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Thirty-third session

SUMMARY RECORD OF THE 700th MEETING

Held at Headquarters, New York,
on Wednesday, 28 June 2000, at 10 a.m.

Chairman:

Mr. Jeffrey CHAN

(Singapore)

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(continued)

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The meeting was called to order at 10.15 a.m.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS
(continued) (A/CN.9/471 and Add.1-9)

1. The CHAIRMAN invited the Commission to resume consideration of the draft legislative recommendations contained in document A/CN.9/471/Add.9.

Chapter IV: Construction and Operation of Infrastructure (continued)

2. Mr. WALLACE (United States of America) reiterated his support for the Egyptian proposal that reference to the project agreement should be included in the title of chapter IV.

3. Mr. SARIE ELDIN (Egypt), replying to a comment made by the representative of Germany at the previous meeting, said that he saw no reason why the current titles of both chapter IV and chapter V could not be preceded by the words "Project Agreement:"; alternatively, chapter IV could be given a longer title incorporating several of the subheadings contained therein.

4. The CHAIRMAN pointed out that the last-mentioned suggestion would make the title rather long.

5. Mr. ONG (Singapore) suggested that the chapter title should be amended to read "Content and Implementation of the Project Agreement".

6. Mr. LALLIOT (France) said that while he had no preference as to the chapter title, he strongly objected to the Egyptian proposal to combine chapters IV and V.

7. Mr. RENGGER (Germany), Mr. MARADIAGA (Honduras) and Mr. Al-SAIDI (Observer for Kuwait) endorsed the proposal made by the representative of Singapore.

8. Mr. SARIE ELDIN (Egypt) said that, upon reflection, he too was prepared to support that proposal.

9. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the Secretariat had deliberately chosen a neutral wording for the title because there had been considerable disagreement on whether the issues covered in the chapter should be addressed through a statutory or case law approach. For that reason, the Commission might wish to postpone a decision on the title until it had considered all the recommendations contained in chapters IV and V.

10. The CHAIRMAN said that if there was no objection, he would take it that the Commission wished to proceed along those lines.

11. It was so decided.

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Draft recommendation 39 (continued)

12. Mr. MORENO RUFFINELLI (Paraguay) and Mr. MARADIAGA (Honduras) proposed minor drafting changes in the Spanish text of the recommendation.

13. Mr. WIWEN-NILSSON (Observer for Sweden) said that he had spoken in error at the previous meeting: he had meant to propose that the reference to recommendations 39 to 65 should be amended to "recommendations 40 to 67".

14. Mr. RENGER (Germany) asked the Secretariat to explain the basis on which those recommendations had been selected.

15. Mr. ESTRELLA FARIA (International Trade Law Branch) said that in fact, a reference to recommendation 39 would be redundant and that recommendation 66 had been inadvertently omitted from the series. However, because recommendation 67 had been the source of considerable conflict at the previous session of the Commission, it had been decided that the issues raised therein should be left to the discretion of the parties concerned. Thus, the text should read "recommendations 40 to 66".

16. Mr. WIWEN-NILSSON (Observer for Sweden) pointed out that in the absence of that explanation, the reader might wonder why recommendation 67 had not been mentioned; moreover, there might be other recommendations in the series on which there was not full consensus. Thus, it would be best to mention recommendations 40 to 67.

17. The CHAIRMAN suggested that the Commission should complete its consideration of recommendations 40 to 67 before finalizing recommendation 39.

18. Mr. WALLACE (United States of America) said that such a procedure was unnecessary; the use of the words "might" and "may" rather than "should" ensured flexibility for the parties, and the Commission should simply adopt the Swedish proposal.

19. Mr. SARIE ELDIN (Egypt) said that since some recommendations in the series used the word "should" while others, less dogmatic, used "may", the best solution might be to delete the entire second half of the recommendation, which would thus end with the word "agreement".

20. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the reference to specific recommendations had been included at the suggestion of outside experts; the Commission was free to delete it.

21. Ms. Li Ling (China) said that she would prefer to keep the list of recommendations, which provided useful guidance on the issues to be covered in the project agreement. She therefore supported the Swedish proposal.

22. Mr. RENGER (Germany) and Mr. KASHIWAGI (Japan) said that they agreed with the representative of China.

23. The CHAIRMAN said that there seemed to be general agreement on the Swedish proposal.

24. Draft recommendation 39, as orally amended, was adopted.

Draft recommendation 40

25. Mr. SARIE ELDIN (Egypt) asked whether the words "Unless otherwise provided" were intended to mean "provided by law" or "agreed to by the parties". The English was ambiguous whereas the Arabic clearly suggested the former interpretation.

