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Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Note by the Secretariat

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I. Introduction

1. At its thirty-third session, held in New York from 12 June to 7 July 2000, the United Nations Commission on International Trade Law (UNCITRAL) 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.¹ The Legislative Guide was published in all official languages in 2001.
2. 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.²
3. 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.³
4. 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, during the second week of the thirty-fourth session of the Commission.
5. At its thirty-fourth session, in 2001, the Commission took note with appreciation of the results of the Colloquium as summarized in a note by the Secretariat (A/CN.9/488). The Commission expressed its gratitude to PPIAF for its financial and organizational support, to the various international intergovernmental and non-governmental organizations represented and to the speakers who participated at the Colloquium.
6. The various views that were expressed as to the desirability and feasibility of further work of the Commission in the field of privately financed infrastructure projects are reflected in the Commission's report on the work of its thirty-fourth session.⁴ 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 the working group should identify the specific issues on which model legislative provisions, possibly to become an addendum to the Guide, could be formulated.⁵

7. The Working Group (previously named the Working Group on Time-Limits and Limitations (Prescription) in the international sale of goods) held its fourth session in Vienna from 24 to 28 September 2001. The Working Group had before it the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. The Working Group decided to use the legislative recommendations contained in the Legislative Guide as the basis for its deliberations.

8. In accordance with a suggestion that had been made at the Colloquium (A/CN.9/488, para. 19), the Working Group was invited to devote its attention to a specific phase of infrastructure projects, namely, the selection of the concessionaire, with a view to formulating specific drafting proposals for legislative provisions. Nevertheless, the Working Group was of the view that model legislative provisions on various other topics might be desirable (see A/CN.9/505, paras. 18-174). The Working Group requested the Secretariat 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 Working Group at its fifth session for review and further discussion.

9. The Working Group continued its work on the drafting of core model legislative provisions (hereinafter referred to as “draft model provisions”) at its fifth session, held in Vienna from 9 to 13 September 2002. The Working Group reviewed the draft model provisions that had been prepared by the Secretariat with the assistance of outside experts and approved their text, as set out in the annex to its report on that session (A/CN.9/521). The Working Group requested the Secretariat to circulate the draft model provisions to States for comments and to submit the draft model provisions, together with the comments received from States, to the Commission, for its review and adoption, at its thirty-sixth session, to be held in Vienna from 30 June to 18 July 2003.

10. Section II of the present document contains short explanatory notes on the draft model provisions. Section III refers to matters dealt with in the UNCITRAL Legislative Guide on which no draft model provisions have been drafted. Section IV presents the available options to the Commission concerning the relationship between the draft model provisions and the legislative recommendations.

11. Addenda to the present note contain the following texts: (a) the draft model provisions, as they were approved by the Working Group; and (b) a concordance table presenting side by side the draft model provisions and the legislative recommendations to which they relate.

II. Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects: draft model legislative provisions

12. The draft model provisions were prepared by the Secretariat with the assistance of outside experts, as requested by the Commission and the Working Group. The draft model provisions develop further the legislative principles

underlying those legislative recommendations contained in the UNCITRAL Legislative Guide on which the Working Group, at its fourth and fifth sessions, decided that draft model provisions should be drafted. They are, on occasion, followed by footnotes intended to provide specific advice and guidance to legislators in enacting States regarding the policy issues relating to the relevant draft model provisions and options available for their implementation. For the user's ease of reference, the arrangement of the draft model provisions follows as closely as possible the sequence of legislative recommendations in the UNCITRAL Legislative Guide.

A. General provisions

Model provision 1. Preamble

13. At its fourth session, the Working Group acknowledged that both provisions contained in legislative 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 (A/CN.9/505, para. 91).

Model provision 2. Definitions

14. Unless otherwise indicated, all definitions included in the draft model provision are derived from or based on the UNCITRAL Legislative Guide (see, in particular, UNCITRAL Legislative Guide, "Introduction and background information on privately financed infrastructure projects", paras. 9-20).

Contracting authority

15. By linking the notion of "contracting authority" to "concession contract", the proposed definition aims at avoiding the difficulty of referring to the entity having actual responsibility for the implementation of infrastructure projects.

