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

(Vienna, 9-13 September 2002)

Contents

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the fifth session of the Working Group on Privately Financed Infrastructure Projects (previously known as the Working Group on time-limits and limitations (prescription) in the international sale of goods).

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its fifth session in Vienna from 9 to 13 September 2002. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Cameroon, China, Colombia, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Romania, Russian Federation, Rwanda, Spain, Sweden, Thailand and United States of America.

3. The session was attended by observers from the following States: Algeria, Antigua and Barbuda, Czech Republic, Libyan Arab Jamahiriya, Peru, Philippines, Poland, Republic of Korea, Slovakia, Turkey, Ukraine and Yemen.

4. The session was also attended by observers from the following international organizations: United Nations Industrial Development Organization, Centre for International Legal Studies, European Law Students' Association and European Lawyers' Union.

5. The Working Group elected the following officers:

Chairman: Tore Wiwen-Nilsson (Sweden)

Rapporteur: Ali Hajigholam Saryazdi (Islamic Republic of Iran)

6. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.I/WP.28); a note by the Secretariat setting out issues related to formulation of model legislative provisions on privately financed infrastructure projects (A/CN.9/WG.I/WP.29) and two additional notes containing a set of draft model legislative provisions, which had been prepared by the Secretariat in consultation with outside experts (A/CN.9/WG.I/WP.29/Add.1 and 2); and the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects.

7. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of draft model law provisions.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

8. At its fifth session, the Working Group continued its work on the drafting of core model legislative provisions in the field of privately financed infrastructure projects, pursuant to a decision taken by the Commission at its thirty-fourth session (Vienna, 25 June-13 July 2001).[1] The Working Group used the notes referred to in paragraph 6 (see A/CN.9/WG.I/WP.29/Add.1 and 2) as a basis for its deliberations.

9. The Working Group reviewed the draft model legislative provisions and approved their version, as set out in the annex to the present report. The Secretariat was requested to circulate the draft model legislative provisions to States for comments and to submit the draft model legislative provisions, together with the comments received from States, to the Commission, for its review and adoption, at its thirty-sixth session (Vienna, 30 June-18 July 2003).

IV. General remarks on the draft model legislative provisions on privately financed infrastructure projects

A. Introduction

10. At its thirty-third session (New York, 12 June-7 July 2000), the Commission adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at that session and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the Secretariat was authorized to finalize in the light of the deliberations of the Commission.[2] The Legislative Guide has since been published in all official languages.

11. At the same session, the Commission also considered a proposal for future work in that area. It was suggested that, although the Legislative Guide would be a useful reference for domestic legislators in establishing a legal framework favourable to private investment in public infrastructure, it would nevertheless be desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues.[3]

12. After consideration of that proposal, the Commission decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-forth 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.[4]

13. The Colloquium on Privately Financed Infrastructure: Legal Framework and Technical Assistance was organized with the co-sponsorship and organizational assistance of the Public-Private Infrastructure Advisory Facility, 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.

14. At its thirty-fourth session, the Commission took note with appreciation of the results of the Colloquium as summarized in a note by the Secretariat (A/CN.9/488). The Commission expressed its gratitude to the Public-Private Infrastructure Advisory Facility for its financial and organizational support and to the various international organizations represented, both intergovernmental and non-governmental, as well as to the speakers who participated in the Colloquium.

15. 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 report of the Commission on the work of its thirty-fourth session.[5] 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 was to be accomplished within a 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, at its first session, such a working group should identify the specific issues on which model legislative provisions, possibly to become an addendum to the Legislative Guide, could be formulated.[6]

16. The Working Group 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. The Working Group also had before it the report on the Colloquium referred to in paragraph 6 (A/CN.9/488).

17. In accordance with a suggestion made at the Colloquium (see 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 submitted to the Working Group at its fifth session for review and further discussion. The draft model provisions were contained in the notes by the Secretariat that were before the Working Group at its fifth session.

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

18. At its fifth session, the Working Group considered at length the relationship between the draft model provisions and the Legislative Guide. 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.

19. 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 circumstances alone excluded the possibility of replacing the entirety of the legislative recommendations with the draft model provisions.

20. 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.

21. 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 to the Commission to consider whether, once adopted, the model legislative provisions should supersede those legislative recommendations which dealt with the same subject matter. 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 in one single publication as soon as possible after their adoption by the Commission. In order, however, not to delay their dissemination, 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.

V. Consideration of the draft model legislative provisions

Foreword

22. The text of the foreword was as follows:

> *"The following model legislative provisions (hereinafter referred to as "model provisions") have been prepared by the United Nations Commission on International Trade Law (UNCITRAL) as an addition to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (hereinafter referred to as "the Legislative Guide"), which was adopted by the Commission in 2000. The model provisions are intended to further assist domestic*

legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. The user is advised to read the model provisions together with the legislative recommendations and the notes contained in the Legislative Guide, which offer an analytical explanation to the financial, regulatory, legal, policy and other issues raised in the subject area.

"The model provisions consist of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects. While most model provisions relate to specific legislative recommendations contained in the Legislative Guide, they do not cover the entire range of issues dealt with in the legislative recommendations. In particular, no specific model provisions have been formulated on administrative or institutional matters, such as those dealt with in legislative recommendations 1 and 5-13.

"The model provisions are designed to be implemented and supplemented by the issuance of regulations providing further details. Areas suitable for being addressed by regulations rather than by statutes are identified accordingly. Moreover, the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical expertise, appropriate human and financial resources and economic stability.

"It should be noted that the model provisions do not deal with other areas of law that also have an impact on privately financed infrastructure projects but on which no specific legislative recommendations are made in the Legislative Guide. Those other areas of law include, for instance, promotion and protection of investments, property law, security interests, rules and procedures on compulsory acquisition of private property, rules on government contracts and administrative law, tax law, environmental protection and consumer protection laws.

"For the user's ease of reference, the model provisions are preceded by headings and bear titles that follow as closely as possible the headings of relevant sections of the Legislative Guide and the titles of its legislative recommendations. However, with a view to ensuring uniformity of style throughout the model provisions, a few headings and titles have been added and some of the original headings and titles have been modified so as to reflect the content of the model provisions to which they relate."

23. The Working Group agreed to replace words "technical expertise" with the words "technical, legal and financial expertise" in the last sentence of the third paragraph, and to add the words "general contract law" before the words "rules on government contracts" in the last sentence of the fourth paragraph.

24. The Working Group also noted that the parts of the foreword referring to the relationship between the draft model provisions and the legislative recommendations contained in the Legislative Guide might need to be adjusted in the light of the Commission's final decision on the matter.

25. Subject to those changes, the Working Group approved the substance of the foreword and referred it to the drafting group.

I. General provisions

Model provision 1. Preamble

26. The text of the draft model provision was as follows:

Variant A

"WHEREAS the [Government] [Parliament] of ... considers it desirable to establish a legislative framework to promote and facilitate private investment in infrastructure development,

"Be it therefore enacted as follows:"

Variant B

"WHEREAS the [Government] [Parliament] of ... considers it desirable to establish a favourable framework for the implementation of privately financed infrastructure projects by promoting transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;

"WHEREAS the [Government] [Parliament] of ... considers it desirable to further develop the general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects;

"[*Other objectives that the enacting State might wish to state;*]

"Be it therefore enacted as follows:"

27. It was noted that, at its fourth session, the Working Group had acknowledged that both provisions contained in legislative recommendation 1 of the Legislative Guide were of a general nature and as such were not suitable for translation into legislative language. However, it had then been 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).

28. It was pointed out that variant A reflected the substance of legislative recommendation 1 only. Variant B was more elaborate and included a preambular paragraph reflecting the substance of legislative recommendation 14, which the Working Group also found worthy of being formulated in legislative language.

29. Wide support was expressed in favour of retaining variant B only. In addition to it being more comprehensive, it would allow enacting States to add further objectives they might deem appropriate.