26. Mr. ESTRELLA FARIA (International Trade Law Branch) said that after extensive discussion at the previous session of the Commission, the words "Unless otherwise provided" had been proposed by the observer for Canada. While the ambiguity of those words was deliberate, the Arabic translators at the United Nations Office at Vienna had warned the Secretariat that it might be difficult to retain that neutrality in the Arabic text.

27. The CHAIRMAN said that unless the Arabic-speaking participants could suggest an alternative wording, he saw no solution to the problem. He would therefore take it that the Commission wished to adopt recommendation 40 in its current form.

28. Draft recommendation 40 was adopted.

Draft recommendations 41 and 42

29. Draft recommendations 41 and 42 were adopted.

Draft recommendation 43

30. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that the recommendation had originally contained more detailed provision on Government responsibility for providing the land, and there had been an extensive discussion as to whether that obligation would be carried out by compulsory acquisition or by other means. It had eventually been decided, in view of the many different administrative arrangements existing in the various host countries, that it would not be feasible to attempt to formulate a recommendation that would be applicable to all legal systems. The notes discussed the need for acquisition of the land, but there was no specific recommendation.

31. Whereas draft recommendation 44 dealt only with easements and not with compulsory purchase, which was discussed in the notes, recommendation 43 addressed the different issue of clarifying who owned what, once the land had been acquired and the project built.

32. Ms. FOLLIOT (France) suggested that the words "de l'Etat" in the French version of the text were too restrictive and should be replaced by the words "des autorités contractantes".

33. Mr. MARADIAGA (Honduras) pointed out that recommendation 43 referred in two places to termination of the project agreement. He was not sure that the word "rescindirse" was the appropriate word to use in the Spanish version of the text, and he requested clarification.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the term used in the Spanish version did not correspond exactly to the word used in the English version, which had a broader meaning. However, during the final revision of the text, the Commission would consult colleagues from the Spanish Translation Service to ensure that the translation was correct.

35. Mr. WIWEN-NILLSON (Observer for Sweden) suggested that the expression "propriété publique" should be used in the French text.

36. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the phrase in the French version would be amended to read "propriété publique".

37. Draft recommendation 43, as orally amended, was adopted.

Draft recommendation 44

38. Mr. WALLACE (United States of America), referring to the heading "The project site and easements", said that recommendation 44 dealt only with easements, although assistance with the acquisition of the site was probably a sine qua non of the project in many cases. Although it might not be required in every case, the text should refer to the acquisition of site and easements. The word "should" should be changed to "may", and the text amended to read "The contracting authority may have the authority to assist the concessionaire in the acquisition of the site and easements ...". The text would then correspond to the heading.

39. Mr. ESTRELLA FARIA (International Trade Law Branch) noted that if the Commission agreed to the United States proposal, a minor amendment would have to be made to recommendation 44. The order of recommendations 43 and 44 should be reversed, and the notes rearranged.

40. Mr. MAZINI (Observer for Morocco) wondered whether it was appropriate to refer to "acquisition" of easements. It would seem more appropriate to refer to benefiting from easements, rather than acquiring them. He requested the Secretariat to find a more appropriate term.

41. Ms. GAVRILESCU (Romania) asked whether the United States delegation wanted to modify the wording of recommendation 44. She agreed with the Moroccan delegation that easements were granted by the host country rather than acquired. If the Commission was going to change the main thrust of the text, it could open a very protracted discussion.

42. Ms. NIKANJAM (Islamic Republic of Iran) said she would not object to retaining the present order of the recommendations. The rights to easement, for her delegation, derived from property rights. The question of whether the assets involved were public or private property should be discussed first, and then the exceptional cases of rights to easement should follow.

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43. Ms. FOLLIOT (France) said that although the use of the word "servitudes" in the French version could lead to confusion, it had been chosen by the Secretariat and the Commission. As its use in the text was defined very precisely in note 31 (in document A/CN.9/471/Add.5) there did not seem to be any need for further concern.

44. Mr. SARIE ELDIN (Egypt) supported the United States proposal. It seemed straightforward that the project agreement should refer to acquisition of the site, which was perhaps more important than the easements. He would accept any rearrangement found necessary by the Secretariat.

45. Mr. DEWAST (European Lawyers Union) suggested that the words "droits d'accès" could be used in the French text instead of "servitudes" as a translation of "easements".

46. Ms. GAVRILESCU (Romania) said that her delegation could accept the term "droits d'accès", but not the idea of acquiring the site, which would run counter to the Romanian constitution.