Concession contract

16. At its fifth session, the Working Group noted that, in view of the difficulty of offering a definition of the term "concession" that would be acceptable to various legal systems, the Secretariat had suggested combining the notions of "project agreement" and "concession", which had been used in the Legislative Guide, into one single definition. The use of the words "concession agreement", as compared with the corresponding notion of "project agreement", which was used in the Legislative Guide, it was said, would have the advantage of facilitating the incorporation of the draft model provisions in domestic legal systems, since the term "concession agreement", which in the past was more widely used in civil law jurisdictions only, was being used increasingly in common law jurisdictions as well.

17. For those reasons, the Working Group agreed that words such as "concession agreement" or "concession contract" would be preferable to "project agreement".

From the available options, preference was eventually given to the expression “concession contract”, as it was already used in many legal systems and avoided some of the ambiguities of the word “agreement”, which some delegations felt to be more appropriately used in a public law context (A/CN.9/521, paras. 34 and 35).

Model provision 3. Authority to enter into concession agreements

Model provision 4. Eligible infrastructure sectors

18. Draft model provision 3 reflects legislative recommendation 2 and draft model provision 4 reflects legislative recommendation 4.

B. Selection of the concessionaire

Model provision 5. Rules governing the selection proceedings

19. The draft model provision reflects the principles underlying legislative recommendation 14. The accompanying footnotes are designed to highlight the close relationship between the procedures for selecting a concessionaire and the enacting State’s general laws on government procurement.

1. Pre-selection of bidders

Model provision 6. Purpose and procedure of pre-selection

20. Although there is no specific legislative recommendation reflecting the substance of model provision 6, paragraph 1, this provision was felt to be necessary to complement the remaining provisions on pre-selection so as to clarify the purpose of the exercise and provide for the basic rules governing the proceedings (see A/CN.9/521, para. 45). The model provision is based on article 7, paragraph 1, of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereinafter referred to as the “UNCITRAL Model Procurement Law”).

21. Paragraph 3 contains a few additional elements drawn from chapter III, paragraph 36, of the Legislative Guide. The elements referred to in paragraph 4 have been added to ensure transparency as regards the important information referred to in draft model provisions 7-9 and 30.

22. Paragraph 5 clarifies that general rules of the enacting State on the pre-selection of bidders only apply to the extent that the subject matter is not dealt with in paragraphs 1-4 of the draft model provision.

Model provision 7. Pre-selection criteria

23. Model provision 7 reflects the substance of legislative recommendation 15.

Model provision 8. Participation of consortia

24. Paragraphs 1 and 2 of the draft model provision reflect legislative recommendation 16. Paragraph 2 reaffirms essentially the restrictive approach taken by the Commission in the UNCITRAL Legislative Guide to the effect that each of the members of a qualified consortium may participate, either directly or through

subsidiary companies, in only one bid for the project. However, the reference, in paragraph 2, to the possibility of an exception is intended to render the rule more flexible, as there may be cases where no project could be carried out without a certain company, in view of its particular expertise.

25. Paragraphs 1 and 2 have been formulated to reflect the advice contained in chapter III, “Selection of the concessionaire”, paragraphs 41 and 42, of the UNCITRAL Legislative Guide.

Model provision 9. Decision on pre-selection

26. Although there is no specific legislative recommendation reflecting the substance of paragraph 1 of draft model provision 9, the provision seems necessary to clarify the manner in which a decision on the qualifications of bidders is arrived at. The provision is based on article 7, paragraph 5, of the UNCITRAL Model Procurement Law.

27. Paragraph 2 of the draft model provision reflects legislative recommendation 17.

28. Unlike the Legislative Guide, the draft model provision does not use expressions such as “short list” or “final list”. The Working Group was of the view that expressions of that type were not needed in a legislative text to qualify the list of bidders that would subsequently be invited by the contracting authority to submit proposals (see A/CN.9/521, para. 60).

2. Procedure for requesting proposals

Model provision 10. Single-stage and two-stage procedure for requesting proposals

29. Paragraph 1, which reflects the purpose of legislative recommendation 18, is based on article 26 of the UNCITRAL Model Procurement Law.

30. Paragraphs 2 and 3 reflect legislative recommendation 19. Paragraph 3 (a) refers to “main contractual terms proposed by the contracting authority” rather than simply to “proposed contractual terms” to avoid the impression that a contracting authority would be expected to have developed detailed contract documents at this early stage of the selection process. Paragraph 3 (b) is a slightly modified version of subparagraph (b) of legislative recommendation 19, which has been aligned with the discussion in paragraph 57 of chapter III of the UNCITRAL Legislative Guide, to make it clear that meetings convened at this stage may not necessarily involve all the bidders. Paragraph 3 (c) further develops subparagraph (c) of legislative recommendation 19 by spelling out the elements referred to in paragraph 58 of chapter III of the Legislative Guide. Paragraph 3 (d), which is based on article 46, paragraph 4, of the UNCITRAL Model Procurement Law, has been added to clarify the sequence of actions during the first stage of the proceedings.

