidders to submit proposals relating to output specifications and other characteristics of the project as well as to the proposed contractual terms;
>
> (b) The contracting authority may convene a meeting of bidders to clarify questions concerning the initial request for proposals;
>
> (c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial project specifications and contractual terms prior to issuing a final request for proposals."

38. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Content of the final request for proposals

Recommendation 20

39. The text of the recommendation was as follows:

> "The final request for proposals should include at least the following:
>
> "(a) General information as may be required by the bidders in order to prepare and submit their proposals;
>
> "(b) Project specifications and performance indicators, as appropriate, including the

contracting authority's requirements regarding safety and security standards and environmental protection;

"(c) The contractual terms proposed by the contracting authority;

"(d) The criteria for evaluating the proposals, the relative weight to be accorded to each such criterion and the manner in which the criteria are to be applied in the evaluation of proposals."

40. It was observed that it was crucial to provide for the contractual terms proposed by the contracting authority to be included in the final request for proposal, as provided by recommendation 20, paragraph c, and that therefore a model provision reflecting that recommendation should be drafted.

Clarifications and modifications

Recommendation 21

41. The text of the recommendation was as follows:

"The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, modify the final request for proposals by issuing addenda at a reasonable time prior to the deadline for submission of proposals."

42. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Evaluation criteria

Recommendation 22

43. The text of the recommendation was as follows:

"The criteria for the evaluation and comparison of the technical proposals should concern the effectiveness of the proposal submitted by the bidder in meeting the needs of the contracting authority, including the following:

"(a) Technical soundness;

"(b) Operational feasibility;

"(c) Quality of services and measures to ensure their continuity;

"(d) Social and economic development potential offered by the proposals."

Recommendation 23

44. The text of the recommendation was as follows:

"The criteria for the evaluation and comparison of the financial and commercial proposals may include, as appropriate:

"(a) The present value of the proposed tolls, fees, unit prices and other charges over the concession period;

"(b) The present value of the proposed direct payments by the contracting authority, if any;

"(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

"(d) The extent of financial support, if any, expected from the Government;

"(e) Soundness of the proposed financial arrangements;

"(f) The extent of acceptance of the proposed contractual terms."

45. The Working Group discussed the issue of the relationship between the evaluation criteria referring to non-financial aspects, as listed in recommendation 22, and the criteria relating to the financial aspects, as listed in recommendation 23.

46. It was felt that the model legislative provisions should recommend avoiding placing excessive emphasis on the financial aspects of a proposal, namely on the price criterion, to the detriment of non-financial aspects, which was felt inappropriate in respect of privately financed infrastructure projects. A similar view was that the model legislative provisions should clarify that price-related criteria could be taken into account only after evaluation of the non-financial aspects of the proposals had been carried out.

47. In response, it was noted that the issue of the relative weight to be given to financial criteria vis-à-vis non-financial aspects had been thoroughly addressed in the notes to the Legislative Guide. It was further noted that it would be inappropriate to address

the issue of hierarchy among evaluation criteria at the legislative level. In that connection, it was also recalled that the mandate given to the Working Group was meant to comply with and not to amend the policy decisions underlying the Guide.

48. The concern was raised that departure from the price criterion might result in the overall transparency of the process being impaired. It was suggested that the draft model legislative provisions should provide for parameters capable of ensuring the objectiveness of the procedure. In that connection, it was observed that such problems of transparency and objectiveness might be addressed by the thresholds established by the contracting authority for the purpose of assessing the qualification and the responsiveness of the proposals, as provided in recommendation 24. It was further noted that such thresholds should be established by the contracting authority with a view to ensuring the viability of the project. Another suggestion was that the thresholds established for the purposes of assessing the responsiveness of the proposals should be included in the final request for proposals addressed in recommendation 20.

49. After discussion, the Working Group agreed that the issue of determining the relative weight to be given to the evaluation criteria should be left to the contracting authority, provided however that adequate transparency was ensured. However, it was further agreed that the model legislative provisions might usefully refer to the possibility for the contracting authority to structure the evaluation process in two stages, along the lines of article 42 of the UNCITRAL Model Procurement Law and as reflected in paragraph 81 of the notes to the Legislative Guide.

50. The suggestion that environmental soundness, though possibly implied in the criteria of "technical soundness" and "quality of services", should be mentioned explicitly among the relevant non-financial evaluation criteria received support.

51. In response to a query as to the relationship between subparagraph (f) of recommendation 23 and recommendation 21, providing for the contracting authority being able to provide clarifications and modifications to the final request for proposals, it was explained that subparagraph (f) was only concerned with contractual terms that had not been qualified as non-negotiable by the contracting authority, in respect of which negotiations were allowed. With a view to enhancing transparency, it was agreed that the point be clearly spelled out in the model legislative provisions.

Submission, opening, comparison and evaluation of proposals

Recommendation 24

52. The text of the recommendation was as follows:

> "The contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects to be reflected in the proposals in accordance with the criteria as set out in the request for proposals. Proposals that fail to achieve the thresholds should be regarded as non-responsive."

53. Subject to the suggestion made in respect of recommendation 23, subparagraph f, the Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Recommendation 25

54. The text of the recommendation was as follows:

> "Whether or not it has followed a pre-selection process, the contracting authority may retain the right to require the bidders to demonstrate their qualifications again in accordance with criteria and procedures set forth in the request for proposals or the pre-selection documents, as appropriate. Where a pre-selection process has been followed, the criteria should be the same as those used in the pre-selection proceedings."

55. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Final negotiations and project award

Recommendation 26

56. The text of the recommendation was as follows:

> "The contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite for final negotiation of the project agreement the bidder that has attained the best rating. Final negotiations may not concern

those terms of the contract which were stated as non-negotiable in the final request for proposals."

57. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Recommendation 27

58. The text of the recommendation was as follows:

"If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a project agreement, the contracting authority should inform that bidder that it is terminating the negotiations and then invite for negotiations the other bidders on the basis of their ranking until it arrives at a project agreement or rejects all remaining proposals."

59. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation. For the purposes of transparency, however, it was suggested that the circumstances under which the contracting authority might consider it "apparent" that negotiations with the perspective bidder would not result in entering into the agreement should be identified explicitly.

Concession award without competitive procedures

Recommendation 28

60. The text of the recommendation was as follows:

"The law should set forth the exceptional circumstances under which the contracting authority may be authorized to award a concession without using competitive procedures, such as:

"(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in a competitive selection procedure would therefore be impractical;

"(b) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;

"(c) Reasons of national defence or national security;

"(d) Cases where there is only one source capable of providing the required service (for example, because it requires the use of patented technology or unique know-how);

"(e) In case of unsolicited proposals of the type referred to in legislative recommendations 34 and 35;

"(f) When an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals, and if, in the judgement of the contracting authority, issuing a new request for proposals would be unlikely to result in a project award;

"(g) Other cases where the higher authority authorizes such an exception for compelling reasons of public interest."

61. As a general comment, it was noted that in some countries concessions were not always awarded through structured competitive procedures. Coupled with measures enhancing transparency, the less formal procedures used in those countries produced satisfactory results, a circumstance that was adequately reflected in the notes to legislative recommendation 28. It was therefore suggested that the word "exceptional" should not appear in a model provision to implement recommendation 28.

62. There was strong objection to that proposal, since the prevailing view within the Working Group was that the text of recommendation 28 correctly reflected the policy guidance adopted by the Commission that, in the context of privately financed infrastructure projects, the award of a concession without structured competitive procedures should be used in exceptional circumstances.

63. The Working Group was reminded of the Commission's understanding that the list of exceptional circumstances authorizing the award of a concession without structured competitive procedures was not exhaustive.[7] The Working Group was of the view, however, that the flexibility intended by the Commission was already contained in sub-paragraph (g) of the recommendation and that, as a matter of drafting technique, the words "such as" should not appear in a model provision to implement

recommendation 28. The Working Group agreed to consider expanding the scope of subparagraph (g) by adding language along the following lines "or other cases of the same exceptional nature, as defined by the law".

64. The Working Group agreed that the words "urgent" in subparagraph (a) and "compelling" in subparagraph (g) might not be needed in a model provision to implement recommendation 28.

Recommendation 29

65. The text of the recommendation was as follows:

> "The law may require that the following procedures be observed for the award of a concession without competitive procedures:
>
> "(a) The contracting authority should publish a notice of its intention to award a concession for the implementation of the proposed project and should engage in negotiations with as many companies judged capable of carrying out the project as circumstances permit;
>
> "(b) Offers should be evaluated and ranked according to the evaluation criteria established by the contracting authority;
>
> "(c) Except for the situation referred to in recommendation 28 (c), the contracting authority should cause a notice of the concession award to be published, disclosing the specific circumstances and reasons for the award of the concession without competitive procedures."

66. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

67. The Working Group also agreed that it might be useful to expand the scope of subparagraph (c) so as to align the publicity requirements contained therein with the record-keeping requirements referred to in paragraph 122 of chapter III of the Legislative Guide.

Unsolicited proposals

68. There was general agreement within the Working Group that it would be useful to provide specific legislative guidance, in the form of model legislative provisions, on the manner in which contracting authorities might handle unsolicited proposals. It was pointed out, in that connection, that whether or not such proposals might give rise to some objections of principle, it would be preferable to offer enacting States a satisfactory system to ensure transparency and fairness in handling unsolicited proposals, rather than simply to ignore them altogether.

69. As a general remark, it was observed that it might be useful for the Working Group to define more clearly the notion of unsolicited proposals. It was also suggested that the Working Group should point out, possibly in notes that might accompany the model legislative provisions, that appropriate administrative procedures should be developed by the contracting authority in order to ensure efficiency and transparency in handling unsolicited proposals.

Recommendation 30

70. The text of the recommendation was as follows:

> "By way of exception to the selection procedures described in legislative recommendations 14-27, the contracting authority may be authorized to handle unsolicited proposals pursuant to specific procedures established by the law for handling unsolicited proposals, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced by the contracting authority."

71. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Procedures for determining the admissibility of unsolicited proposals

Recommendation 31

72. The text of the recommendation was as follows:

> "Following receipt and preliminary examination of an unsolicited proposal, the contracting authority should inform the proponent, within a reasonably short period, whether or not there is a potential public interest in the project. If the project is found to be in the public interest, the contracting authority should invite the proponent to submit a formal proposal

in sufficient detail to allow the contracting authority to make a proper evaluation of the concept or technology and determine whether the proposal meets the conditions set forth in the law and is likely to be successfully implemented at the scale of the proposed project."

73. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Recommendation 32

74. The text of the recommendation was as follows:

"The proponent should retain title to all documents submitted throughout the procedure and those documents should be returned to it in the event that the proposal is rejected."

75. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Procedures for handling unsolicited proposals that do not involve proprietary concepts or technology

Recommendation 33

76. The text of the recommendation was as follows:

"The contracting authority should initiate competitive selection procedures under recommendations 14-27 above if it is found that the envisaged output of the project can be achieved without the use of a process, design, methodology or engineering concept for which the author of the unsolicited proposal possesses exclusive rights or if the proposed concept or technology is not truly unique or new. The author of the unsolicited proposal should be invited to participate in such proceedings and may be given a premium for submitting the proposal."

77. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation. It was pointed out, however, that the notion of "premium" in the recommendation might need to be clarified by the Working Group at a later stage.

Procedures for handling unsolicited proposals involving proprietary concepts or technology

Recommendation 34

78. The text of the recommendation was as follows:

"If it appears that the envisaged output of the project cannot be achieved without using a process, design, methodology or engineering concept for which the author of the unsolicited proposal possesses exclusive rights, the contracting authority should seek to obtain elements of comparison for the unsolicited proposal. For that purpose, the contracting authority should publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit alternative or comparable proposals within a certain reasonable period."

79. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Recommendation 35

80. The text of the recommendation was as follows:

"The contracting authority may engage in negotiations with the author of the unsolicited proposal if no alternative proposals are received, subject to approval by a higher authority. If alternative proposals are submitted, the contracting authority should invite all the proponents to negotiations in accordance with the provisions of legislative recommendation 29 (a)-(c)."

81. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Confidentiality

Recommendation 36

82. The text of the recommendation was as follows:

"Negotiations between the contracting authority and bidders should be confidential and one party to the negotiations should not reveal to any other person any technical, price or other commercial information relating to the

negotiations without the consent of the other party."

83. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Notice of project award

Recommendation 37

84. The text of the recommendation was as follows:

"The contracting authority should cause a notice of the award of the project to be published. The notice should identify the concessionaire and include a summary of the essential terms of the project agreement."

85. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Record of selection and award proceedings

Recommendation 38

86. The text of the recommendation was as follows:

"The contracting authority should keep an appropriate record of key information pertaining to the selection and award proceedings. The law should set forth the requirements for public access."

87. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

Review procedures

Recommendation 39

88. The text of the recommendation was as follows:

"Bidders who claim to have suffered, or who may suffer, loss or injury owing to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts in accordance with the laws of the host country."

89. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation. It was observed, in that connection, that the Working Group should, at a later stage, consider whether such model provision should appear after the provisions dealing with the selection of the concessionaire or whether it should be best placed together with the provisions dealing with settlement of disputes in the various phases of an infrastructure project.

Chapter I. General legislative and institutional framework

Constitutional, legislative and institutional framework

Recommendation 1

90. The text of the recommendation was as follows:

"The constitutional, legislative and institutional framework for the implementation of privately financed infrastructure projects should ensure transparency, fairness, and the long-term sustainability of projects. Undesirable restrictions on private sector participation in infrastructure development and operation should be eliminated."

91. The Working Group acknowledged that both provisions contained in recommendation 1 were of a general nature and as such were not suitable for translation into legislative language. However, it was agreed that the substance of the recommendation might usefully be retained as a reminder of the broad objectives to be pursued in the field of privately financed infrastructure, possibly in a preamble or in explanatory notes to the model legislative provisions that the Working Group might decide to prepare.

Scope of authority to award concessions

92. The text of the relevant recommendations was as follows:

Recommendation 2

"The law should identify the public authorities of the host country (including, as appropriate, national, provincial and local

authorities) that are empowered to award concessions and enter into agreements for the implementation of privately financed infrastructure projects."

Recommendation 3

"Privately financed infrastructure projects may include concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems."

Recommendation 4

"The law should identify the sectors or types of infrastructure in respect of which concessions may be granted."

Recommendation 5

"The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction."

93. The Working Group considered recommendations 2-5, on the scope of authority to award concessions, as a unitary set. As a general remark, it was recalled that all those recommendations served the purpose of recommending legislative clarity both as to the identification of the authorities empowered to award concession agreements and as to the scope of such powers. Accordingly, support was expressed for the view that all the aspects addressed in recommendations 2-5 might be reflected and dealt with in a single model legislative provision.

94. As to the technique in which the identification of the relevant authorities should be made, it was suggested that alternative solutions could be proposed, possibly along the lines of the options provided in article 2, paragraph (b), of the UNCITRAL Model Procurement Law. It was clarified, however, that providing for an exhaustive list of the single relevant bodies or agencies might make it necessary for the law to specify also the sectors in respect of which those bodies or agencies were empowered. Without prejudice to the solution to be given to that issue, the Working Group agreed that the model legislative provisions should have a general scope and not be limited to specific sectors. In that connection, it was also felt that a general definition as to the types of infrastructure projects falling within the scope of those provisions, along the lines of recommendation 3, could be usefully retained.

95. Support was expressed for the view that the issue of possible overlapping of competencies and authorities in respect of privately financed infrastructure projects, depending on the structure of the enacting State or on the nature of the service at stake, should be expressly addressed in a model legislative provision, with a view to ensuring coordination.

96. After discussion, the Working Group requested the Secretariat to draft a model legislative provision addressing that issue, without however delving into excessive details that might result in unnecessary complication of the text. In that connection, it was clarified that the task of providing details as to the structure of the enacting State should be left to national legislators.

Administrative coordination

Recommendation 6

97. The text of the recommendation was as follows:

"Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned."