30. With respect to the wording of the preamble, it was agreed that the word "legislative" should be added before the word "framework" and that the words "to promote and facilitate" should be added before the words "the implementation of

privately financed infrastructure projects". With those additions, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 2. Definitions

31. The text of the draft model provision was as follows:

"For the purposes of this law:

"(a) '*Infrastructure facility*' means physical facilities and systems that directly or indirectly provide services to the general public;

"(b) '*Infrastructure project*' means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

"(c) '*Contracting authority*' means the public authority that has the power to enter into a concession agreement for the implementation of an infrastructure project [under the provisions of this law];[1]

"(d) '*Concessionaire*' means the person that carries out an infrastructure project under a concession agreement entered into with a contracting authority;

"(e) '*Concession agreement*' means the legally binding contract or contracts between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project;

"(f) '*Bidder*' and '*bidders*' mean persons, including groups thereof, that participate in selection proceedings for the award of infrastructure projects;[2]

"(g) '*Unsolicited proposal*' means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

"(h) '*Regulatory agency*' means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.[3]"

"[1] It should be noted that the authority referred to in this definition relates only to the power to enter into concession agreements. Depending on the regulatory regime of the enacting State, a separate body, referred to as 'regulatory' agency in subparagraph (h), may have the responsibility for issuing rules and regulations governing the provision of the relevant service.

"[2] The term 'bidder' or 'bidders' encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority's request for proposals.

"[3] The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see recommendations 7-11 and chap. I, 'General legislative and institutional framework', paras. 30-53)."

32. The Working Group noted that, unless otherwise indicated, all definitions included in the draft model provision had been derived from or were based upon the Legislative Guide (see, in particular, Legislative Guide, "Introduction and background information on privately financed infrastructure projects", paras. 9-20).

Contracting authority

33. It was pointed out that the proposed definition linked the notion of "contracting authority" to "concession agreement", with a view to avoiding the difficulty of referring to the entity having actual responsibility for the implementation of infrastructure projects.

Concession agreement

34. 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" in 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, is being increasingly used in common law jurisdictions as well.

35. 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.

36. The view was expressed that the phrase "legally binding" was redundant, since it was generally assumed that a contract would in most cases be legally binding. In response to that view, it was pointed out that in some jurisdictions the public entity concluding the concession contract enjoyed powers to change unilaterally the terms and conditions of the concession contract. Some qualification was considered to be useful so as to stress that a concession contract was equally binding upon both parties. The Working Group agreed with the suggestion, approved the substance of the draft model provision and referred it to the drafting group. The Working Group requested the Secretariat to revise the entire model law provisions so as to ensure that consequential changes were also made elsewhere.

Model provision 3. Authority to enter into concession agreements

37. The text of the draft model provision was as follows:

"The following public authorities have the power to enter into concession agreements[4] for the implementation of infrastructure projects falling within their respective spheres of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into concession agreements by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authorities or a combination thereof*].[5]"

"[4] It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see legislative recommendation 6 and chap. I, 'General legislative and institutional framework', paras. 23-29). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or regulation governing the activities of entities authorized to offer government support, to clearly identify which entities have the power to provide such support and what kind of support may be provided (see chap. II, 'Project risks and government support').

"[5] Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession agreements, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those agreements, without naming the relevant public authorities. In a federal State, for example, such an enabling clause might refer to 'the Union, the states [or provinces] and the municipalities'. In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder."

38. It was noted that the draft model provision reflected legislative recommendation 2. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 4. Eligible infrastructure sectors

39. The text of the draft model provision was as follows:

"Concession agreements may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].[6]"

"[6] It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder."

40. It was noted that the draft model provision reflected legislative recommendation 4. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

II. Selection of the concessionaire

Model provision 5. Rules governing the selection proceedings

41. The text of the draft model provision was as follows:

> "The award of infrastructure projects shall be conducted in accordance with [*model provisions 6-26*] and, for matters not provided herein, in accordance with [*the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive procedures for the award of government contracts*].[7]"

"[7] The user's attention is drawn to the relationship between the procedures for the selection of the concessionaire and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of privately financed infrastructure projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which was adopted by UNCITRAL at its twenty-seventh session, held in New York from 31 May to 17 June 1994 (hereinafter referred to as the 'Model Procurement Law'). The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators to develop special rules suited for the selection of the concessionaire. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public, bid security and review procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, mutatis mutandis, supplement the practical elements of the selection procedure described herein."

42. The Working Group noted that the draft model provision reflected the principles underlying legislative recommendation 14 and that the accompanying footnote was designed to highlight the close relationship between the procedures for selecting a concessionaire and the enacting State's general laws on government procurement.

43. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

1. Pre-selection of bidders

Model provision 6. Purpose and procedure of pre-selection

44. The text of the draft model provision was as follows:

"1. The contracting authority [may] [shall] engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure project.

"2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [*the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the pre-qualification of suppliers and contractors*].

"3. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and contractors*],[8] the invitation to participate in the pre-selection proceedings shall include at least the following:

"(a) A description of the infrastructure facility to be built or renovated;

"(b) An indication of other essential elements of the project, such as the services to be delivered by the concessionaire, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the concessionaire);

"(c) Where already known, a summary of the main required terms of the concession agreement to be entered into;

"(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and

"(e) The manner and place for solicitation of the pre-selection documents.

"4. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors*],[9] the pre-selection documents shall include at least the following information:

"(a) The pre-selection criteria in accordance with [*model provision 7*];

"(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in [*model provision 8*];

"[8] A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 25, paragraph 2, of the Model Procurement Law.

"[9] A list of elements typically contained in pre-qualification documents can be found in article 7, paragraph 3, of the Model Procurement Law.

"(c) Whether the contracting authority intends to request only a limited number[10] of pre-selected bidders to submit proposals upon completion of the pre-selection proceedings in accordance with [*model provision 9, para. 2*], and, if applicable, the manner in which this selection will be carried out;

"(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [*this State*] in accordance with [*model provision 29*].

"5. The pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification of suppliers and contractors*].[11]"

"[10] In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, 'Selection of the concessionaire', paras. 48-49). See also footnote 13.

"[11] Procedural steps on pre-qualification proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the bidders' qualifications, can be found in article 7 of the Model Procurement Law, paragraphs 2-7."

45. It was pointed out that although there was no specific legislative recommendation reflecting the substance of draft model provision 6, paragraph 1, the provision was 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. The Working Group noted that the draft model provision was 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").

46. The Working Group noted that paragraph 3 contained a few additional elements drawn from chapter III, paragraph 36, of the Legislative Guide and that the elements referred to in paragraph 4 had been added to ensure transparency as regards the important information referred to in draft model provisions 7-9 and 29.

47. With respect to paragraph 1, the Working Group agreed to delete the word "may" and the square brackets around the word "shall" to emphasize the mandatory character of the provision.

48. It was suggested that paragraph 5 should clarify that general rules of the enacting State on the pre-selection of bidders only applied to the extent that the subject matter was not dealt with in paragraphs 1-4 of the draft model provision. The Working Group agreed with that suggestion.

49. With those amendments, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 7. Pre-selection criteria

50. The text of the draft model provision was as follows:

"In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria[12] that the contracting authority considers appropriate in the particular proceedings, as stated in the pre-selection documents. These criteria shall include at least the following:

"(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

"(b) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

"(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities."

"[12] The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the Legislative Guide (see chap. III, 'Selection of the concessionaire', paras. 43 and 44). The Legislative Guide suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they should be announced in advance, preferably in the invitation to the pre-selection proceedings."

51. The Working Group noted that draft model provision 7 reflected the substance of legislative recommendation 15.

52. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 8. Participation of consortia

53. The text of the draft model provision was as follows:

"1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with [*model provision 7*] shall relate to the consortium as a whole as well as to its individual participants.

"2. Unless otherwise [authorized by ... [*the enacting State indicates the relevant authority*] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one

consortium.[13] A violation of this rule shall cause the disqualification of the consortium and of the individual members.

"3. When considering the qualifications of bidding consortia, the contracting authority shall consider the individual capabilities of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project."

"[13] The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project."

54. The Working Group noted that paragraph 1 of the draft model provision reflected legislative recommendation 16, and that paragraph 2 reaffirmed essentially the restrictive approach taken by the Commission in the Legislative Guide to the effect that each of the members of a qualified consortium might participate, either directly or through subsidiary companies, in only one bid for the project. However, it was pointed out that the reference, in paragraph 2, to the possibility of an exception was intended to render the rule more flexible, as there might be cases where no project could be carried out without a certain company, in view of its particular expertise.

55. The Working Group noted that paragraphs 1 and 2 had been added to reflect the advice contained in chapter III, "Selection of the concessionaire", paragraph 40, of the Legislative Guide.

56. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 9. Decision on pre-selection

57. The text of the draft model provision was as follows:

"1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with [*model provisions 10-16*].