31. For purposes of transparency and accountability, paragraph 3 (b) requires the contracting authority to keep minutes of any meeting convened or discussion held with bidders, indicating the questions raised by bidders and clarifications provided by the contracting authority (see A/CN.9/521, para. 68). Also for the same purpose

and in order to limit the scope for unfair changes meant to favour particular bidders, paragraph 3 (c) requires the contracting authority to state in the record of the selection proceedings to be kept pursuant to draft model provision 26 the reasons for any amendment to, or modification in, the elements of the request for proposals under paragraph 3 (c) (A/CN.9/521, para. 69).

Model provision 11. Content of the final request for proposals

32. Model provision 11 reflects legislative recommendation 20. In line with the second sentence of legislative recommendation 26 and the discussion in chapter III, paragraph 69, of the UNCITRAL Legislative Guide, subparagraph (c) requires the request for proposals to contain an indication of which contractual terms are deemed non-negotiable by the contracting authority. Subparagraph (d) contains a specific reference to thresholds for evaluation of proposals, which are referred to in legislative recommendation 24.

Model provision 12. Bid securities

33. Although no specific legislative recommendation existed on this topic, the Working Group was of the view that the draft model provision was useful, since the circumstances under which such securities might be forfeited in a selection procedure concerning the execution of a privately financed infrastructure project might differ from the circumstances under which bid securities might be forfeited in other types of procurement (A/CN.9/521, para. 76).

Model provision 13. Clarifications and modifications

34. The draft model provision reflects legislative recommendation 21. The additional language is intended to clarify the scope of modifications to the request for proposals. The cross-reference to draft model provision 11 is intended to remind contracting authorities of the need to refrain from making unnecessary changes to the essential elements of the request for proposals. For purposes of transparency, the contracting authority is required to state in the record of the selection proceedings to be kept pursuant to draft model provision 26 the reasons for any amendment to, or modification in, the elements of the request for proposal under the draft model provision (A/CN.9/521, para. 82).

Model provision 14. Evaluation criteria

35. The draft model provision reflects legislative recommendations 22 and 23, which have been combined for ease of reading.

36. The Working Group concurred with the suggestion made by outside experts who had been consulted by the Secretariat that subparagraph (d) of recommendation 22, on social and economic development potential offered by the proposals, would be more appropriately placed among the commercial aspects of the proposals (recommendation 23). It therefore appears as paragraph 2 (g) in model provision 14 (A/CN.9/521, para. 86).

Model provision 15. Comparison and evaluation of proposals

37. The draft model provision reflects the substance of legislative recommendation 24. The title has been changed to reflect more accurately the scope of the model

provision. A new provision, in paragraph 1, has been added to clarify the sequence of actions by the contracting authority in evaluating proposals.

Model provision 16. Further demonstration of fulfilment of qualification criteria

38. This draft model provision, which previously appeared as paragraph 3 of draft model provision 9, has been placed in a separate model provision, as the Working Group wished to emphasize that requests by the contracting authority for a further demonstration of the bidder's fulfilment of the qualification criteria would often be made after the completion of the pre-selection phase. The draft model provision reflects the substance of recommendation 25. In order to clarify which qualification criteria the contracting authority should use in that situation, the Working Group agreed that a footnote reflecting the substance of the last sentence of article 34, paragraph 6, of the UNCITRAL Model Procurement Law should be added to the new model provision (A/CN.9/521, paras. 92 and 93).

Model provision 17. Final negotiations

39. The draft model provision reflects legislative recommendations 26 and 27, which have been combined for ease of reading. Following suggestions made in the Secretariat's consultations with outside experts, paragraph 2 includes the requirement that bidders be given notice and be requested to submit a "best and final offer" by a specified date before the contracting authority terminates the negotiations. The procedure prescribed in the draft model provision to that end follows article 48, paragraph 8, and article 49, paragraph 4, of the UNCITRAL Model Procurement Law.

3. Concession award without competitive procedures

Model provision 18. Circumstances authorizing award without competitive procedures

40. The draft model provision reflects the substance of legislative recommendation 28.

41. With a view to enhancing transparency in negotiations under subparagraph (f), the Working Group agreed that the contracting authority should be required to state the reasons for any departure from the original project specifications and contractual terms in the record that it was required to keep under model legislative provision 26. The Working Group also agreed that a footnote should be added to subparagraph (f) to that effect (A/CN.9/521, para. 103).