98. While recalling that the recommendation had been considered crucial to avoid delays and inefficiencies related to lack of coordination among

different public authorities, it was felt that the issue did not necessarily lend itself to be dealt with in legislation. In that connection, it was observed that many countries considered such coordination as a matter of administrative practice.

99. Another view was that the issue of coordination among authorities was crucial in order to ensure the long-term sustainability of infrastructure projects and that, accordingly, it should be reflected in a provision of a legislative nature. Some support was expressed for the suggestion that the policy underlying the recommendation be retained in the preamble or the notes to the model legislative provisions, as an issue of a general nature. A further suggestion was that the issue should be dealt with within the context of scope of authority.

100. As a general remark, the Working Group agreed that the issue of determining how to reflect principles that, though important, were not felt suitable to be addressed in model legislative provisions should be deferred to a later stage.

Authority to regulate infrastructure services

101. The text of the relevant recommendations was as follows:

Recommendation 7

> "The authority to regulate infrastructure services should not be entrusted to entities that directly or indirectly provide infrastructure services."

Recommendation 8

> "Regulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers."

Recommendation 9

> "The rules governing regulatory procedures should be made public. Regulatory decisions should state the reasons on which they are based and should be accessible to interested parties through publication or other means."

Recommendation 10

> "The law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the grounds on which such a review may be based."

Recommendation 11

> "Where appropriate, special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector."

102. The general view was that recommendations 7-11 were not suitable to be translated into legislative language and that, accordingly, the authority to regulate infrastructure services should remain outside the scope of the model legislative provisions. In that connection, it was pointed out that some issues pertaining to the regulatory authority might be usefully dealt with within the context of other chapters, such as those addressing the operation phase or the settlement of disputes.

Chapter II. Project risks and government support

Project risks and risk allocation

Recommendation 12

103. The text of the recommendation was as follows:

> "No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project."

104. While reaffirming its importance for the purpose of making legislators aware of the implications of their policy choices in the field of privately financed infrastructure, the Working Group agreed that the recommendation had an educational rather than a prescriptive character and therefore was not suitable to be transformed into a model legislative provision.

Government support

Recommendation 13

105. The text of the recommendation was as follows:

> "The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide."

106. One view was that the recommendation was related to the broader issue of the scope of authority to award concessions. Accordingly, it was suggested that its substance should be included in the model legislative provisions related to legislative recommendations 2-5. While that view attracted some support, a concern was that mentioning governmental financial or economic support in a model legislative provision would be tantamount to recommending that support be given by the Government, a result that was considered inappropriate in respect of those Governments whose policy was not to grant any support for privately financed infrastructure projects. In response, it was observed that the purpose of a provision reflecting the substance of recommendation 13 would not consist in recommending government support to be granted as a policy approach, but rather in ensuring transparency in those systems where a policy decision in favour of such support had been taken.

107. In respect of the last part of the recommendation, suggesting that the law should clearly state the types of support that could be provided by the public authorities, it was feared that its incorporation in a model legislative provision might result in unnecessarily diminishing flexibility in negotiations. A further concern was that the task of drafting a comprehensive list might prove difficult, owing to the variety of forms that such support could take.

108. After discussion, the Working Group requested the Secretariat to draft a model provision reflecting the substance of the recommendation, possibly in square brackets, with a view to drawing the attention of the Group to the need to reconsider the issue at a later stage.

Chapter IV. Construction and operation of infrastructure: legislative framework and project agreement

General provisions on the project agreement

Recommendation 40

109. The text of the recommendation was as follows:

> "The law might identify the core terms to be provided in the project agreement, which may include those terms referred to in recommendations 41-68 below."

110. The Working Group noted that, as pointed out in the Legislative Guide (chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", para. 2), domestic legislation often contained provisions dealing with the content of the project agreement. In some countries, the law merely referred to the need for an agreement between the concessionaire and the contracting authority, while the laws of other countries contained extensive mandatory provisions concerning the content of clauses to be included in the agreement. An intermediate approach was taken by those laws which listed a number of issues that need to be addressed in the project agreement without regulating in detail the content of its clauses.

111. The Working Group was mindful of the fact that general legislative provisions on certain essential elements of the project agreement might serve the purpose of establishing a general framework for the allocation of rights and obligations between the parties. They might also be intended to ensure consistency in the treatment of certain contractual issues and to provide guidance to the public authorities involved in the negotiation of project agreements at different levels of government (national, provincial or local). Lastly, legislation might sometimes be required so as to provide the contracting authority with the power to agree on certain types of provisions.

112. However, the Working Group was of the view that general legislative provisions dealing in detail with the rights and obligations of the parties might deprive the contracting authority and the concessionaire of the necessary flexibility to negotiate an agreement that

took into account the needs and particularities of a specific project.

113. Against that background, the Working Group held an extensive exchange of views on whether it would be desirable to formulate a model legislative provision that listed essential issues that needed to be addressed in the project agreement. It was proposed, in that connection, that such a list be based upon the headings that preceded recommendations 41-68, with some adjustments where it was felt that the language used in the headings did not provide a sufficiently clear indication of the subject matter to be dealt with in the project agreement. The Working Group was also reminded of the possible disadvantages of drafting such a list of essential provisions. It was said, for instance, that such a list would give rise to the question as to whether the parties had the power not to include any of the matters listed or whether they might, in turn, include other matters not contained in the list. Another possible disadvantage might be uncertainty as to what might be the legal consequences of failure by the parties to follow a list of provisions established in legislation.