47. Mr. MAZINI (Observer for Morocco) suggested the wording "The contracting authority should assist the concessionaire in benefiting from the rules of easements". Easement implied more than the right of access; it also included the right of transit, the right of temporary use and a number of other legal concepts in the Moroccan legal system. He therefore preferred to retain the word "servitudes".

48. It did not seem necessary to refer to acquisition of the site. The concessionaire could purchase the site in the usual way, or it could be assisted by the State, which would amount to expropriation. Insisting on adding such a reference would open another debate.

49. Mr. LALLIOT (France), referring to the Moroccan proposal, said that the sole purpose of the second sentence was to explain the term "easements", which had a very precise legal meaning. The meaning of the French term "servitudes" had a much broader meaning than "droits d'accès".

50. In response to the concerns expressed by the United States and Egyptian delegations, he would prefer a reference to acquisition of the land, in the first sentence, rather than acquisition of the site. The sentence could begin "The contracting authority should assist the concessionaire in the purchase of the land needed ...", which would make a complete and well-balanced recommendation, without going into the difficult and sensitive subject of expropriation rights. The first sentence would refer to acquisition of the land, and the second would refer to rights associated with acquisition, which were referred to as "easements" in some legal systems. The recommendation would also then be consistent with the notes.

51. Mr. WIWEN-NILSSON (Observer for Sweden) said that the two sentences did not deal with the same subject. The second sentence related only to requirements for the construction phase, and hence had a more narrow meaning than the first sentence.

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52. The Commission should respect the fact that some countries had difficulty with the concessionaire's acquiring ownership of the land. Instead of referring to the right to acquire the site, the first sentence could be amended to read: "... in the acquisition of easements and other rights to land ..." without specifying whether it was ownership, leasing or other rights, so that it would be appropriate for the different legal systems.

53. Mr. MARADIAGA (Honduras) said that he understood that recommendation 44 was dealing with easements rather than property rights. On another point, he pointed out that the end of the second sentence should be amended to read: "construction, operation and maintenance of the facility".

54. Ms. GAVRILESCU (Romania) said that if a compromise could not be found, Romania would not be able to accept the legislative guide. She suggested that assistance with acquisition or leasing of the site could be referred to as options rather than obligations, to make text more acceptable. However, the best solution might be to leave the original text of the recommendation, without any additions or deletions. It was, after all, based on the drafting decisions taken at a previous session of the Commission.

55. Mr. KASHIWAGI (Japan) said that it was very important for the construction company and the operating company to receive assistance in acquiring the site and easements, and such provision was often included in construction contracts. He insisted that there should be some reference to government assistance in the recommendation.

56. The two sentences were quite different. The first said that the contracting authority "should" assist, and the second said that the law "might" empower the concessionaire. He shared the views of the observer for Sweden, who had offered a compromise solution.

57. Mr. ESTRELLA FARIA (International Trade Law Branch) said that it was clear from the notes on chapter IV, in paragraphs 23 to 25 of document A/CN.9/471/Add.5, that in some legal systems all the assets used in public service were public property and remained as such. In other systems there could be different categories of assets, some being the property of the concessionaire, and under other systems all assets might be private property. No single solution was imposed by the guide.

58. With regard to the French proposal, and the concerns expressed by the Romanian delegation, if the contracting authority provided assistance with acquiring the site, the question arose of who was the owner. Under many legal systems, any expropriated property became public property. The contracting authority was required only to do its best to make the site available to the concessionaire so that the project could be implemented. The question of ownership was left to the law of the host country.

59. Mr. ONG (Singapore) said that recommendation 44 should be read in conjunction with paragraphs 31 and 32 of document A/CN.9/471/Add.5. Recommendation 44 referred to two ways in which a concessionaire could be assisted in acquiring easements; for the sake of clarity, the words "another solution might be for" could be added at the beginning of the second sentence.

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60. Mr. DARCY (United Kingdom) said that his delegation supported recommendation 44, and agreed with Honduras that it made no reference to the ownership of property. It was important that the concessionaire should have the necessary rights to be able to operate, construct and maintain a facility. Rather than referring to "easements", it might be better to use the words "the necessary rights".

The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.

61. Mr. SARIE ELDIN (Egypt) said his delegation felt that it was very important to add a reference to the project site, which had nothing to do with the question of ownership. The meaning of the word "easements" was clear in the English and Arabic texts.

62. Mr. MAZINI (Observer for Morocco) said that his delegation endorsed the explanation that recommendation 44 did not incorporate the idea of any transfer of property, and could support the recommendation if it referred only to easements. The word "acquisition" in the first sentence should be changed.