42. At the fourth session of the Working Group it had been suggested that the subparagraph should be expanded by adding the words "or other cases of the same exceptional nature, as defined by the law" (see A/CN.9/505, para. 63). At its fifth session, the Working Group agreed that those words should be kept, but that they should be put in the footnote to the subparagraph rather than to the main text. The Working Group also agreed that the square brackets around the word "compelling" should be deleted (A/CN.9/521, para. 104).

Model provision 19. Procedures for negotiation of a concession agreement

43. The draft model provision reflects the substance of legislative recommendation 29. The original subparagraph (c) of legislative recommendation 29 is now subsumed in the general provision on notice of project awards under draft model provision 25.

44. In order to enhance transparency in the award of a concession contract without competitive procedures, the Working Group agreed that the language of subparagraph (b) implied that the bidder with whom the contracting authority engaged in direct negotiations would have to demonstrate the fulfilment of certain qualification requirements. It was agreed that a footnote should be added to the subparagraph to that effect (A/CN.9/521, para. 108).

4. Unsolicited proposals**Model provision 20. Admissibility of unsolicited proposals**

45. The draft model provision reflects the substance of legislative recommendation 30.

Model provision 21. Procedures for determining the admissibility of unsolicited proposals

46. The draft model provision reflects legislative recommendations 31 and 32. Paragraph 3 of the draft model provision elaborates on legislative recommendation 32 with a view to clarifying the relationship between the proponent's intellectual property rights and the contracting authority's use of information provided by the proponent.

47. The word "potentially" in paragraph 1 has been added in view of the fact that at such an early stage of examination of an unsolicited proposal there could not be a final determination as to whether or not a project was in the public interest. The footnote to this paragraph has been included since enacting States may wish to set forth, possibly in special regulations, the criteria to be used in assessing the qualifications of the proponent, which could be modelled upon the qualification criteria mentioned in draft model provision 7 (A/CN.9/521, paras. 114 and 115).

Model provision 22. Unsolicited proposals that do not involve proprietary concepts or technology

48. The draft model provision reflects the substance of legislative recommendation 33.

49. The conjunction "and" is used instead of "or" to connect subparagraphs (a) and (b) of paragraph 1, since the Working Group was of the view that those conditions needed to be cumulative (A/CN.9/521, para. 120).

Model provision 23. Unsolicited proposals involving proprietary concepts or technology

50. The draft model provision reflects the substance of legislative recommendations 34 and 35.

5. Miscellaneous provisions

Model provision 24. Confidentiality of negotiations

51. Model provision 23 reflects the substance of legislative recommendation 36. The first sentence is drawn from article 45 of the UNCITRAL Model Procurement Law. The reference to “agents, subcontractors, lenders, advisers or consultants” has been added with a view to avoiding an excessively restrictive interpretation of the model provision.

Model provision 25. Notice of project award

52. The draft model provision reflects legislative recommendation 37.

Model provision 26. Record of selection and award proceedings

53. The draft model provision reflects legislative recommendation 38. The footnote has been added as the Working Group felt that the draft model provision should be more emphatic in recommending that enacting States review their legislation with a view to ensuring that it reflected internationally recognized standards of transparency (A/CN.9/521, para. 135).

Model provision 27. Review procedures

54. The draft model provision reflects legislative recommendation 39.

C. Construction and operation of infrastructure

Model provision 28. Contents of the concession agreement

55. At its fourth session, the Working Group generally took the view that various matters dealt with in chapter IV of the Legislative Guide were contractual in nature and did not require specific draft model provisions (see A/CN.9/505, paras. 110-116). At the same time, however, 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. It requested the Secretariat to prepare an initial draft of such a 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 (A/CN.9/505, para. 114).