"2. Notwithstanding paragraph 1, the contracting authority may, provided that it has made an appropriate statement in the pre-selection documents to that effect, reserve the right to request proposals upon

completion of the pre-selection proceedings only from a limited number[14] of bidders that best meet the pre-selection criteria. For this purpose, the contracting authority shall rate the bidders that meet the pre-selection criteria on the basis of the criteria applied to assess their qualifications and draw up [a short] [the final] list of the bidders that will be invited to submit proposals upon completion of the pre-selection proceedings. In drawing up the short list, the contracting authority shall apply only the manner of rating that is set forth in the pre-selection documents.

"3. The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so."

"[14] In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, 'Selection of the concessionaire', para. 48). It should be noted that the rating system is used solely for the purpose of the pre-selection of bidders. The ratings of the pre-selected bidders should not be taken into account at the stage of evaluation of proposals (see model provision 15), at which all pre-selected bidders should start out on an equal standing."

58. It was pointed out that although there was no specific legislative recommendation reflecting the substance of paragraph 1 of the draft model provision, that provision was deemed necessary to clarify the manner in which a decision on the qualifications of bidders is to be arrived at. The Working Group noted that the draft provision was based on article 7, paragraph 5, of the UNCITRAL Model Procurement Law.

59. The Working Group noted that paragraph 2 of the draft model provision reflected legislative recommendation 17 and paragraph 3 legislative recommendation 25.

60. In connection with paragraph 2, it was suggested that both the expressions "short list" and "final list", which appeared in square brackets, 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. The Working Group concurred with that suggestion and requested the Secretariat to make any consequential changes that might be required.

61. The view was expressed that paragraph 3 might be better placed elsewhere in the draft model legislative provisions, since requests by the contracting authority that bidders demonstrated again their qualifications typically occurred at a later stage during the selection proceedings. The Working Group took note of that view and decided to revert to the matter once it had completed its consideration of the draft model provisions dealing with the selection of the concessionaire.

62. Subject to those comments and suggestions, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

2. Procedure for requesting proposals

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

63. The text of the draft model provision was as follows:

"1. The contracting authority shall provide a set of the [final] request for proposals and related documents issued in accordance with [*model provision 11*] to each pre-selected bidder that pays the price, if any, charged for those documents.

"2. Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders when [it is not feasible for the contracting authority] [the contracting authority does not deem it to be feasible] to describe in the request for proposals the characteristics of the project such as project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

"3. Where a two-stage procedure is used, the following provisions apply:

"(a) The initial request for proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;[15]

"(b) The contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders;

"(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other

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"[15] In many cases, in particular for new types of project, the contracting authority may not be in a position, at this stage, to have formulated a detailed draft of the contractual terms envisaged by it. Also, the contracting authority may find it preferable to develop such terms only after an initial round of consultations with the pre-selected bidders. In any event, however, it is important for the contracting authority, at this stage, to provide some indication of the key contractual terms of the concession agreement, in particular the way in which the project risks should be allocated between the parties under the concession agreement. If this allocation of contractual rights and obligations is left entirely open until after the issuance of the final request for proposals, the bidders may respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project (see chap. III, 'Selection of the concessionaire', paras. 67-70; see further chap. II, 'Project risks and government support', paras. 8-29)."

characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

"(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with [*model provisions 11-16*]."

64. The Working Group noted that paragraph 1, which reflected the purpose of legislative recommendation 18, was based on article 26 of the UNCITRAL Model Procurement Law, and that paragraphs 2 and 3 reflected legislative recommendation 19.

65. It was pointed out that paragraph 3 (a) referred 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 that early stage of the selection process. Paragraph 3 (b) showed a slightly modified version of subparagraph (b) of legislative recommendation 19, which had been aligned with the discussion in paragraph 57 of chapter III of the Legislative Guide, to make clear that meetings convened at that stage might not necessarily involve all the bidders. Paragraph 3 (c) elaborated further on 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 was based on article 46, paragraph 4, of the UNCITRAL Model Procurement Law, had been added to clarify the sequence of actions during the first stage of the proceedings.

66. The Working Group agreed that the word "final" was not needed before the words "request for proposals", in paragraph 1 and elsewhere in the draft model legislative provisions.

67. In connection with paragraph 2, it was agreed that the words in square brackets "it is not feasible for the contracting authority" should be deleted and that the words "the contracting authority does not deem it to be feasible" should be retained without the square brackets.

68. It was suggested that, for purposes of transparency and accountability, the contracting authority should be required 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. The Working Group agreed with that suggestion and requested the drafting group to formulate appropriate additional language to that effect to be included in paragraph 3, subparagraph (b).

69. Also for purposes of transparency and accountability, and in order to limit the scope for unfair changes meant to favour particular bidders, it was suggested that the contracting authority should be required to state in the record of the selection proceedings, to be kept pursuant to draft model provision 25, the reasons for any amendment to, or modification in, the elements of the request for proposal under paragraph 3, subparagraph (c). The Working Group agreed with that suggestion and

requested the drafting group to formulate appropriate additional language to that effect to be included in paragraph 3, subparagraph (c).

70. With those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 11. Content of the final request for proposals

71. The text of the draft model provision was as follows:

"To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals*],[16] the final request for proposals shall include at least the following information:

"(a) General information as may be required by the bidders in order to prepare and submit their proposals;[17]

"(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;[18]

"(c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;

"(d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals."

"[16] A list of elements typically contained in a request for proposals for services can be found in article 38 of the Model Procurement Law.

"[17] A list of elements that should be provided can be found in chapter III, 'Selection of the concessionaire', paragraphs 61 and 62, of the Legislative Guide.

"[18] See chapter III, 'Selection of the concessionaire', paragraphs 64-66."

72. The Working Group noted that the draft model provision reflected legislative recommendation 20. It was pointed out that, in line with the second sentence of legislative recommendation 26 and the discussion in chapter III, paragraph 69, of the Legislative Guide, subparagraph (c) required the request for proposals to contain an indication of which contractual terms were deemed non-negotiable by the contracting authority. Subparagraph (d) contained a specific reference to thresholds for evaluation of proposals, which were referred to in legislative recommendation 24.

73. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

[Model provision 12. Bid security]

74. The text of the draft model provision was as follows:

"1. [The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security.]

"2. [A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:[19]

"(a) Withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;

"(b) Failure to enter into final negotiations with the contracting authority pursuant to [*model provision 16*];

"(c) Failure to formulate a best and final offer within the time limit prescribed by the contracting authority pursuant to [*model provision 16, para. 2*];

"(d) Failure to sign the concession agreement, if required by the contracting authority to do so, after the proposal has been accepted;

"(e) Failure to provide required security for the fulfilment of the concession agreement after the proposal has been accepted or to comply with any other condition prior to signing the project agreement specified in the request for proposals.]"

"[19] General provisions on bid securities can be found in article 32 of the Model Procurement Law."

75. The Working Group was informed that, following consultations by the Secretariat with experts, it had been suggested that it might be useful to include a draft model provision dealing with bid securities, along the lines of the discussion in chapter III, paragraph 62, of the Legislative Guide and article 37, paragraph 1 (f), of the UNCITRAL Model Procurement Law. It was pointed out that the draft model provision had been put in square brackets, as there was no specific legislative recommendation on that topic.

76. 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. Thus, the Working Group agreed to remove the square brackets around the draft model provision.

77. For purposes of clarity, the Working Group agreed that the cross-reference in subparagraph (b) of paragraph 2 should be to paragraph 1 of draft model provision 16.

78. With those amendments, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 13. Clarifications and modifications

79. The text of the draft model provision was as follows:

> "The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise the final request for proposals by deleting or modifying any aspect of the project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the final request for proposals, as well as by adding characteristics or criteria to it. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the final request for proposals at a reasonable time prior to the deadline for submission of proposals."

80. The Working Group noted that the draft model provision reflected legislative recommendation 21 and that the additional language was intended to clarify the scope of modifications to the request for proposals.

81. The view was expressed that the additional language included in the draft model provision, as compared with legislative recommendation 21, seemed to expand excessively the contracting authority's power to amend the request for proposals. While that power, in and of itself, was regarded as necessary in a proceeding as complex as the selection of a concessionaire for an infrastructure project, it was suggested that the draft provisions required additional language so as to make it clear that changes made by the contracting authority should be based on objective grounds. Such a qualification was said to be important so as to reduce the risk of changes being made solely for the purpose of favouring particular bidders.

