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Thirty-third session

SUMMARY RECORD OF THE 701st MEETING

Held at Headquarters, New York,
on Wednesday, 28 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 3.10 p.m.

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

Draft recommendation 48

1. The CHAIRMAN said that the Commission had resolved all issues relating to the recommendation with the exception of whether the first line should read "raising" or "obtaining" the funds required.

2. Mr. MARADIAGA (Honduras) said that, following consultations with the representatives of Spain and Paraguay, he no longer had any objections to the use of the phrase "recaudar los fondos" ("raising the funds") in Spanish.

3. Mr. Al-SAIDI (Observer for Kuwait) said that he still had doubts about whether the Arabic and French translations of document A/CN.9/471/Add.9 adequately reflected the meaning of the English word "raising".

4. The CHAIRMAN said that the Secretariat would look into the matter.

5. Draft recommendation 48 was adopted.

Draft recommendation 49

6. Mr. WALLACE (United States of America) suggested that the second sentence should be deleted. The first and second sentences both dealt with whether the contracting authority should give its consent to an assignment of the concession. While the second sentence stated that the concession should not be assigned without the consent of the contracting authority, the first sentence left open the possibility that such consent might not be required at all. It therefore reflected the type of flexibility that might be needed in the types of projects under consideration. The second sentence appeared to be too categorical in the light of paragraphs 61 to 63 of the report of the Secretary-General (A/CN.9/471/Add.5).

7. The CHAIRMAN said that the suggestion made by the United States representative raised a policy issue. He recalled that at the conclusion of its previous session, the Commission had decided that there should be no interference with policies which it had already established. He invited the representative of the Secretariat to comment on whether the United States proposal adequately reflected the Commission's previous decision.

8. Mr. ESTRELLA FARIA (International Trade Law Branch) said that there had been an extensive debate at the previous session as to the link between so-called direct agreements between the contracting authority and the lenders and the other principle reflected in the second sentence of the recommendation, to which the United States representative had referred. The final formulation had been arrived at following negotiations held between the Secretariat and outside experts at the request of the Commission. The idea was that the second sentence constituted a general principle and the first sentence an exception thereto.

The first sentence described a situation where an exception would be made by means of a direct agreement between the contracting authority and the lenders allowing for "step-in" rights or the transfer of the concession to a third party. Although strong views had also been expressed against the general principle as reflected in the second sentence, the prevailing view had been that the principle was one that was common to many legal systems, since the concessionaire was selected because of its ability to carry out the project and it should not be free to transfer that responsibility to third parties. In the course of the discussion it had been agreed to combine the two ideas, but perhaps greater clarity would be achieved if they were reversed.

9. The CHAIRMAN said that, as explained by the Secretariat, the decision reached by the Commission after much debate was the reverse of the position put forward by the United States delegation. The Secretariat was now proposing that the principle to be recommended was that concessionaires should not be free to assign the concession to a third party without the consent of the contracting authority except in the circumstances set out in the first sentence.

10. Mr. SARIE ELDIN (Egypt) said that he was grateful to the Secretariat for the clarification provided and had intended to make the same proposal.

11. Ms. GAVRILESCU (Romania) and Mr. MARADIAGA (Honduras) said that they, too, supported the Secretariat's proposal.

12. Draft recommendation 49, as orally amended, was adopted.

Draft recommendation 50

13. Ms. GAVRILESCU (Romania) requested clarification of the term "intérêt majoritaire" (majority interest).

14. The CHAIRMAN said that the word "majority" did not appear in the English version.

15. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the term used in English was "controlling interest". In the case of a joint stock corporation, that would mean the person or entity controlling the majority of the voting shares in the capital of that corporation. The French delegation appeared to be satisfied that the term used in the French version adequately reflected the original English text.

16. Mr. JACOBSON (United States of America) suggested that the phrase "under specified circumstances" should be added at the end of the recommendation. That would reflect the discussion in paragraphs 63 to 68 of document A/CN.9/471/Add.5, which made it clear that restrictions on the transfer of the equity interest were limited in various ways and might not be appropriate in many cases.