56. In order to implement that request, the draft model provision, which reflects the policy of recommendation 40, lists a number of issues that should be addressed in the project agreement. Some of those issues are also the subject of specific draft model provisions. Other issues listed therein, however, relate to legislative recommendations on which the Working Group did not request that specific draft model provisions be drafted. The sources are indicated below:

(a) Subparagraph (a) is based in part on chapter IV, paragraph 1, of the UNCITRAL Legislative Guide;

(b) Subparagraph (b) refers, in part, to matters dealt with in legislative recommendation 5;

(c) Subparagraph (c) refers to matters dealt with in legislative recommendation 6;

(d) Subparagraph (d) refers to matters dealt with in legislative recommendations 42 and 43 and in draft model provision 29;

(e) Subparagraph (e) refers to matters dealt with in legislative recommendations 44 and 45 and in draft model provisions 30-32;

(f) Subparagraph (f) refers to matters dealt with in legislative recommendations 46 and 48. At the Working Group's fifth session it was noted that in some jurisdictions the remuneration of the concessionaire by way of collecting tariffs or fees from users for the use of the facility was a constitutive element of a concession. It was therefore suggested that the words "as appropriate" in the first line of the subparagraph should be deleted. In response to that view, it was observed that the intention of the draft model provision was to give the legislator guidance on the possible content of the concession contract, rather than to restate the elements of the notion of "concession" under any particular legal system. In order to clarify the indicative nature of the subparagraph, it was agreed that the words "in particular and as appropriate, the concessionaire's right to charge, receive, or collect" should be replaced with the words "whether consisting of" (A/CN.9/521, para. 147);

(g) Subparagraph (g) reflects the substance of legislative recommendation 52;

(h) Subparagraph (h) refers to matters dealt with in legislative recommendation 53 and in draft model provision 37;

(i) Subparagraph (i) reflects legislative recommendations 52 and 54 (b);

(j) Subparagraph (j) reflects legislative recommendation 54 (a);

(k) Subparagraph (k) summarizes the advice on contractual arrangements that is contained in chapter IV, paragraphs 73-76, of the Legislative Guide and is a natural complement of subparagraphs (h) and (i);

(l) Subparagraph (l) reflects the substance of legislative recommendation 56;

(m) Subparagraph (m) reflects the substance of legislative recommendation 58 (a) and (b);

(n) Subparagraph (n) reflects the substance of legislative recommendation 58 (e);

(o) Subparagraph (o) reflects the substance of legislative recommendation 58 (d);

(p) Subparagraph (p) reflects the substance of legislative recommendation 61;

(q) Subparagraph (q) reflects the substance of legislative recommendation 67;

(r) Subparagraph (r) refers to matters dealt with in legislative recommendation 69 and in draft model provision 49.

57. The words “such as” in the *chapeau* of the draft model provision have been used by the Working Group to emphasize the idea that the list, albeit relating to essential matters, is not meant to be mandatory in its full length. The Working Group agreed at its fifth session that the text was not meant to suggest that a contract not containing any of the elements listed in the draft model provision would be void, without prejudice to the possible internal accountability of agents of the contracting authority, a matter that was left for the national laws of the enacting States outside the scope of application of the draft model provisions (A/CN.9/521, paras. 144-146).

Model provision 29. Governing law

58. The draft model provision reflects the substance of legislative recommendation 41, except that, unlike recommendation 41, the draft model provision contemplates the possibility for the parties to agree in the concession contract on the application of a law other than the law of the enacting State (A/CN.9/521, paras. 151-153).

Model provision 30. Organization of the concessionaire

59. The draft model provision reflects the substance of legislative recommendations 42 and 43.

Model provision 31. Ownership of assets

60. Draft model provision 31 reflects the substance of legislative recommendation 44.

Model provision 32. Acquisition of project site

Model provision 33. Easements

61. Draft model provisions 32 and 33 reflect the substance of legislative recommendation 45, which have been reformulated in two separate provisions for ease of reading.

Model provision 34. Financial arrangements

62. The draft model provision reflects the substance of legislative recommendations 46 and 47.

Model provision 35. Security interests

63. The draft model provision reflects the substance of legislative recommendation 49.

Model provision 36. Assignment of the concession agreement

64. The draft model provision reflects the substance of legislative recommendation 50.

Model provision 37. Transfer of controlling interest in the concessionaire

65. The draft model provision reflects the substance of legislative recommendation 51.

Model provision 38. Operation of infrastructure

66. Model provision 38, paragraph 1, reflects the substance of legislative recommendations 53 and 55.

67. The Working Group reconsidered the question of the desirability of including a model provision dealing with the concessionaire's right to issue and enforce rules concerning the use of the infrastructure facility, which the Working Group, at its fourth session, did not consider to be necessary (see A/CN.9/505, para. 144). It was noted that some countries with a well-established tradition of awarding concessions for the provision of public services recognized the concessionaire's power to establish rules designed to facilitate the provision of the service (such as instructions to users or safety rules), take reasonable measures to ensure compliance with those rules and suspend the provision of service for emergency or safety reasons. However, given the essential nature of certain public services, the exercise of that power by an entity other than a Government sometimes required legislative authority. The Working Group therefore agreed, at its fifth session, that it was useful to retain the provision contained in paragraph 2 (A/CN.9/521, para. 183).