82. The Working Group was generally in agreement with the importance of ensuring that the formulation of the draft model provision promoted transparency and did not lend itself to abuse by the contracting authority. However, it was felt that adding a requirement that any change in the request for proposals needed to be "objectively justifiable" would not be desirable, as such a qualification might invite challenges by bidders. Having considered those views, and mindful of the desirability of reminding contracting authorities of the need to refrain from making unnecessary changes to the essential elements in the request for proposals, the Working Group agreed that a cross-reference to draft model provision 11 should substitute for the full list of elements contained in the first sentence of the draft model provision. The Working Group also agreed that, for purposes of transparency, the contracting authority should be required to state in the record of the selection proceedings to be kept pursuant to draft model provision 25 the reasons for any amendment to, or modification in, the elements of the request for proposal under the draft model provision.

83. Subject to those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 14. Evaluation criteria

84. The text of the draft model provision was as follows:

"1. The criteria for the evaluation and comparison of the technical proposals[20] shall include at least the following:

"(a) Technical and environmental soundness;

"(b) Operational feasibility;

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

"2. The criteria for the evaluation and comparison of the financial and commercial proposals[21] shall include, as appropriate:

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

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

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

"(d) The extent of financial support, if any, expected from a public authority of [*this State*];

"(e) Soundness of the proposed financial arrangements;

"(f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;

"(g) The social and economic development potential offered by the proposals."

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"[20] See chapter III, 'Selection of the concessionaire', paragraph 74.

"[21] See chapter III, 'Selection of the concessionaire', paragraphs 75-77."

85. The Working Group noted that the draft model provision reflected legislative recommendations 22 and 23, which had been combined for ease of reading.

86. It was pointed out that, following consultations with experts, the suggestion had been made that subparagraph (d) of recommendation 22, "social and economic development potential offered by the proposals", would be more appropriately placed among the commercial aspects of the proposals (recommendation 23). Accordingly, the subparagraph was placed as paragraph 2 (g) in draft model provision 14, even though the Legislative Guide referred to "social and economic development potential offered by the proposals" in connection with the criteria for the evaluation of the technical aspects of the proposal (see chap. III, para. 74 (f)).

87. The Working Group noted that subparagraph (f) of paragraph 2 had been aligned with subparagraph (c) of draft model provision 11.

88. Subject to editorial changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 15. Comparison and evaluation of proposals

89. The text of the draft model provision was as follows:

> "1. The contracting authority shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set forth in the request for proposals.
>
> "2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.[22]"

"[22] This model provision offers an example of an evaluation process that a contracting authority may wish to apply to compare and evaluate proposals for privately financed infrastructure projects. Alternative evaluation processes are described in chapter III, 'Selection of the concessionaire', paragraphs 79-82, of the Legislative Guide, such as a two-step evaluation process or the two-envelope system. In contrast to the process set forth in this model provision, the processes described in the Legislative Guide are designed to allow the contracting authority to compare and evaluate the non-financial criteria separately from the financial criteria so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria. In order to ensure the integrity, transparency and predictability of the evaluation stage of the selection proceedings, it is recommended that the enacting State set forth in its law the evaluation processes that contracting authorities may use to compare and evaluate proposals and the details of the application of this process."

90. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 24. It was pointed out that the title had been changed to reflect more accurately the scope of the draft model provision. A new provision, in paragraph 1, had been added to clarify the sequence of actions by the contracting authority in evaluating proposals.

91. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 15 bis. Further demonstration of fulfilment of qualification criteria

92. The Working Group agreed that paragraph 3 of draft model legislative provision 9 should be placed in a separate model legislative provision between model law provisions 15 and 16, so as 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. In order to clarify which qualification criteria the contracting authority should use in that situation, it was suggested that a footnote reflecting the substance of the last sentence of article 34, paragraph 6, of the Procurement Model Law should be added to the new model legislative provision.

93. The Working Group concurred with that suggestion, approved the substance of the draft model provision and referred it to the drafting group.

Model provision 16. Final negotiations

94. The text of the draft model provision was as follows:

> "1. The contracting authority shall rank all responsive proposals and invite for final negotiation of the concession contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals.
>
> "2. If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a concession contract, the contracting authority shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the bidder fails to formulate an offer acceptable to the contracting authority within the prescribed time limit, the contracting authority shall terminate the negotiations with the bidder concerned. The contracting authority shall then invite for negotiations the bidder that has attained the second best rating; if the negotiations with that bidder do not result in a concession contract, the contracting authority shall thereafter invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with whom negotiations have been terminated pursuant to this paragraph."

95. The Working Group noted that the draft model provision reflected legislative recommendations 26 and 27, which had been combined for ease of reading. The Working Group also noted that following suggestions made in the Secretariat's consultations with outside experts, paragraph 2 had been drafted to include the requirement that bidders should be given notice and be requested to submit a "best and final offer" by a specified date before the contracting authority terminated the negotiations. It was pointed out that that requirement reflected article 48, paragraph 8, and article 49, paragraph 4, of the Model Procurement Law.

96. With respect to the third sentence of paragraph 2, it was suggested that the words "the bidder that has attained the second best rating; if the negotiations with that bidder do not result in a concession contract, the contracting authority shall thereafter invite for negotiations" should be deleted in order to increase the readability of the provision without reducing its substance.

97. The Working Group concurred with that suggestion, approved, with that amendment, the substance of the draft model provision and referred it to the drafting group.

3. Negotiation of concession agreements without competitive procedures

Model provision 17. Circumstances authorizing award without competitive procedures

98. The text of the draft model provision was as follows:

"[Subject to approval by ... [*the enacting State indicates the relevant authority*]][23] the contracting authority is authorized to negotiate a concession contract without using the procedure set forth in [*model provisions 6-16*], in the following cases:

"(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in [*model provisions 6-16*] would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

"(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of ...] [*the enacting State specifies a monetary ceiling*] [set forth in ...] [*the enacting State indicates the provisions of its laws that specify the monetary threshold below which a privately financed infrastructure project may be awarded without competitive procedures*];[24]

"(c) Where the project involves national defence or national security;

"(d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property right or other exclusive right owned or possessed by a certain person or persons;

"[23] The rationale for subjecting the award of the concession contract without competitive procedures to the approval of a higher authority is to ensure that the contracting authority engages in direct negotiations with bidders only in the appropriate circumstances (see chap. III, 'Selection of the concessionaire', paras. 85-96). The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

"[24] As an alternative to the exclusion provided in subparagraph (b), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by applying the procedures described in article 48 of the Model Procurement Law.

"(e) In cases of unsolicited proposals falling under [*model provision 22*];

"(f) When an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria [set forth in the request for proposals], and if, in the judgement of the contracting authority, issuing a new invitation to the pre-selection proceedings and a new request for proposals would be unlikely to result in a project award, within a required time frame, provided that the terms of any concession contract so negotiated between the parties must [be consistent with] [not depart from] the project specifications and contractual terms originally transmitted with the request for proposals;

"(g) In other cases where the [*the enacting State indicates the relevant authority*] authorizes such an exception for [compelling] reasons of public interest [or other cases of the same exceptional nature, as defined in the law].[25]"

"[25] Enacting States that deem it desirable to authorize the use of negotiated procedures on an ad hoc basis may wish to retain subparagraph (g) when implementing the model provision. Enacting States wishing to limit exceptions to the competitive selection procedures may in turn prefer not to include the subparagraph."

99. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 28.

100. As a safeguard against abuse in the recourse to direct negotiations, the Working Group agreed that the square brackets in the first line of the draft model provision should be deleted, so that approval by an authority would be required in all cases covered by the draft model legislative provision.

101. With respect to subparagraph (a), it was pointed out that the additional language contained in that provision was included so as to align the provision with the discussion in chapter III, paragraph 89 (a), of the Legislative Guide.

102. With respect to subparagraph (b), the Working Group agreed that both alternatives in square brackets should be retained.

103. With respect to subparagraph (f), it was pointed out that, following the Secretariat's consultations with outside experts, additional language had been included in the provision to the effect that negotiations following unsuccessful attempts to begin competitive procedures should not depart from the original project specifications and contract terms. The additional language was designed as an additional safeguard against manipulation of the selection process. It was noted, however, that the new text would render the provision unworkable since the additional language would significantly reduce the scope of application of the provision. It was also suggested that the goal of preventing abuse of direct negotiations could be best achieved if the subparagraph were to be deleted altogether. The Working Group, however, preferred to retain the subparagraph with the deletion of the additional language. Among the options available to ensure transparency in the negotiations under that subparagraph, wide support was expressed for the suggestion 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 which it was required to keep under model legislative provision 25. The Working Group agreed that a footnote should be added to subparagraph (f) to that effect.