17. The CHAIRMAN said that the United States proposal would significantly change the sense of the recommendation as drafted by the Secretariat. Under the United States proposal, transfer of a controlling interest in the concessionaire would be allowed except under certain specified circumstances. He invited the

representative of the Secretariat to comment on whether that proposal adequately reflected the decision reached by the Commission at its previous session.

18. Mr. ESTRELLA FARIA (International Trade Law Branch) said that in its original draft the Secretariat had presented a more detailed provision, spelling out the circumstances under which it might be reasonable for the contracting authority to require that any transfer should be subject to its prior consent. A full discussion of the matter was to be found in paragraphs 64 to 66 of document A/CN.9/471/Add.5. It should be noted that recommendation 50 was one of the few recommendations in chapter IV that used the word "may"; it was therefore not as strong as the other recommendations in the chapter. The point made by the United States representative was implicit in the wording of the recommendation. Nevertheless, should the United States proposal be adopted, it would not be inconsistent with the overall sense of the Commission when it had last discussed the issue.

19. Mr. WIWEN-NILSSON (Observer for Sweden) suggested that the French version might be preferable to the English one, as the French text omitted the words "in the capital of".

20. Mr. SARIE ELDIN (Egypt) said that, while it was legitimate to underscore the principle of the prior approval of the contracting authority, the concern expressed by the United States delegation might be allayed by adding the words "unless agreed otherwise" at the end of the recommendation.

21. Mr. JACOBSON (United States of America) said that he had no objection to the Egyptian proposal.

22. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to add the words "under specified circumstances, unless agreed otherwise" at the end of the recommendation and to delete the phrase "in the capital of".

23. Draft recommendation 50, as orally amended, was adopted.

Draft recommendation 51

24. Draft recommendation 51 was adopted.

Draft recommendation 52

25. Mr. MAZINI (Observer for Morocco) said that the Arabic translation of the recommendation reflected the exact opposite of the principle that the Commission was discussing. He suggested that some drafting changes should be made to the text: (a) should read "... so as to meet the evolving actual demand for the service"; (b) should read "... under conditions guaranteeing equal access to all users"; and (d) should read "The access of other service providers to the interconnection to any public infrastructure network operated by the concessionaire under objective, transparent and non-discriminatory conditions."

26. The CHAIRMAN asked whether the Commission as a whole was satisfied with the text as drafted.

27. Ms. NIKANJAM (Islamic Republic of Iran), referring to (a), said that it was unclear what the phrase "actual demand for the service" meant.

28. Mr. MORÁN BOVIO (Spain) and Mr. RENGER (Germany) said that the text as drafted adequately reflected the discussion at the previous session.

29. The CHAIRMAN said that the text would remain as drafted.

30. Draft recommendation 52 was adopted.

Draft recommendations 53 to 55

31. Draft recommendations 53 to 55 were adopted.

Draft recommendation 56

32. Mr. JACOBSON (United States of America) suggested that the final clause should be amended to read "except in exceptional circumstances". The intention underlying the recommendation was that parties should be free to choose the applicable law.

33. The CHAIRMAN requested the representative of the Secretariat to clarify whether the United States proposal related to a matter of policy.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) said that, to the extent of his recollection, the understanding of the Commission at the previous session had been in line with what the United States delegation was currently suggesting. The prevailing view had been that the concessionaire should have sufficient flexibility to agree on the applicable law with its contractors. "Public policy" referred to situations in which the concessionaire was an entity of public law that would be under certain restrictions in terms of agreeing to the application of foreign law to a contract that was executed in the country with another party that was a national of that same State. In some countries that might be considered a violation of public policy. Such circumstances would, however, be exceptional.

35. Ms. Li Ling (China) suggested that the words "public policy" at the end of draft recommendation 56 should be followed by the words "and law", since in her country, for example, the law provided that in certain cases Chinese law must govern such contracts.

36. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the philosophy of the Commission on the matter was reflected in paragraph 264 of the report on the work of the thirty-second session (A/54/17). At that session the Commission had recognized that freedom to choose the law governing commercial contracts was restricted in some countries under certain circumstances for reasons of compelling public policy, for example, in contracts where governmental agencies or consumers were a party. The prevailing view, however, had been that it was not desirable to restrict choice of law in general.

37. Mr. ADENSAMER (Austria) said that his delegation supported the Chinese suggestion and could not endorse the United States proposal. In Austria, as

indeed throughout Europe, consumer protection was considered very important and was enshrined in law, and contracts with consumers were too common to fit under the category of "exceptional cases". China's reminder that choice of law might be restricted by law as well as public policy was useful, because the term "public policy" could be construed narrowly as meaning public order, which would not cover the situations he had mentioned.

38. Mr. GHAZIZADEH (Islamic Republic of Iran) and Mr. MORENO RUFFINELLI (Paraguay) thought that a reference to the host country's law, as suggested by the Chinese representative, would provide welcome clarification.

39. Mr. WIWEN-NILSSON (Observer for Sweden) said that the text was better as it stood. The United States wording, "except in exceptional cases", might, contrary to the proposer's intention, be interpreted even more broadly than the original language. With regard to the Chinese suggestion, it should be recalled that whatever the Commission recommended, public policy would prevail in any case. The document was intended as a guide, not as a convention, and no country would be in any way bound to follow its recommendations.

40. Ms. MANGKLATANAKUL (Thailand) and Mr. Al-NASSER (Observer for Saudi Arabia) observed that it would be better to adhere to the language already agreed upon, since public policy would prevail in any case.

41. Mr. HERRMANN (Secretary of the Commission) said that the mention of "law" would result in something of a circular argument. The draft recommendations were intended as a guide to legislators, who would be looking at their own national laws and adapting them, to the extent that they were persuaded by the guide. Existing laws restricting choice might conceivably be changed in that exercise, unless they were based on the firm policy of the Government.

42. Mr. ADENSAMER (Austria) said that he had been convinced by the reasoning of the Secretary.

43. Ms. Li Ling (China) said that her delegation still felt that a reference to law would make the draft recommendation clearer.

44. The CHAIRMAN asked whether supporters of the proposed amendments were still of the same mind. Hearing no response, he took it that the Commission was willing to preserve the wording as it stood.

45. Draft recommendation 56 was adopted.

Draft recommendations 57 to 59

46. Draft recommendations 57 to 59 were adopted.

Draft recommendations 60 and 61

47. Mr. MAZINI (Morocco) suggested that draft recommendation 61 (a) could be made more concise by replacing the phrase "the occurrence of circumstances beyond either party's reasonable control" with the term "force majeure", which had a well-understood legal meaning.

48. Mr. HERRMANN (Secretary of the Commission) said that the equivalent in English of "force majeure" was "acts of God and acts of war", a concept which was too narrow for the purposes of draft recommendation 61 (a). It was customary in the Commission=s work to attempt to avoid technical terms, which might be well understood only in certain languages or legal systems, and to use instead more descriptive language, a policy that had been followed in other UNCITRAL texts, including the United Nations Sales Convention.

49. Mr. MAZINI (Observer for Morocco) said that he accepted the Secretariat's explanation, but he still found the word "reasonable" modifying "control" to be ambiguous and proposed deleting it.

50. Mr. RENGER (Germany) recalled that the chapter had been discussed at length during the thirty-second session of the Commission, a debate which was summarized in paragraphs 206 to 253 of the report on the session (A/54/17). To the best of his recollection, the present wording of draft recommendation 61 faithfully reflected the outcome of that debate.

51. The CHAIRMAN noted that there did not appear to be any support for the proposal by the observer for Morocco.

52. Draft recommendations 60 and 61 were adopted.

Draft recommendation 62

53. Mr. Al-NASSER (Observer for Saudi Arabia) said that his delegation would prefer a simpler wording for the first part of draft recommendation 62 (a). The words "it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations" should be replaced by "the concessionaire is unable to perform its obligations".