Model provision 39. Compensation for specific changes in legislation

68. Draft model provision 39 reflects legislative recommendation 58 (c). A number of elements have been added, however, so as to reflect the depth of the discussion in paragraphs 122-125 of chapter IV of the Legislative Guide.

Model provision 40. Revision of the concession agreement

69. Draft model provision 40 reflects legislative recommendation 58 (c). A number of elements have been added, however, so as to reflect the depth of the discussion in paragraphs 126-130 of chapter IV of the Legislative Guide.

70. The draft model provision does not address the issue of the consequences of a disagreement between the contracting authority and the concessionaire on a revision of the concession contract. That issue is addressed in draft model provision 45, subparagraph (b).

Model provision 41. Takeover of an infrastructure project by the contracting authority

71. The draft model provision reflects legislative recommendation 59.

Model provision 42. Substitution of the concessionaire

72. The draft model provision reflects legislative recommendation 60.

73. At its fifth session, the Working Group rejected the suggestion that the provision should also refer to the concessionaire as a party to the agreement that set forth the terms and conditions of the concessionaire's substitution. The Working Group also rejected the suggestion that the circumstances triggering such a

substitution should be limited to a serious breach of the concessionaire's obligations under the concession contract. The Working Group felt that the proposed amendments departed from the policy embodied in the Legislative Guide (see A/CN.9/521, paras. 201-204).

D. Duration, extension and termination of the concession agreement

Model provision 43. Duration and extension of the concession agreement

74. The draft model provision reflects the substance of legislative recommendation 62.

75. At the fifth session of the Working Group, it was observed that the substance of the draft model provision, in particular subparagraph (c), was too stringent, as it did not provide for the possibility for the contracting authority and the concessionaire to agree on the extension of the term of the concession in the concession contract. In response to that view, it was pointed out that the provision reflected the advice of the Legislative Guide according to which such an extension should only be permissible if that possibility was set forth in the law of the enacting State. For that reason, the Working Group agreed to preserve the body of the text of the provision. It was then suggested that a footnote should be added to the provision for the purpose of reminding enacting States that they might wish to consider the possibility for an extension of the concession contract by mutual agreement between the contracting authority and the concessionaire for compelling reasons of public interest. The Working Group agreed with that suggestion (A/CN.9/521, paras. 207 and 208).

Model provision 44. Termination of the concession agreement by the contracting authority

76. The draft model provision reflects the substance of legislative recommendation 63.

77. The word "compelling" has been added before the word "reasons" in subparagraph (b) so as to align the provision more closely with the Legislative Guide and ensure consistency with the footnote added to the preceding draft model provision 43. In order to provide guidance to enacting States as to the meaning of the notion of "compelling" public interest, the Working Group decided to add a footnote to subparagraph (b) referring to the relevant section of the Legislative Guide (A/CN.9/521, para. 212).

Model provision 45. Termination of the concession agreement by the concessionaire

78. The draft model provision reflects the substance of legislative recommendation 64. Subparagraph (b) has been added to so as to align the draft model provision with draft model provision 40.

79. The cross-reference to subparagraphs (h) and (i) of draft model provision 28 in subparagraph (c) is intended to provide an indication of the nature of the acts of other public authorities that might trigger the concessionaire's right to terminate the concession contract. The expression "appropriate revision", which is used in

the legislative recommendation, has been replaced with “revision”, as the right to terminate resulted from the objective fact of the absence of agreement on a revision, rather than on a subjective assessment of what would constitute an “appropriate” revision (see A/CN.9/521, para. 218).

Model provision 46. Termination of the concession agreement by either party

80. The draft model provision reflects the substance of legislative recommendation 65.

Model provision 47. Financial arrangements upon expiry or termination of the concession agreement

81. The draft model provision reflects the substance of legislative recommendation 67.

Model provision 48. Wind-up and transfer measures

82. Subparagraph (a) of the draft model provision reflects the substance of legislative recommendation 66 and matters referred to in paragraphs 37-42 of chapter V of the Legislative Guide. Subparagraph (b) reflects the substance of legislative recommendation 68 and the matters referred to in paragraphs 50-62 of chapter V of the Legislative Guide.