104. With respect to subparagraph (g), it was suggested at the last session of the Working Group that the provision 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). The Working Group was invited to consider whether such an addition, which was reflected in the draft model provision, would strictly be necessary, or whether such a possibility would already be covered under the first phrase of subparagraph (g). 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.

105. Subject to those changes and amendments, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 18. Procedures for negotiation of a concession agreement

106. The text of the draft model provision was as follows:

> "Where a concession contract is negotiated without using the procedures set forth in [*model provisions 6-16*] the contracting authority shall:[26]
>
> "(a) Except for concession contracts negotiated pursuant to [*model provision 17, para. (c)*], cause a notice of its intention to commence negotiations in respect of a concession contract to be published in accordance with [*the enacting State indicates the provisions of any relevant laws on procurement proceedings that govern the publication of notices*];
>
> "(b) Engage in negotiations with as many persons as the contracting authority judges capable of carrying out the project as circumstances permit;
>
> "(c) Establish evaluation criteria against which proposals shall be evaluated and ranked."

"[26] A number of elements to enhance transparency in negotiations under this model provision are discussed in chapter III, 'Selection of the concessionaire', paragraphs 90-96, of the Legislative Guide."

107. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 29. It was pointed out that the original subparagraph (c) of legislative recommendation 29 had been subsumed in the general provision on notice of project awards under draft model provision 24.

108. 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.

109. Subject to that change, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

4. Unsolicited proposals[27]

Model provision 19. Admissibility of unsolicited proposals

110. The text of the draft model provision was as follows:

> "As an exception to [*model provisions 6-16*], the contracting authority[28] is authorized to consider unsolicited proposals pursuant to the procedures set forth in [*model provisions 20-22*], provided that such proposals do not relate to a project for which selection procedures have been initiated or announced."

"[27] The policy considerations on the advantages and disadvantages of unsolicited proposals are discussed in chapter III, 'Selection of the concessionaire', paragraphs 98-100, of the Legislative Guide. States that wish to allow contracting authorities to handle such proposals may wish to use the procedures set forth in model provisions 22-24.

"[28] The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the regulatory system of the enacting State, a body separate from the contracting authority may have the responsibility for entertaining unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes 1, 3 and 23 and the references cited therein)."

111. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 30, approved its substance and referred it to the drafting group.

Model provision 20. Procedures for determining the admissibility of unsolicited proposals

112. The text of the draft model provision was as follows:

> "1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall promptly inform the proponent whether or not the project is considered to be in the public interest.[29]

"[29] The determination that a proposed project is in the public interest entails a considered judgement regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the infrastructure sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks."

"2. If the project is considered to be in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environment impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

"3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. In particular, the contracting authority shall not make use of any information issued or provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. [Except as otherwise agreed by the parties], the contracting authority shall, in the event that the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared [, whether in hard copy or in electronic format,] throughout the procedure."

113. The Working Group noted that the draft model provision reflected legislative recommendations 31 and 32. It was pointed out that paragraph 3 elaborated 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.

114. In connection with paragraph 1, it was pointed out 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. It would be more appropriate for paragraphs 1 and 2 to refer to a preliminary conclusion of the contracting authority that the proposal was regarded as being "potentially" in the public interest. The Working Group concurred with that suggestion.

115. The Working Group agreed to include a footnote to paragraph 2 to the effect that the enacting State might 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.

116. The Working Group was of the view that the relationship between the duty to protect the proponent's intellectual property, trade secrets or other exclusive rights, under the first sentence of paragraph 3, and the contracting authority's duty not to use proprietary information disclosed by the proponent, under the second sentence, should be expressed more clearly. The Working Group thus agreed that the words "in particular" at the beginning of the second sentence should be replaced with the word "therefore". The Working Group further agreed to remove the square brackets around the words "except as otherwise agreed by the parties" in the third sentence and to delete the words in square brackets "whether in hard copy or in electronic format", which were not felt to be needed.

117. Subject to those amendments and other editorial changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 21. Unsolicited proposals that do not involve proprietary concepts or technology

118. The text of the draft model provision was as follows:

> "1. Except in the circumstances set forth in [*model provision 17*], the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with [*model provisions 6-16*] if the contracting authority considers that:
>
> "(a) The envisaged output of the project can be achieved without the use of an intellectual property right or other exclusive right owned or possessed by the proponent; or
>
> "(b) The proposed concept or technology is not truly unique or new.
>
> "2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit [in a manner described by the contracting authority in the request for proposals] in consideration for the development and submission of the proposal."

119. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 33.

120. For purposes of consistency, the Working Group decided that the words "intellectual property, trade secrets or other exclusive rights", which appeared in paragraph 3 of draft model provision 20, should also be used in the title and elsewhere in the text of the draft model provisions. The Working Group also agreed that the conjunction "and" should be used instead of "or" to connect subparagraphs (a) and (b) of paragraph 1, since those conditions needed to be cumulative.

121. Subject to those amendments and other editorial changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 22. Unsolicited proposals involving proprietary concepts or technology

122. The text of the draft model provision was as follows:

> "1. If the contracting authority determines that the conditions of [*model provision 21, para. 1 (a) or (b)*] are not met, it shall not be required to carry out a selection procedure pursuant to [*model provisions 6-16*]. However, the contracting authority may still seek to obtain elements of comparison for the

unsolicited proposal in accordance with the provisions set out in paragraphs 2-4.[30]

"2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [*the enacting State indicates a certain amount of time*].

"3. If no proposals in response to an invitation issued pursuant to paragraph 2 are received within [a reasonable period] [the amount of time specified in paragraph 2 above], the contracting authority may engage in negotiations with the original proponent.

"4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in [*model provision 18*]. In the event that the contracting authority receives a sufficiently large number of proponents, which appear prima facie to meet its infrastructure needs, the contracting authority shall request the submission of proposals pursuant to [*model provisions 10-16*], subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with [*model provision 21, para. 2*]."

_____

"[30] The enacting State may wish to consider adopting a special procedure for handling unsolicited proposals falling under this model provision, which may be modelled, mutatis mutandis, on the request-for-proposals procedure set forth in article 48 of the Model Procurement Law."

123. The Working Group noted that the draft model provision reflected the substance of legislative recommendations 34 and 35.

124. The Working Group agreed that the title and the text of the draft model provision should be aligned with draft model provision 21.

125. With those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

5. Miscellaneous provisions

Model provision 23. Confidentiality of negotiations

126. The text of the draft model provision was as follows:

"The contracting authority shall treat proposals in such a manner as to avoid the disclosure of any information contained therein to competing bidders. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to [*model provisions 10, para. 3, 16, 17, 18 or 22, para. 3*] shall be confidential. [Unless required by law or by a court order,] Each party to the negotiations shall not disclose to any other person, apart from its agents, subcontractors, lenders, advisers or consultants, any technical, price or other information that it has received in relation to

discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party."

127. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 36. It was pointed out that the first sentence of the draft model provision was drawn from article 45 of the UNCITRAL Model Procurement Law. The reference to "agents, subcontractors, lenders, advisers or consultants" had been added with a view to avoiding an excessively restrictive interpretation of the draft model provision.

128. The Working Group agreed to remove the square brackets around the words "unless required by law or by a court order" in the second sentence of the draft model provision. In connection with that sentence, the question was asked as to whether the word "court" was meant only to include judicial bodies or whether it could also encompass arbitral tribunals. It was pointed out, in that connection, that some institutions that administered arbitration proceedings were sometimes referred to as "arbitration courts" and that some legal systems admitted arbitration of procurement-related disputes. In response, it was noted that nothing in the draft model provision limited the enacting State's ability to expressly expand the scope of the draft model provision to arbitral tribunals or to interpret it in that manner, when such an interpretation would be admissible under its own laws. As currently drafted, however, the draft model provision was meant to refer to state courts, and not to arbitral tribunals.

129. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 24. Notice of project award

130. The text of the draft model provision was as follows:

"Except for infrastructure projects awarded pursuant to [*model provision 17, subpara. (c)*], the contracting authority shall cause a notice of the award of the project to be published in accordance with [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices*]. The notice shall identify the concessionaire and include a summary of the essential terms of the concession agreement."