114. Having considered the various views that were expressed, the Working Group agreed that it would be useful to formulate a model legislative provision that listed essential issues that needed to be addressed in the project agreement. The Secretariat was requested to prepare an initial draft of such model provision on the basis of the headings that preceded recommendations 41-68, with the adjustments that might be required so as to spell out clearly, but without unnecessary details, the various topics that needed to be covered by project agreements.

115. The Working Group proceeded to consider the suggestion that, in addition to the list of core provisions of the project agreement, some of the matters dealt with in recommendations 41-68 related to issues that deserved to be treated separately in specific model legislative provisions. This, it was said, was the case, in particular, of those recommendations which related to matters for which prior legislative authorization might be needed or those which might affect the interests of third parties or provisions relating to essential policy matters on which variation by agreement was not admitted in some legal systems.

116. While there were no objections in principle to that proposal, the Working Group decided to revert to it at a later stage once it had completed its review of legislative recommendations 41-68 (see paras. 118-165 below).

Recommendation 41

117. The text of the recommendation was as follows:

> "Unless otherwise provided, the project agreement is governed by the law of the host country."

118. In response to a question as to the meaning of the opening phrase of the recommendation, it was pointed out that the issue of the law governing the project agreement had been the subject of extensive debate at the thirty-second session of the Commission. The flexible wording eventually agreed upon by the Commission was intended to take into account the fact that, under some legal systems, provisions allowing for the application of a law other than the law of the host country could only be of a statutory nature, whereas in other legal systems the contracting authority might have the power to agree on the applicable law.

119. It was further stated that beyond the question of the choice between domestic or foreign law, the recommendation also related to the issue of which branch of the laws of the host country would govern the project agreement (i.e. whether administrative law or general contract law). That question, it was pointed out, had significant practical implications, since administrative law in some legal systems provided for a number of implied or explicit prerogatives of governmental agencies in connection with administrative contracts, such as powers to terminate a contract unilaterally or to amend its terms.

120. It was suggested that legislative recommendation 41 did not lend itself to being transformed into a self-standing model legislative provision. At the most, it was said, the Working Group might wish to consider, at an appropriate stage, including a heading such as "governing law" in a list of core provisions of a project agreement that might be drafted to implement legislative recommendation 40.

121. The countervailing view, however, was that recommendation 41 was important, since it touched upon the sovereignty of host countries. While in practice investors, in particular foreign ones, might have concerns about the overall stability and

predictability of the host country's legal framework for private investment in infrastructure, the model legislative provisions should acknowledge the efforts that had been made in many countries, including developing countries, to improve their investment climate. The Working Group took those views into account and requested the Secretariat to draft a model legislative provision reflecting the substance of recommendation 41.

Organization of the concessionaire

122. The text of the relevant recommendations was as follows:

Recommendation 42

> "The contracting authority should have the option to require that the selected bidders establish an independent legal entity with a seat in the country."

Recommendation 43

> "The project agreement should specify the minimum capital of the project company and the procedures for obtaining the approval by the contracting authority of the statutes and by-laws of the project company and fundamental changes therein."

123. It was observed that on some occasions the requirement of a minimum capital was established by the contracting authority as a prerequisite for entering into the agreement. The suggestion was made that, in view of the relationship between recommendations 42 and 43 and the governing law of the project agreement, those recommendations were suitable for transformation into model legislative provisions.

The project site, assets and easements

Recommendation 44

124. The text of the recommendation was as follows:

> "The project agreement should specify, as appropriate, which assets will be public property and which assets will be the private property of the concessionaire. The project agreement should identify which assets the concessionaire is required to transfer to the contracting authority or to a new concessionaire upon expiry or termination of the project agreement; which assets the contracting authority, at its option, may purchase from the concessionaire; and which assets the concessionaire may freely remove or dispose of upon expiry or termination of the project agreement."

125. It was suggested that the distinction made in recommendation 44 between various categories of project assets reflected well-established principles of law in some legal systems. Therefore, the recommendation was found to be suitable for transformation into a model legislative provision.

Recommendation 45

126. The text of the recommendation was as follows:

> "The contracting authority should assist the concessionaire in obtaining such rights related to the project site as necessary for the operation, construction and maintenance of the facility. The law might empower the concessionaire to enter upon, transit through, do work or fix installations upon property of third parties, as required for the construction, operation and maintenance of the facility."

127. Strong support was expressed for the view that the issues addressed in recommendation 45 needed to be reflected in model legislative provisions, since they addressed rights and obligations of third parties.

Financial arrangements

128. The text of the relevant recommendations was as follows:

Recommendation 46

> "The law should enable the concessionaire to collect tariffs or user fees for the use of the facility or the services it provides. The project agreement should provide for methods and formulas for the adjustment of those tariffs or user fees."

Recommendation 47

> "Where the tariffs or fees charged by the concessionaire are subject to external control by a regulatory body, the law should set forth the mechanisms for periodic and extraordinary revisions of the tariff adjustment formulas."

Recommendation 48

> "The contracting authority should have the power, where appropriate, to agree to make direct payments to the concessionaire as a substitute for, or in addition to, service charges to be paid by the users or to enter into commitments for the purchase of fixed quantities of goods or services."