E. Settlement of disputes

Model provision 49. Disputes between the contracting authority and the concessionaire

83. The draft model provision reflects legislative recommendation 69.

84. At the fifth session of the Working Group it was pointed out that the laws of some States already provided dispute settlement mechanisms that were regarded as well suited to the needs of privately financed infrastructure projects. The parties to the concession contract should not be discouraged from choosing those mechanisms, where they existed. The footnote to the provision contemplates that possibility (see A/CN.9/521, para. 232-236).

Model provision 50. Disputes involving customers or users of the infrastructure facility

85. The draft model provision, which reflects legislative recommendation 71, has been included despite the fact that the Working Group, at its fourth session, had not requested that a model provision be drafted on the matter (see A/CN.9/505, para. 174). At its fifth session, the Working Group reversed that earlier decision, since it felt that the draft model provision underscored the need for appropriate measures to protect the rights of the users of public services and infrastructure facilities, an important concern in many legal systems (see A/CN.9/521, para. 242).

Model provision 51. Other disputes

86. The draft model provision reflects the substance of legislative recommendation 70.

III. Matters not covered in the draft model legislative provisions

A. Matters dealt with in chapter I, “General legislative and institutional framework”, of the UNCITRAL Legislative Guide

Scope and authority to award concessions (see UNCITRAL Legislative Guide, legislative recommendations 2-5, and chap. I, “General legislative and institutional framework”, paras. 15-22)

87. No model provision was drafted to implement legislative recommendation 5, although the Working Group, at its fourth session, had found that a model provision on the matter would be useful (see A/CN.9/505, paras. 93-96). The Secretariat pointed out that in the view of the experts that it had consulted, it was not feasible to transform the legislative recommendation into a model legislative provision (see A/CN.9/WG.I/WP.29, para. 69). As an alternative, the issue of the degree of exclusivity of the concession has been mentioned among the contents of the concession agreement under draft model provision 28, subparagraph (b).

88. The Working Group, at its fifth session, did not object to the above suggestions.

Administrative coordination (see UNCITRAL Legislative Guide, legislative recommendation 6, and chap. I, “General legislative and institutional framework”, paras. 23-29)

89. At its fourth session, the Working Group found that a model provision on the matter would be useful (see A/CN.9/505, paras. 98-100). However, given the complexity of the issues and the various policy options mentioned in the legislative recommendation, the experts consulted by the Secretariat suggested that it would be better to keep it as a footnote to the text of the model provision dealing with the authority to enter into concession agreements in a footnote to draft model provision 3.

90. The Working Group, at its fifth session, did not object to the above suggestions.

Authority to regulate infrastructure services (see UNCITRAL Legislative Guide, legislative recommendations 7-11, and chap. I, “General legislative and institutional framework”, paras. 30-53)

91. No model provision was requested by the Working Group (see A/CN.9/505, para. 102).

B. Matters dealt with in chapter II, “Project risks and government support”, of the UNCITRAL Legislative Guide

Project risks and risk allocation (see UNCITRAL Legislative Guide, legislative recommendation 12, and chap. II, “Project risks and government support”, paras. 8-29)

92. No model provision was requested by the Working Group (see A/CN.9/505, para. 104).

Government support (see UNCITRAL Legislative Guide, legislative recommendation 13, and chap. II, “Project risks and government support”, paras. 30-60)

93. At its fourth session, the Working Group found that a model provision on the matter would be useful (see A/CN.9/505, paras. 106-108). However, in view of the complexity of the issues and the various policy options mentioned in the legislative recommendation, the experts consulted by the Secretariat suggested that it would be better to refer to the matter in a footnote to the text of the model provision dealing with the authority to enter into concession agreements (see proposed footnote to draft model provision 3). The matter is, however, referred to in draft model provision 28, subparagraph (f).

94. The Working Group, at its fifth session, did not object to the above suggestions.

C. Matters dealt with in chapter IV, “Construction and operation of infrastructure: legislative framework and project agreement”, of the UNCITRAL Legislative Guide

Financial arrangements (see UNCITRAL Legislative Guide, legislative recommendations 46-48, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 33-51)

95. No specific model provision was requested by the Working Group with respect to legislative recommendations 47 and 48 (see A/CN.9/505, para. 129). The matters dealt with in those recommendations are, however, referred to in draft model provision 28, subparagraph (f).