131. The Working Group noted that the draft model provision reflected legislative recommendation 37.

132. Subject to editorial changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 25. Record of selection and award proceedings

133. The text of the draft model provision was as follows:

"The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance

with [*the enacting State indicates the provisions of its laws on public procurement that govern record of procurement proceedings*].[31]"

"[31] The contents of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, may need to be set forth in regulations issued by the enacting State to implement the model provision, where no such rules exist under the enacting State's procurement laws. These issues are discussed in chapter III, 'Selection of the concessionaire', parasgraphs 120-126, of the Legislative Guide. The content of such a record for the various types of project award contemplated is set out in article 11 of the Model Procurement Law."

134. The Working Group noted that the draft model provision reflected legislative recommendation 38.

135. The view was expressed that legal requirements on record of selection and award proceedings were essential elements for ensuring transparency and accountability in the selection process. It was recognized that including all the elements referred to in paragraphs 120-126 of chapter III of the Legislative Guide would render the draft model provision excessively detailed. Nevertheless, it was said, 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. The Working Group considered various proposals that were made to achieve that result and eventually agreed that the text of the draft model provisions should be essentially kept as it was, but that the footnote should be redrafted along the following lines:

"The contents of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, are discussed in chapter III, 'Selection of the concessionaire', paragraphs 120-126, of the Legislative Guide. The content of such a record for the various types of project award is further set out in article 11 of the Model Procurement Law. If the laws of the enacting State do not adequately address these matters, the enacting State should adopt appropriate legislation to that effect."

136. With those additions, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 26. Review procedures

137. The text of the draft model provision was as follows:

"A bidder who claims to have suffered, or who may suffer, loss or injury due to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts or failures to act in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].[32]"

"[32] Elements for the establishment of an adequate review system are discussed in chapter III, 'Selection of the concessionaire', paragraphs 127-131, of the Legislative Guide. They are also contained in chapter VI of the Model Procurement Law."

138. The Working Group noted that the draft model provision reflected legislative recommendation 39.

139. For the purpose of stressing the importance of appropriate review procedures, which were felt to be an indispensable component of a fair selection process, the Working Group agreed to add, at the end of the footnote, a sentence stating that if the laws of the enacting State did not provide such an adequate review system, the enacting State should consider adopting appropriate legislation to that effect.

140. With those additions, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

III. Construction and operation of infrastructure

Model provision 27. Contents of the concession agreement

141. The text of the draft model provision was as follows:

> "The concession contract shall provide for such matters as the parties deem appropriate, including:
>
> "(a) The nature and scope of works to be performed and services to be provided by the concessionaire [*see chap. IV, para. 1*];
>
> "(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire's rights under the concession contract [*see recommendation 5*];
>
> "(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project [*see recommendation 6*];
>
> "(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with [*model provision 29*] [*see recommendation 42 and draft model provision 29*];
>
> "(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with [*model provisions 30-32*] [*see recommendations 44 and 45 and draft model provisions 30-32*];
>
> "(f) The remuneration of the concessionaire, in particular and as appropriate, the concessionaire's right to charge, receive or collect tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of those tariffs or fees; and any payments, if any, that may be made by the contracting authority or other public authority [*see recommendations 46 and 48*];
>
> "(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility [*see recommendation 52*];
>
> "(h) The extent of the concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand

for the service, its continuity and its provision under essentially the same conditions for all users [*see recommendation 53 and draft model provision 37*];

"(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements [*see recommendation 54 (b)*];

"(j) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations [*see recommendation 54 (a)*];

"(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled [*see chap. IV, paras. 73-76*];

"(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons [*see recommendation 56*];

"(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project [*see recommendation 58 (a) and (b)*];

"(n) Remedies available in the event of default of either party [*see recommendation 58 (e)*];

"(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession contract owing to circumstances beyond its reasonable control [*see recommendation 58 (d)*];

"(p) The duration of the concession contract and the rights and obligations of the parties upon its expiry or termination [*see recommendation 61*];

"(q) The manner for calculating compensation pursuant to [*model provision 46*] [*see recommendation 67*];

"(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire [*see recommendations 41 and 69 and draft model provisions 28 and 48*]."

142. At its fourth session, the Working Group had requested the Secretariat to prepare an initial draft of a model provision that listed essential issues that needed to be addressed in the project agreement (see A/CN.9/505, para. 114).

143. In order to implement that request, the draft model provision listed a number of issues that should be addressed in the project agreement. Some of those issues were also the subject of specific draft model provisions. Other issues listed therein, however, related to legislative recommendations on which the Working Group did not request that specific draft model provisions should be drafted.

144. Support was expressed for the view that the list of matters for possible inclusion in the concession contract should be of an indicative rather than exhaustive nature. It was pointed out that the elements listed in the draft model provision might not cater for all types of concession under all circumstances. It was also pointed out that the parties should be free to agree on the matters most appropriate for the particular needs and requirements of the specific infrastructure project and that the draft model provision contained a valuable indication of essential elements of the concession contract.

145. In response to that view, it was observed that the underlying purpose of a concession contract, as envisaged by the draft model provision, was the provision of services to the public through a private entity. As the concession contract thus touched upon issues of public interest, it was suggested that the draft model provision should prescribe at least those matters on which variation by agreement were not admitted for reasons of public interest. That issue gave rise to the question, however, as to whether contracts not containing all the elements contained in the draft model provision could be challenged or declared void, a result that was largely felt to be undesirable.

146. After some discussion, it was suggested that the chapeau should be reformulated so as to express more closely the idea that the list, albeit relating to essential matters, was not meant to be mandatory in its full length. In order to reflect that intention and to align the various language versions, the Working Group agreed that the word “including” in the chapeau of the draft model provision should be replaced with the words “such as”. The Working Group agreed that that 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.

147. With respect to subparagraph (f), it was noted that in some jurisdictions the remuneration of the concessionaire by way of collecting tariffs or fees from the 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 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”.

148. Subject to those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 28. Governing law

149. The text of the draft model provision was as follows:

> "The concession contract is governed by the law of this State [unless otherwise provided in the concession contract].[33]"

"[33] Legal systems provide varying answers to the question as to whether the parties to a concession contract may choose as the governing law of the agreement a law other than the laws of the host country. Furthermore, as discussed in the Legislative Guide (see chap. IV, 'Construction and operation of infrastructure: legislative framework and project agreement', paras. 5-8), in some countries the concession contract may be subject to administrative law, while in others the concession contract may be governed by private law (see also Legislative Guide, chap. VII, 'Other relevant areas of law', paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the execution of an infrastructure project (see generally Legislative Guide, chap. VII, 'Other relevant areas of law', sect. B)."

150. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 41.

151. The Working Group agreed to delete the brackets in the draft model provision.

152. It was noted that in some cases, in particular in the case of concession contracts concluded under bilateral investment treaties, the contract between the contracting authority and the concessionaire might be governed by public international law instead of the law of the enacting State. It was suggested that the wording of the draft model provision should also cover those cases. The Working Group, however, did not concur with that suggestion. It was agreed that the last sentence of the footnote to the draft model provision referring to chapter VII of the Legislative Guide would provide sufficient guidance to enacting States on that matter.

153. Subject to that amendment, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 29. Organization of the concessionaire

154. The text of the draft model provision was as follows:

> "The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*this State*], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statutes and by-laws and significant changes therein shall be set forth in the concession contract."

155. The Working Group noted that the draft model provision reflected the substance of legislative recommendations 42 and 43.

156. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 30. Ownership of assets[34]

157. The text of the draft model provision was as follows:

"The concession contract shall specify, [where necessary and] [as appropriate], which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. The concession contract shall in particular identify which assets belong to the following categories:

"(a) Assets, if any, that the concessionaire is required, as appropriate, to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the concession contract;

"(b) Assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

"(c) Assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the concession contract."

"[34] Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see 'Introduction and background information on privately financed infrastructure projects', paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see chap. IV, 'Construction and operation of infrastructure: legislative framework and project agreement', paras. 20-26). Irrespective of the host country's general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the concessionaire's ability to create security interests in project assets for the purpose of raising financing for the project (ibid., paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the concessionaire."

158. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 44.

159. The Working Group agreed to delete the words "[where necessary and]", as it was felt that the phrase was redundant. For the same reason, the Working Group also agreed to delete the words "as appropriate" in subparagraph (a).