63. Mr. PINZÓN SÁNCHEZ (Colombia) said that his delegation agreed that recommendation 44 did not refer to property rights. It had no difficulty with the use of the word "easements", the meaning of which was clarified in the second sentence.

64. Mr. LALLIOT (France) proposed that in the first sentence, the words "à acquérir les servitudes" should be changed to "à disposer des droits", as a more neutral formulation.

65. Ms. GAVRILESCU (Romania) said that her delegation supported that proposal.

66. Mr. ESTRELLA FARIA (International Trade Law Branch) suggested that the first sentence should read: "The contracting authority should assist the concessionaire in obtaining rights related to the project site".

67. Mr. MARADIAGA (Honduras) said that his delegation supported that suggestion. He proposed that the Spanish wording should be: "La autoridad contratante debe otorgar las facilidades para que el concesionario pueda disponer de las servidumbres necesarias ...".

68. Mr. Al-NASSER (Observer for Saudi Arabia) said that his delegation had no difficulty with the Secretariat's suggestion. However, the words "except property rights" should be added at the end of the first sentence.

69. Mr. MOHAMED (Nigeria) supported the revision proposed by the Secretariat, which showed clearly that the point at issue was land and related sites. The French amendment introduced a similar clarification. On a different point, he asked why the first sentence contained the phrase "operation, construction and maintenance", whereas the second mentioned only "construction and operation".

70. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the omission of "maintenance" in the second sentence was inadvertent and would be rectified.

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71. Ms. GAVRILESCU (Romania) said that her delegation found the wording proposed by the representatives of France and Honduras and the observer for Saudi Arabia more acceptable than that of the Secretariat, which seemed to depart from the position advanced by France. In the French proposal, however, "disposer" might be preferable to "jouir".

72. Mr. KASHIWAGI (Japan) expressed his delegation's strong support for the Secretariat's proposal. It was clear and avoided any possible confusion over the word "easements".

73. Mr. SARIE ELDIN (Egypt), supported by Mr. WALLACE (United States of America), expressed full support for the revision proposed by the Secretariat.

74. Mr. MAZINI (Observer for Morocco) expressed a preference for the wording proposed by the representatives of France and Honduras, though he believed that the Commission was largely in agreement on the substance of the recommendation. He, too, would prefer the word "disposer" to "jouir" in the French version. The use of the word "acquérir", which appeared in the proposal by the Secretariat, might cause confusion.

75. The CHAIRMAN pointed out that the word used in English had been "obtained". Moreover, as conveyed by the interpretation, the Honduran proposal had contained the word "easements", which had seemed to be the sticking point for some delegations.

76. Mr. MAZINI (Observer for Morocco) confirmed that the use - and possible misuse - of the word "acquérir" constituted the main defect in the Secretariat's proposal. The representative of Honduras had not, however, used the Spanish term for "easements".

77. Mr. WIWEN-NILSSON (Observer for Sweden) expressed support for the English version of the Secretariat's proposal. Any remaining difficulties were surely linguistic and could be resolved. He also suggested the word "obtenir" as an alternative to "acquérir".

78. Mr. LALLIOT (France) said that any differences between his delegation's proposal and the Secretariat's was linguistic and could be resolved later.

79. Draft recommendation 44, as orally amended, was adopted.

Draft recommendations 45-47

80. Draft recommendations 45-47 were adopted.

Draft recommendation 48

81. Ms. FOLLIOT (France) said that her delegation would prefer the word "utilisé" to the word "détenu", as being more neutral. Alternatively, the last phrase could be deleted in the draft recommendation, which would then end with the words "public property".

82. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the change from "détenu" to "utilisé" was substantive enough to involve a change in the other languages.

83. Mr. WALLACE (United States of America), Ms. GAVRILESCU (Romania) and Mr. WIWEN-NILSSON (Observer for Sweden) supported the deletion of the last phrase of the draft recommendation.

84. Mr. MOHAMED (Nigeria) proposed that, as in draft recommendation 44, the word "maintained" should be inserted in the first sentence.

85. Mr. MARADIAGA (Honduras) said that in the Spanish text the word "obtener" was preferable to the word "recaudar".

86. Mr. RENGER (Germany) said that in English there was a significant difference between "obtaining" and "raising" funds.

87. The CHAIRMAN said that he took it that the Commission wished to delete the final phrase of the draft recommendation. The discussion on the Honduran amendment would be resumed at the 701st meeting.

The meeting rose at 1 p.m.