129. The view was expressed that model legislative provisions in respect of recommendations 46-48 should be drafted, since the issue of both collection of fees and other payments to be made to the concessionaire was crucial in respect of the financial balance of the project and the very notion of concession agreement and therefore needed to be addressed at a legislative rather than at a contractual level. After considering that suggestion, the Working Group decided that a model legislative provision dealing with financial arrangements should be limited to stating the right of the concessionaire to collect tariffs or fees for the use of the facility, as mentioned in the first sentence of recommendation 46.

Security interests

Recommendation 49

130. The text of the recommendation was as follows:

> "The concessionaire should be responsible for raising the funds required to construct and operate the infrastructure facility and, for that purpose, should have the right to secure any financing required for the project with a security interest in any of its property, with a pledge of shares of the project company, with a pledge of the proceeds and receivables arising out of the concession, or with other suitable security, without prejudice to any rule of law that might prohibit the creation of security interests in public property."

131. The Working Group acknowledged that the ability of the concessionaire to grant all those securities which might be required in order to obtain adequate financing (including, when appropriate, securities on the shares of the project company or on the proceeds and the revenues of the concession) was often crucial for the success of the project. While there was consensus as to the importance of the issue, it was also recalled that the issue had proved to be particularly sensible, owing to the constraints provided in some legal systems in respect of the creation of securities or other liens on public property. It was also pointed out that the creation of security rights was a matter exceeding the scope of the concession law and dealt with by the general law on security interests.

132. While the Working Group was aware of the possible difficulty of drafting a model legislative provision that dealt with the various issues related to security interests in an adequate fashion, it was felt that a model legislative provision in that respect would be desirable.

Assignment of the concession

Recommendation 50

133. The text of the recommendation was as follows:

> "The concession should not be assigned to third parties without the consent of the contracting authority. The project agreement should set forth the conditions under which the contracting authority might give its consent to an assignment of the concession, including the acceptance by the new concessionaire of all obligations under the project agreement and evidence of the new concessionaire's technical and financial capability as necessary for providing the service."

134. It was pointed out that recommendation 50 reflected the importance attached by some legal systems to the personal character (*intuitu personae*) of concession contracts, which was found to be crucial for ensuring the long-term sustainability of the project. Accordingly, the Working Group agreed that the essential principles reflected in the recommendation deserved to be addressed in the form of a model legislative provision.

Transfer of controlling interest in the project company

Recommendation 51

135. The text of the recommendation was as follows:

> "The transfer of a controlling interest in a concessionaire company may require the consent of the contracting authority, unless otherwise provided."

136. It was suggested that recommendation 51, like recommendation 50, was crucial in order to preserve the personal character of the project agreement and that, accordingly, its content should be reflected in a model legislative provision.

Construction works

Recommendation 52

137. The text of the recommendation was as follows:

> "The project agreement should set forth the procedures for the review and approval of construction plans and specifications by the contracting authority, the contracting authority's right to monitor the construction of, or improvements to, the infrastructure facility, the conditions under which the contracting authority may order variations in respect of construction specifications and the procedures for testing and final inspection, approval and acceptance of the facility, its equipment and appurtenances."

138. The Working Group shared the view that the recommendation dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

Operation of infrastructure

Recommendation 53

139. The text of the recommendation was as follows:

> "The project agreement should set forth, as appropriate, the extent of the concessionaire's obligations to ensure:
>
> "(a) The adaptation of the service so as to meet the actual demand for the service;
>
> "(b) The continuity of the service;
>
> "(c) The availability of the service under essentially the same conditions to all users;
>
> "(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire."

140. It was suggested that the recommendation reflected fundamental principles of law governing the obligations of infrastructure concessionaires in some legal systems and that, therefore, it would be useful to transform it into a model legislative provision.

Recommendation 54

141. The text of the recommendation was as follows:

> "The project agreement should set forth:
>
> "(a) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory body, as appropriate, with reports and other information on its operations;
>
> "(b) The procedures for monitoring the concessionaire's performance and for taking such reasonable actions as the contracting authority or a regulatory body may find appropriate, to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements."

142. The Working Group shared the view that the recommendation dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

Recommendation 55

143. The text of the recommendation was as follows:

> "The concessionaire should have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body."

144. The Working Group did not find it desirable or necessary to formulate a draft model legislative provision on the basis of recommendation 55.

General contractual arrangements

145. The text of the relevant recommendations was as follows:

Recommendation 56

> "The contracting authority may reserve the right to review and approve major contracts to be entered into by the concessionaire, in particular contracts with the concessionaire's own shareholders or related persons. The contracting authority's approval should not normally be withheld except where the contracts contain provisions inconsistent with the project agreement or manifestly contrary to the public interest or to mandatory rules of a public law nature."

Recommendation 57

> "The concessionaire and its lenders, insurers and other contracting partners should be free to choose the applicable law to govern their contractual relations, except where such a choice would violate the host country's public policy."

146. The Working Group was of the view that recommendations 56 and 57 dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

Recommendation 58

147. The text of the recommendation was as follows:

> "The project agreement should set forth:
>
> "(a) The forms, duration and amounts of the guarantees of performance that the concessionaire may be required to provide in connection with the construction and the operation of the facility;
>
> "(b) The insurance policies that the concessionaire may be required to maintain;
>
> "(c) The compensation to which the concessionaire may be entitled following the occurrence of legislative changes or other changes in the economic or financial conditions that render the performance of the obligation substantially more onerous than originally foreseen. The project agreement should further provide mechanisms for revising the terms of the project agreement following the occurrence of any such changes;
>
> "(d) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the project agreement owing to circumstances beyond their reasonable control;
>
> "(e) Remedies available to the contracting authority and the concessionaire in the event of default by the other party."