Construction works (see UNCITRAL Legislative Guide, legislative recommendation 52, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 69-79)

96. No specific provision was requested by the Working Group (see A/CN.9/505, para. 138). The matter is, however, referred to in draft model provision 28, subparagraph (g).

Infrastructure operation (see UNCITRAL Legislative Guide, legislative recommendations 53-55, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 80-97)

97. No specific provision was requested by the Working Group with respect to legislative recommendation 54 (see A/CN.9/505, para. 142). Those matters are, however, referred to in draft model provision 28, subparagraphs (i) and (j).

General contractual arrangements (see UNCITRAL Legislative Guide, legislative recommendations 56-60, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 98-150)

98. No specific provision was requested by the Working Group with respect to legislative recommendations 56 and 57 (see A/CN.9/505, para. 146). However, the

subject referred to in legislative recommendation 56 is mentioned in draft model provision 28, subparagraph (l).

99. Furthermore, no specific provision was requested by the Working Group with respect to legislative recommendation 58 (a), (b), (d) and (e) (see A/CN.9/505, para. 148). Nevertheless, for the sake of ensuring the completeness of the list contained in draft model provision 28, the matters referred to in legislative recommendation 58 (a) and (b) are mentioned in subparagraph (m) of the draft model provision. Likewise, the matters referred to in legislative recommendation 58 (d) and (e) are mentioned in subparagraphs (n) and (o) of draft model provision 28.

D. Matters dealt with in chapter V, “Duration, extension and termination of the project agreement”, of the UNCITRAL Legislative Guide

100. No specific provision was requested by the Working Group with respect to legislative recommendation 66 (see A/CN.9/505, para. 160). However, the matter is generally referred to in draft model provision 48, subparagraph (a).

IV. Relationship between the draft model legislative provisions and the legislative recommendations

101. At its fifth session, the Working Group considered at length the relationship between the draft model provisions and the Legislative Guide (A/CN.9/521, paras. 18-21). There was general agreement that the draft model provisions were not a departure from, but rather a development of, the policies and principles upon which the Legislative Guide was based. Thus, the draft model provisions did not replace the Legislative Guide in its entirety and were to be understood and applied in the light and with the assistance of the explanatory notes contained in the Guide.

102. The Working Group proceeded to consider the particular relationship between the draft model provisions and the legislative recommendations contained in the Legislative Guide. The Working Group noted, in that connection, that the draft model provisions covered most of the subject matter addressed in the legislative recommendations. However, the Working Group also noted that there were matters dealt with in some legislative recommendations that were not addressed in any of the draft model provisions, as was the case, in particular, of recommendations 1 and 5-13. That circumstance alone excluded the possibility of replacing the entirety of the legislative recommendations with the draft model provisions.

103. The Working Group then considered whether the draft model provisions and the legislative recommendations should be retained as two related but independent texts or whether they should be combined in a single text that contained all draft legislative provisions and those of the legislative recommendations on which no draft model provision had been drafted.

104. Although there were expressions of support for keeping the legislative recommendations separate from the draft model provisions, so as to reflect more clearly the development of the Commission’s work on the matter, the general

preference was that, for the user's ease of reference, it was desirable to explore combining them. The Secretariat was requested to review both the draft model provisions and the legislative recommendations carefully so as to identify which legislative recommendations dealt with matters not covered in the draft model provisions. Those legislative recommendations should then be presented under a separate heading in the same text as the draft model provisions, in order for the Commission to make an informed decision on the matter. The Working Group recommended that the Commission consider whether, once adopted, the model legislative provisions should supersede those legislative recommendations, which dealt with the same subject matter. A consolidated text including both the remaining legislative recommendations and the draft model provisions is contained in an addendum to the present document (A/CN.9/522/Add.1). For the Commission's ease of reference, the Secretariat has also prepared a concordance table (see A/CN.9/522/Add.2).

105. The Working Group agreed to recommend to the Commission that, subject to the availability of funds in its publications budget, the draft model provisions should be consolidated with the Legislative Guide into one single publication as soon as possible after their adoption by the Commission. In order not to delay their dissemination, however, and with a view to avoiding wasting the existing stocks of the Legislative Guide, it was suggested that the Commission could consider whether draft model provisions might, for an interim period, appear in a separate publication, which should contain appropriate indication of its relationship to the Guide.

Notes

¹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 195-368.

² *Ibid.*, para. 375.

³ *Ibid.*, para. 379.

⁴ *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 366-369.

⁵ *Ibid.*, para. 369.