160. Some support was expressed for the view that the phrase "upon expiry or termination of the concession contract" should be added to subparagraphs (b) and (c). In response to that view, however, it was pointed out that the new wording might reduce the flexibility inherent in the original text. The situation dealt with in subparagraph (b), for instance, might also arise during the execution of the concession contract. The Working Group therefore agreed that the text of the draft model provision should be preserved and that the words "upon expiry or termination of the concession contract" should be added at the end of the footnote to the provision, followed by the words "or at any other time", although it was understood that the appropriate place for the new words might need to be considered further.

161. Subject to those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 31. Acquisition of project site

162. The text of the draft model provision was as follows:

> "1. The contracting authority or other public authority under the terms of the law and the concession contract shall [obtain] [make available to the concessionaire] or, as appropriate, assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.
>
> "2. Any compulsory acquisition of land that may be required for the execution of the project shall be carried out in accordance with [*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*] and the terms of the concession contract."

163. In order to clarify the wording of paragraph 1 and streamline the number of options given to enacting States without reducing the substance of the provision, the Working Group agreed to delete the word "obtain" and the brackets in the paragraph and to add the word "shall" before the word "assist". In order to reflect those changes in the heading of the draft model provision, the Working Group agreed to replace the original text of the heading by the words "Acquisition of rights related to the project site".

164. With respect to paragraph 2, the Working Group agreed that the words "and the terms of the concession contract" should be deleted, as there was wide agreement that any compulsory acquisition should only be carried out in accordance with the law of the enacting State, rather than the terms of the concession contract.

Model provision 32. Easements[35]

165. The text of the draft model provision was as follows:

> "The concessionaire shall [have] [be granted] the power to enter upon, transit through, do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project [in accordance with (*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*)]."

"[35] The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see chap. IV, 'Construction and operation of infrastructure: legislative framework and project agreement', paras. 30-32). The alternative wording offered within the first set of square brackets in the model provision is intended to reflect those options."

166. For reasons of consistency, the Working Group agreed that the word "power" should be replaced by the word "right". The Working Group further agreed to delete the brackets in the draft model provision.

Model provision 33. Financial arrangements

167. The text of the draft model provision was as follows:

> "The concessionaire has the right to charge, receive or collect tariffs or fees for the use of the facility or the services it provides. The concession agreement shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [in accordance with the rules established by the competent regulatory agency].[36]"

"[36] Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the Legislative Guide as 'tariffs', may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, 'Project risks and government support', paras. 30-60). The cost at which public services are provided is typically an element of the Government's infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of 'reasonableness', 'fairness' or 'equity' (see chap. IV, 'Construction and operation of infrastructure: legislative framework and project agreement', paras. 36-46)."

168. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 46.

169. The question was asked as to whether a separate provision on the matter was needed, in view of the fact that subparagraph (f) of draft model provision 27 already dealt with the remuneration of the concessionaire, which was one of the elements to be provided in the project agreement. In response, it was noted that the Working Group, at its fourth session, had decided that a specific provision affirming the concessionaire's right to charge or collect fees for the use of the infrastructure facility was needed (see A/CN.9/505, para. 129). Such a provision was particularly important as in a number of countries prior legislative authorization might be necessary in order for a concessionaire to do so.

170. Subject to replacing the words "has the right" with the words "shall have the right" in the first sentence, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 34. Security interests

171. The text of the draft model provision was as follows:

"1. Subject to any restriction that may be contained in the concession agreement,[37] the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

"(a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;

"(b) A pledge of the proceeds and receivables owed to the concessionaire for the use of the facility or the services it provides.

"2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

"3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is not permitted by the law of [*this State*]."

_____

"[37] These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project."

172. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 49.

173. The Working Group agreed to replace the words "is not permitted" with the words "is prohibited" in paragraph 3. With those amendments, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 35. Assignment of the concession agreement

174. The text of the draft model provision was as follows:

"Except as otherwise provided in [*model provision 34*], the rights and obligations of the concessionaire under the concession agreement may not [, in whole or in part,] be assigned to third parties without the consent of the contracting authority. The concession agreement shall set forth the conditions under which the contracting authority [may] [shall] give its consent to an assignment of the rights and obligations of the concessionaire under the concession agreement, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire's technical and financial capability as necessary for providing the service."

175. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 50.

176. The Working Group agreed to delete the words in square brackets "in whole or in part", which were considered to be more appropriate in a contractual, rather than legislative text. The Working Group further agreed to delete the word "may" and to remove the square brackets around the word "shall" in the second sentence of the draft model provision.

177. With those amendments, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 36. Transfer of controlling interest[38] in the concessionaire

178. The text of the draft model provision was as follows:

> "Except as otherwise provided in the concession agreement, a controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The concession agreement shall set forth the conditions under which consent of the contracting authority [may] [shall] be given."

"[38] The notion of 'controlling interest' generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of 'controlling interest' may need to define the term in regulations issued to implement the model provision."

179. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 51.

180. The Working Group agreed to delete the word "may" and to remove the square brackets around the word "shall" in the second sentence. With that change, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 37. Operation of infrastructure

181. The text of the draft model provision was as follows:

> "1. The concession agreement shall set forth, as appropriate, the extent of the concessionaire's obligations to ensure:
>
> "(a) The modification of the service so as to meet the demand for the service;
>
> "(b) The continuity of the service;
>
> "(c) The provision of the service under essentially the same conditions for all users;
>
> "(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.
>
> "[2. The concessionaire shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.]"

182. The Working Group noted that paragraph 1 of the draft model provision reflected the substance of legislative recommendation 53. It was pointed out that

paragraph 2, reflecting the substance of legislative recommendation 55, had been added in square brackets following suggestions by outside experts, even though the Working Group, at its fourth session, had taken the view that a model provision on the matter was not needed (see A/CN.9/505, para. 144).

183. 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. 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 that it was useful to retain the provision contained in paragraph 3 without the square brackets.

184. The Working Group thus approved the substance of the draft model provision and referred it to the drafting group.

Model provision 38. Compensation for specific changes in legislation

185. The text of the draft model provision was as follows:

> "The concession agreement shall set forth the extent to which the concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the concession agreement has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the service it provides."

186. The Working Group noted that the draft model provision reflected legislative recommendation 58 (c). It was pointed out that a number of elements had been added in the draft model provision to reflect the depth of the discussion in paragraphs 121-130 of chapter IV of the Legislative Guide.

187. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 39. Revision of the concession agreement

188. The text of the draft model provision was as follows:

Variant A

> "1. Without prejudice to [*model provision 38*], the concession contract may further set forth the extent to which the concessionaire is entitled to request a revision of the concession contract with a view to providing compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as

compared with the costs and the value of performance originally foreseen, as a result of:

"(a) Changes in economic or financial conditions; or

"(b) Changes in legislation or regulation other than those referred to in [*model provision 38*].

"2. [Except as otherwise provided in the concession contract] a request for revision of the concession contract pursuant to paragraph 1 may not be granted unless the economic, financial, legislative or regulatory changes:

"(a) Occur after the conclusion of the contract;

"(b) Are beyond the control of the concessionaire; and

"(c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.

"3. The concession contract shall establish procedures for revising the terms of the concession contract following the occurrence of any such changes."

Variant B

"Without prejudice to [*model provision 38*], the concession contract may further set forth the extent to which the concessionaire is entitled to request a revision of the concession contract with a view to providing compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in economic or financial conditions or changes in legislation or regulation other than those referred to in [*model provision 38*]."

189. The Working Group noted that the draft model provision reflected legislative recommendation 58 (c). It was pointed out that a number of elements had been added in the draft model provision to reflect the depth of the discussion in paragraphs 121-130 of chapter IV of the Legislative Guide.

190. It was noted that paragraph 1 of variant A was substantially identical to variant B. As the substance of paragraph 2 of variant A, it was said, was normally dealt with in the concession contract, rather than in legislation, it was suggested that only variant B should be kept. variant A should be deleted, and paragraph 3 of variant A be added to the new provision as paragraph 2. It was felt that changing the provisions in that fashion would simplify the text without reducing the substance of the provision or omitting its essential elements.

191. Although it was acknowledged that variant B presented the substance of variant A in a more succinct form, it was suggested that both variants should be preserved. In any event paragraph 2 of variant A should be kept, as it provided important guidance to enacting States regarding the circumstances that might trigger a revision of the concession contract. That guidance was even more important, given the exceptional nature of contract revision following a hardship situation.