148. It was suggested that subparagraph (c) reflected fundamental principles of law on infrastructure operation in some legal systems and that, therefore, it was useful to translate it into a model legislative provision. As to the other subparagraphs of the recommendation, however, the Working Group felt that they dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

Recommendation 59

149. The text of the recommendation was as follows:

> "The project agreement should set forth the circumstances under which the contracting authority may temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations."

150. It was suggested that the recommendation reflected fundamental principles of law on infrastructure operation in some legal systems and that, therefore, it would be useful to transform it into a model legislative provision.

Recommendation 60

151. The text of the recommendation was as follows:

> "The contracting authority should be authorized to enter into agreements with the lenders providing for the appointment, with the consent of the contracting authority, of a new concessionaire to perform under the existing project agreement if the concessionaire seriously fails to deliver the service required or if other specified events occur that could justify the termination of the project agreement."

152. It was suggested that the recommendation contained useful advice in order to facilitate the financing of infrastructure projects and that, therefore, it would be useful to transform it into a model legislative provision.

Chapter V. Duration, extension and termination of the project agreement

Duration and extension of the project agreement

Recommendation 61

153. The text of the recommendation was as follows:

> "The duration of the concession should be specified in the project agreement."

154. The Working Group was of the view that it would be useful to draft a model legislative provision to implement recommendation 61.

Recommendation 62

155. The text of the recommendation was as follows:

> "The term of the concession should not be extended, except for those circumstances specified in the law, such as:
>
> "(a) Completion delay or interruption of operation due to the occurrence of circumstances beyond either party's reasonable control;
>
> "(b) Project suspension brought about by acts of the contracting authority or other public authorities;
>
> "(c) To allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the project agreement that the concessionaire would not be able to recover during the normal term of the project agreement."

156. The Working Group was of the view that the recommendation set out an important principle to ensure transparency and avoid abuse in the extension of project agreements and that it was therefore suitable for translation into a model legislative provision.

Termination of the project agreement

157. The text of the relevant recommendations was as follows:

Termination by the contracting authority

Recommendation 63

> "The contracting authority should have the right to terminate the project agreement:
>
> "(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;
>
> "(b) For reasons of public interest, subject to payment of compensation to the concessionaire."

Termination by the concessionaire

Recommendation 64

> "The concessionaire should have the right to terminate the project agreement under exceptional circumstances specified in the law, such as:
>
> "(a) In the event of serious breach by the contracting authority or other public authority of their obligations under the project agreement;
>
> "(b) In the event that the concessionaire's performance is rendered substantially more onerous as a result of variation orders or other acts of the contracting authority, unforeseen changes in conditions or acts of other public authorities and that the parties have failed to agree on an appropriate revision of the project agreement."

Termination by either party

Recommendation 65

> "Either party should have the right to terminate the project agreement in the event that the performance of its obligations is rendered impossible by the occurrence of circumstances beyond either party's reasonable control. The parties should also have the right to terminate the project agreement by mutual consent."

158. The Working Group was of the view that it would be useful to formulate model legislative provisions to implement recommendations 63-65.

Consequences of expiry or termination of the project agreement

Transfer of assets to the contracting authority or to a new concessionaire

Recommendation 66

159. The text of the recommendation was as follows:

> "The project agreement should lay down the criteria for establishing, as appropriate, the compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new concessionaire or purchased by the contracting authority upon expiry or termination of the project agreement."

160. The Working Group was of the view that the recommendation dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

Financial arrangements upon termination

Recommendation 67

161. The text of the recommendation was as follows:

> "The project agreement should stipulate how compensation due to either party in the event of termination of the project agreement is to be calculated, providing, where appropriate, for compensation for the fair value of works performed under the project agreement, and for losses, including lost profits."

162. It was suggested that the recommendation contained useful advice in order to facilitate the financing of infrastructure projects and that, therefore, it could be usefully translated into a model legislative provision. In drafting a model provision, it was said, the Working Group should consider the relationship between recommendation 67 and recommendation 58, subparagraph (c).

Wind-up and transitional measures

Recommendation 68

163. The text of the recommendation was as follows:

> "The project agreement should set out, as appropriate, the rights and obligations of the parties with respect to:
>
> "(a) The transfer of technology required for the operation of the facility;
>
> "(b) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;
>
> "(c) The provision, by the concessionaire, of operation and maintenance services and the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire."

164. It was suggested that recommendation 68 dealt with important follow-up measures that were of particular significance for developing countries and that, therefore, it was desirable to formulate a model legislative provision to address them.

Chapter VI. Settlement of disputes

Disputes between the contracting authority and the concessionaire

Recommendation 69

165. The text of the recommendation was as follows:

> "The contracting authority should be free to agree to dispute settlement mechanisms regarded by the parties as best suited to the needs of the project."

166. It was generally felt that the principle expressed in recommendation 69, providing the contracting authority with the freedom to agree upon those mechanisms for settling of disputes which the parties deemed to be appropriate to the specific needs of the project (including without limitation arbitration), should be reflected in model legislative provisions. It was pointed out that a legislative sanction of that freedom would provide useful guidance not only to the benefit of countries where explicit prohibitions were

in place (possibly deriving from the subject matter of the dispute or from the public nature of the contracting authority), but also for those legal systems where no clear enabling provision was available and the implementation of contractual mechanisms of settlement of disputes might be resisted by judiciary or administrative courts. Accordingly, the Secretariat was requested to draft a model provision reflecting the substance of legislative recommendation 69.