54. Mr. ESTRELLA FARIA (International Trade Law Branch) explained that the thinking behind that wording, and indeed behind the entire section on termination of the project agreement, was that the contracting authority should be empowered to ensure that services continued to be provided. By waiting until the concessionaire had already demonstrated its inability to perform its obligations, the contracting authority might fail in its own duty to ensure continuity of services.

55. The CHAIRMAN noted that there did not appear to be any support for the proposal by the observer for Saudi Arabia.

56. Draft recommendation 62 was adopted.

Draft recommendation 63

57. Ms. FOLLIOT (France) pointed out that the parallel presentation of draft recommendation 62 on termination by the contracting authority and draft recommendation 63 on termination by the concessionaire, together with the broad wording of the latter, might give the misleading impression that the concessionaire had the same rights to terminate the project agreement unilaterally as the contracting authority.

58. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the point raised by the representative of France had been debated at the previous session of the Commission, and the concern had been addressed in paragraph 28 of the notes on chapter V (A/CN.9/471/Add.6), which acknowledged that some legal systems did not recognize the concessionaire's right to terminate the project agreement unilaterally, but only the right to request a third party, such as the competent court, to declare the termination of the project agreement. Draft recommendations 62 and 63 had been made parallel for the sake of clarity of style.

59. The CHAIRMAN noted that there did not appear to be any interest in rewording draft recommendation 63.

60. Draft recommendation 63 was adopted.

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

Draft recommendations 64 to 67

61. Draft recommendations 64 to 67 were adopted.

62. The CHAIRMAN, recalling that the inclusion of the term "project agreement" in the title of chapter V had excited some doubts, invited suggestions for amending the titles of either chapter V or chapter IV.

63. Mr. MORÁN BOVIO (Spain) said that he preferred to leave the title of chapter V unaltered. It was an adequate description of the subject matter of the chapter, and if amended it might have an adverse impact on other parts of the draft guide.

64. Mr. SARIE ELDIN (Egypt) felt that the title of chapter IV was misleading, because that chapter did not deal with the various phases of construction. He referred to an earlier proposal by the representative of Singapore to amend the title to read "Content and implementation of the project agreement". That amendment could be adopted, the term "agreement" being replaced by "documents", since the construction and operation of a project might be dealt with in documents other than the agreement. The title of chapter V did not require amendment, because that chapter was concerned with specific aspects of the project agreement as such.

65. Mr. RENGER (Germany) said that he was reluctant to see the title of chapter IV altered. The notes made clear that the scope of the chapter went beyond the project agreement itself, dealing mainly with the construction works, the operation of the infrastructure and general contractual arrangements. The neutral wording of the title therefore offered advantages which should not be sacrificed.

66. Mr. SARIE ELDIN (Egypt) said that he did not agree with the German representative. In addition to the construction aspects of the project, chapter IV also dealt with the financial arrangements, assets and easements, the organization of the concessionaire, security interests, the assignment of the concession, and the transfer of a controlling interest in the project company.

All those issues were quite unrelated to the construction process. The title was therefore misleading, because it dealt with only part of the subject matter of the chapter.

67. Mr. WIWEN-NILSSON (Observer for Sweden) supported the comments just made. However, since no proposals had been made for a new title, he preferred to leave the question of its wording to the Secretariat.

68. Ms. Li Ling (China) also took the view that the content of chapter IV did not wholly conform to its title, since many aspects of the project agreement were covered in the chapter. She suggested including the words "project agreement" in the title.

69. Mr. WALLACE (United States of America) agreed with the observer for Sweden and the representative of China. He pointed out that there was no mention of the project agreement itself in the titles of most of the chapters. Chapter IV dealt with many things. It was quite appropriate to include the words "construction and operation" in its title, but that was not inconsistent with adding a reference to the project agreement. He suggested that the title might read "Content and implementation of the project agreement" or "The project agreement: construction and operation".