167. In that connection, it was suggested that different mechanisms of settlement of disputes might be required in respect of each phase of an infrastructure project. It was clarified that mechanisms that might be suitable in respect of the bidding phase, where the parties had not yet entered into an agreement, might not be appropriate in respect of disputes arising subsequent to the award and the entering into of the project agreement. Similarly, specific mechanisms might be required for the various subsequent phases of development of the project.

168. The prevailing view, however, was that it was not desirable to insert such distinctions in the model legislative provision reflecting the substance of recommendation 69. In that connection, it was clarified that that recommendation was meant to be of a general nature and did not purport to suggest any specific method of resolution of disputes.

169. A query was raised as to the relationship between recommendation 69 and recommendation 10, providing for the right of the concessionaire to request a review of regulatory decisions by an independent and impartial body. In response, it was recalled that recommendation 10 envisaged primarily situations where the law provided that complaints by public service providers should be filed with an entity other than the contracting authority, such as a regulatory agency or another governmental agency, while recommendation 69 merely covered disputes arising between the concessionaire and the contracting authority.

170. While recognizing the importance of drawing the attention of the host country's legislators to the need for providing dispute settlement mechanisms for dealing with the situations envisaged in recommendation 10, the Working Group agreed that an attempt to draft model legislative provisions to implement recommendation 10 might prove difficult, in view of the variety of mechanisms that might need to be considered. The Working Group therefore decided that no such model provision was desirable. Nevertheless, an appropriate reference, possibly in a note accompanying the model legislative provisions, should highlight the importance of procedures of review of regulatory decisions to ensure the objective of transparency set forth in the recommendation.

Disputes between the project promoters and between the concessionaire and its lenders, contractors and suppliers

Recommendation 70

171. The text of the recommendation was as follows:

> "The concessionaire and the project promoters should be free to choose the appropriate mechanisms for settling commercial disputes among the project promoters, or disputes between the concessionaire and its lenders, contractors, suppliers and other business partners."

172. It was observed that recommendation 70 usefully spelled out a specific aspect of the general principle of freedom of contract set forth in recommendation 57. Accordingly, it was agreed that it would be useful to draft a model legislative provision reflecting the recommendation, for the purpose of either eliminating existing legal obstacles or to overcoming possible contrary practices of judicial or administrative authorities.

Disputes involving customers or users of the infrastructure facility

Recommendation 71

173. The text of the recommendation was as follows:

> "The concessionaire may be required to make available simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility."

174. It was pointed out that recommendation 71 was not concerned with major disputes between the concessionaire and its customers or users of the infrastructure facility, but with claims or disagreements that had not yet reached that stage.

Given the variety of mechanisms that might be established to implement the recommendation and the practical rather than legislative character of the matter, the Working Group agreed that no model legislative provision reflecting the substance of the recommendation was desirable.

C. Relationship between the draft model legislative provisions and the Legislative Guide

175. Having completed its review of the legislative recommendations contained in the Legislative Guide, the Working Group proceeded to consider the relationship between the model legislative provisions and the Legislative Guide.

176. As a general comment, it was noted that the model legislative provisions, in accordance with the mandate given to the Working Group by the Commission, were expected to become an addition to the Legislative Guide, but that such model provisions were not expected to supplant the recommendations contained in the Guide.

177. It was pointed out, in that connection, that the need for legislators to bear in mind the whole of the contents of the Legislative Guide, whether or not expressly dealt with in the model legislative provisions, should be clearly spelled out, possibly in the preamble or in explanatory notes thereto. As a general view, it was reaffirmed that the Legislative Guide should be preserved as a valuable piece of work and that, accordingly, the model legislative provisions should be thought of as a product aimed at supplementing rather than replacing it. As to the technique to be used in order to achieve that result, several suggestions were made, including establishing a link between the two texts by way of inserting footnotes or cross references to the relevant chapters of the Guide, or drafting a foreword along the lines of the foreword highlighting the relationship between the recommendations and the notes in the Guide.

178. A further proposal was to reproduce the text of the relevant legislative recommendations next to the text of each model legislative provision. While that suggestion attracted some support, concern was expressed that it might prove misleading as to the respective nature and hierarchy of the provisions, especially where only slight differences in language were given. A further concern was that such a technique might result in diminishing the visibility and ultimately the usefulness of the model legislative provisions.

179. After discussion, it was widely felt that a final decision in that respect would be premature. Accordingly, the Working Group decided that it would be advisable to revert to it at a later stage, while bearing in mind all those different suggestions.

180. There was a specific discussion in respect of the relationship between the model legislative provisions on the selection of the concessionaire and the UNCITRAL Model Procurement Law. In that connection, it was suggested (a) that the preamble or the explanatory notes to the model legislative provisions make clear that the selection proceeding was different from tendering, and (b) that there might be more detailed references in footnotes or otherwise to specific provisions of the UNCITRAL Model Procurement Law.

Notes

[1] See *Official* Records *of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 369.

[2] Subject to approval by the Commission at its thirty-fifth session.

[3] See *Official Records of the General Assembly, Fifty-fifth* Session*, Supplement No. 17* (A/55/17), paras. 195-368.

[4] Ibid., para. 375.

[5] Ibid., para. 379.

[6] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 369.

[7] Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 168.