70. The CHAIRMAN observed that chapter IV covered the legal rules governing the project agreement, not merely the agreement.

71. Mr. WALLACE (United States of America) proposed that the title should read "Legal framework, content and implementation of project agreement".

72. Mr. DARCY (United Kingdom) said that he was happy to leave the wording of the title to the Secretariat.

73. Mr. PANG (Singapore) suggested "Execution of the infrastructure project".

74. The CHAIRMAN said that the prevailing view in the Commission was to follow the wording proposed by the representative of the United States, to include a reference to the project but not necessarily to the agreement, and to leave it to the Secretariat to determine the final wording.

75. It was so decided.

Draft recommendation 68

76. Mr. ESTRELLA FARIA (International Trade Law Branch) explained that the new text in the notes on chapter VI (A/CN.9/471/Add.7) reflected the revision of that chapter which had taken place at the Commission's previous session. The Secretariat had endeavoured in the notes to strike a balance between the interests of private parties in achieving flexibility in their arrangements and public policy concerns on the part of contracting authorities. However, it had not sought to enter into the details of dispute settlement procedures. Because little action was required from the Commission in a legislative sense, there were only four recommendations in chapter VI.

77. Ms. NIKANJAM (Islamic Republic of Iran) said that, since arbitration was only one of the methods of dispute settlement, the reference to it in draft recommendation 68 should be deleted.

78. The CHAIRMAN said the Commission should decide on its recommendations for dispute settlement, as a matter of policy.

79. Mr. SARIE ELDIN (Egypt) said that arrangements for arbitration outside the host country of the project should receive the Commission's endorsement. He suggested the insertion of the term "offshore" before "arbitration". However, judicial methods of dispute settlement should not be ruled out.

80. Mr. MORÁN BOVIO (Spain) said that the reference to arbitration was appropriate, because it was not always clear in relations between contracting authorities and concessionaires that there was a possibility of arbitration in the event of a dispute. The text of draft recommendation 68 adequately provided for all methods of dispute settlement and did not require any change.

81. The CHAIRMAN said that the issue to be decided was whether the wording of draft recommendation 68 was appropriate in a guide for legislators.

82. Mr. WALLACE (United States of America) said that the text of draft recommendation 68 did not make clear from which source the contracting authority derived its freedom to agree to various dispute settlement mechanisms. As a matter of logic, he agreed with the Iranian representative that the reference to arbitration was not necessary. However, many foreign investors would insist on the inclusion of such a reference. The Constitution of Turkey had recently been amended to provide for the possibility of arbitration, without which there could be no foreign investment in the energy sector. As the notes explained, different methods of dispute settlement were used at different stages of a project. There was also the problem of regulation: could a private arbitration override a regulatory decision? Since the notes commented very fully on alternative dispute settlement mechanisms, he felt that the deletion or retention of the words "including arbitration" in draft recommendation 68 was not a vital issue.

83. Mr. MYERS (Observer for the International Bar Association) pointed out that arbitration was the only method of adjudication which was not consensual. He did not object to the deletion or otherwise of the reference to arbitration, but he urged the Commission to keep its legislative recommendations simple and neutral, to enable States and contracting parties to choose the methods of dispute settlement which suited them best.

84. Ms. Li Ling (China) said that it was preferable to delete the reference to arbitration, because it was only one of the available methods. If it was mentioned, the other methods should be mentioned too.

85. Mr. MOHAMED (Nigeria) said that it did not really matter whether or not the reference to arbitration was deleted, but that if it was he would propose amending the recommendation to read that 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 rather than simply "as suited".

86. Mr. WIWEN-NILSSON (Observer for Sweden) said that his delegation would like to retain the explicit reference to arbitration. An arbitration clause was one of the first things most investors asked for, and they would object if Governments excluded it. If the reference to arbitration was deleted and if the notes on arbitration (A/CN.9/471/Add.7, paras. 30-38) remained neutral, it would not be clear that there was a preference in practice for arbitration.

87. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the observer for the International Bar Association had rightly pointed out why arbitration had been singled out in the recommendation. The Secretariat's review of national legislations and its consultations with experts, including representatives of regional investment banks and other multilateral lending agencies, had made plain that there was no legal obstacle to the use of other non-binding methods such as mediation. Possible obstacles to the freedom of the parties to agree to dispute settlement mechanisms arose only in States that made the court system the only option. Recourse to the courts was, of course, always available everywhere.

88. As to the concerns of the Swedish delegation, neither recommendations 68 and 68 bis nor the notes on them expressed a preference for any one method, since some legal systems still did not allow arbitration. The notes described what the outlook of the various parties and the expectations and preferences of the investors were likely to be and indicated that most private investors preferred arbitration, especially international arbitration. The draft Legislative Guide thus gave only a narrative account of the advantages and disadvantages of the various mechanisms without making a judgement as to whether a State should limit dispute settlement to the judicial system or whether it should instead be more flexible.

89. Mr. MARKUS (Observer for Switzerland) said that the Secretariat's comments were an argument for leaving the text as it stood, because if in some legal systems the arbitration option was in doubt or even forbidden, and if at the same time investors strongly favoured what was obviously the only binding option, the term “including arbitration” covered the situation.

90. Mr. WIWEN-NILSSON (Observer for Sweden) said that if the reference to arbitration in recommendation 68 was deleted, he would propose that the words ", and in many cases required", should be inserted in the third sentence of paragraph 30 of the notes, between the clause “Arbitration is preferred" and the phrase "by private investors and lenders, in particular foreign ones”.

91. Mr. WALLACE (United States of America) said that the Swedish suggestion was an excellent one. Paragraph 30 could in fact be expanded in a number of ways, including the incorporation of Egypt's idea regarding offshore arbitration.

92. The CHAIRMAN said he took it that the Commission wished to leave the suggested revisions of paragraph 30 of the notes to the Secretariat.

93. It was so decided.

94. The CHAIRMAN said that the prevailing view seemed to be either that delegations favoured, or that they would not object to, deletion of the reference to arbitration in draft recommendation 68.

95. Mr. MORÁN BOVIO (Spain) noted that a number of delegations had emphasized the importance of the reference to arbitration. It would surely be a mistake not to draw attention to the dispute settlement method to which, the bulk of the notes on recommendation 68 were devoted.

96. Mr. PINZÓN SÁNCHEZ (Colombia) said that he agreed with the Spanish delegation. The phrase in question was not prescriptive but simply illustrative, and the indication that arbitration was one of the options needed to be made explicit.

97. Mr. LALLIOT (France) said that he fully supported the Chairman's conclusion as to the sense of the Commission: the reference to arbitration should be deleted and the notes on recommendation 68 should be expanded as suggested by the United States and other delegations.

98. Ms. POSTELNICESCU (Romania) said that debate on the matter should not be reopened and the phrase in question should be deleted.

99. Mr. Al-NASSER (Observer for Saudi Arabia) said that he could accept either deletion or retention but that if the reference to arbitration was deleted from recommendation 68, then recommendation 68 bis would be superfluous.

100. The CHAIRMAN said he took it that the Commission wished to delete the final phrase ", including arbitration"; add the word "best" before the word "suited"; and adopt recommendation 68 as amended.

101. It was so decided.

102. Draft recommendation 68, as orally amended, was adopted.

Recommendation 68 bis

103. Mr. GHAZIZADEH (Islamic Republic of Iran) observed that in many States it was the project agreement and not the law that should indicate whether and to what extent the contracting authority might raise a plea of sovereign immunity.

104. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that the earlier discussion in the Commission regarding sovereign immunity had been reflected in its 1999 report to the General Assembly (A/54/17, para. 298). The degree of disagreement was reflected in the fact that recommendation 68 bis had been placed within square brackets.

The meeting rose at 6 p.m.