192. After some discussion, it was suggested that both views might be accommodated if variant B were deleted and subparagraphs (a), (b) and (c) of paragraph 2 of variant A were merged into paragraph 1 of variant A, preceded by the words "and provided that". It was felt that that amendment would simplify the draft model provision, clarify the relationship between paragraphs 1 and 2 of variant A and preserve the substance of paragraph 2 of variant A. The Working Group agreed with that suggestion.

193. With respect to paragraph 1, it was suggested that the word "request" in the second line should be deleted and the word "may" in the first line be replaced with "shall". It was noted that that wording would simplify the draft model provision and would more closely correspond to the substance and wording of the underlying recommendation 58 (c). The Working Group agreed with that suggestion.

194. In order to highlight the difference between draft model provision 38 and draft model provision 39, it was suggested that in paragraph 1 (b) of the latter the words "other than those referred to in [*model provision 38*]" should be replaced with the words "changes in legislation or regulations not specifically applicable to the infrastructure facility or the service it provides". The Working Group agreed with that suggestion.

195. It was noted that the draft model provision did not address the issue of the consequences of a disagreement between the contracting authority and the concessionaire on a revision of the concession contract. It was pointed out that that issue was addressed in draft model provision 44. The Working Group agreed to revert to the issue during its consideration of that provision.

196. Subject to those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 40. Takeover of an infrastructure project by the contracting authority

197. The text of the draft model provision was as follows:

> "Under the circumstances set forth in the concession contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so."

198. The Working Group noted that the draft model provision reflected legislative recommendation 59.

199. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 41. Substitution of the concessionaire

200. The text of the draft model provision was as follows:

> "The contracting authority and the entities extending financing for an infrastructure project may agree on procedures for the substitution of the concessionaire by a new entity or person appointed to perform under the

existing concession contract upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession contract or other similar circumstances, as may be agreed by the contracting authority and the entities extending financing for an infrastructure project.[39]"

"[39] The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see chap. IV, 'Construction and operation of infrastructure: legislative framework and project agreement', paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority."

201. The Working Group noted that the draft model provision reflected legislative recommendation 60.

202. It was suggested 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. It was also suggested 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 did not agree with those suggestions, as it was felt that they departed from the policy embodied in the Legislative Guide.

203. It was suggested that, for purposes of completeness, the words "right of such entities" could be added before the words "procedures for" and that the words "may agree" should be moved from the second line to the first line and be included after the words "contracting authority" so as to stress the authorizing nature of the draft model provision. In order to simplify the draft model provision, the Working Group also agreed to delete the last segment of the provision, as it was felt that the "other similar circumstances" would in any case be defined in the concession contract and that the deletion would thus not diminish the substance of the draft model provision.

204. The Working Group approved the substance of the draft model provision and referred it with the proposed changes to the drafting group.

IV. Duration, extension and termination of the concession agreement

1. Duration and extension of the concession agreement

Model provision 42. Duration and extension of the concession agreement

205. The text of the draft model provision was as follows:

"1. The term of the concession agreement, as stipulated in accordance with [*model provision 27 (p)*] shall not be extended except as a result of the following circumstances:

"(a) Completion delay or interruption of operation due to circumstances beyond either party's reasonable control; or

"(b) Project suspension brought about by acts of the contracting authority or other public authorities;

"(c) [*Other circumstances, as specified by the enacting State.*]

"2. The term of the concession contract may further be extended to allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the concession contract, if the concessionaire would not be able to recover such costs during the original term."

206. The Working Group noted that the draft model provision reflected the substance of legislative recommendations 61 and 62.

207. 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.

208. 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.

209. Subject to those amendments, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

2. Termination of the concession agreement

Model provision 43. Termination of the concession agreement by the contracting authority

210. The text of the draft model provision was as follows:

"The contracting authority may terminate the concession contract:

"(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

"(b) For reasons of public interest, subject to payment of compensation to the concessionaire, as agreed in the concession contract;

"(c) [*Other circumstances that the enacting State might wish to add in the law*.]"

211. The Working Group noted that the model provision reflected the substance of legislative recommendation 63.

212. It was suggested that the word "compelling" should be added before the word "reasons" in subparagraph (b). It was pointed out that that amendment would align the provision more closely with the Legislative Guide and would also ensure consistency with the footnote added to the preceding draft model provision 42. In order to provide guidance to enacting States as to the meaning of the notion of "compelling" public interest, it was suggested that a footnote should be added to subparagraph (b) referring to the relevant section of the Legislative Guide.

213. The Working Group agreed with those suggestions, approved the substance of the draft model provision and referred it to the drafting group.

Model provision 44. Termination of the concession agreement by the concessionaire

214. The text of the draft model provision was as follows:

> "The concessionaire may not terminate the concession contract except under the following circumstances:
>
> "(a) In the event of serious breach by the contracting authority or other public authority of their obligations in connection with the concession contract;
>
> "(b) In the event that the concessionaire's performance is rendered substantially more onerous as a result of acts of the contracting authority, unforeseen changes in conditions or acts of other public authorities and that the parties have failed to agree on an appropriate revision of the concession contract."

215. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 64.

216. It was suggested that the wording of the provision, in particular of subparagraph (b), should be redrafted so as to make it consistent with the amended text of draft model provision 39. It was felt that the new text should in particular reflect the idea that the concessionaire should only be able to terminate the concession contract where all the conditions of draft model provision 39, as amended, were met and negotiations on an appropriate revision of the concession contract had failed.

217. A redraft of subparagraph (b) was also suggested on the ground that the nature of the acts of other public authorities that might trigger the concessionaire's right to terminate the concession contract was unclear. In response, it was noted that those acts related to acts such as those which had been included in subparagraphs (h) and (i) of draft model provision 27. It might thus suffice to add a cross-reference to those provisions in draft model provision 44 so as to clarify the provision in that respect.

218. After a discussion of various options, including amendments borrowing language from draft model provision 39, it was suggested that the words "or omissions" should be added after the word "acts". It was also suggested that the word "appropriate" in the phrase "appropriate revision" should be deleted, so as not

to give the impression that the agreed revision of the concession contract was subject to judicial review. The Working Group agreed with those suggestions.

219. Subject to those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 45. Termination of the concession agreement by either party

220. The text of the draft model provision was as follows:

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

221. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 65.

222. For reasons of consistency, the Working Group agreed to replace the word "has" in the first line with "shall have", and to add the word "shall" before the words "also have" in the third line of the provision.

223. It was suggested that the meaning of the word "impossible" should be clarified by way of reformulating the provision, as the word could be read to mean permanent or temporary failure by a party to perform its duties under the concession contract. The Working Group, however, did not concur with that suggestion as it was felt that the Legislative Guide provided sufficient guidance to enacting States on the matter.

224. Subject to those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

3. Arrangements upon expiry or termination of the concession agreement

Model provision 46. Financial arrangements upon expiry or termination of the concession agreement

225. The text of the draft model provision was as follows:

> "The concession agreement shall stipulate how compensation due to either party is calculated in the event of termination of the concession agreement, providing, where appropriate, for compensation for the fair value of works performed under the concession agreement, costs incurred or losses sustained by either party, including, as appropriate, lost profits."

226. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 67.

227. The Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 47. Wind-up and transfer measures

228. The text of the draft model provision was as follows:

"The concession agreement [may] [shall] set forth, as appropriate, the rights and obligations of the parties with respect to:

"(a) Mechanisms and procedures for the transfer of assets to the contracting authority, where appropriate;

"(b) The transfer of technology required for the operation of the facility;

"(c) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

"(d) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire."

229. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 68, with the addition of subparagraph (a) so as to cover the generality of the matters referred to in paragraphs 37-42 of chapter V of the Legislative Guide.

230. Subject to deleting the word "may" and retaining the word "shall" without the square brackets in the first sentence, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

V. Settlement of disputes

Model provision 48. Disputes between the contracting authority and the concessionaire

231. The text of the draft model provision was as follows:

Variant A

"Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession agreement [in accordance with the law of this State]."

Variant B

"The contracting authority shall be free to agree upon mechanisms for the settlement of disputes that may arise between the parties to the concession agreement, as best suited to the needs of the infrastructure project."

232. The Working Group noted that the draft model provision offered two variants to reflect the policy stated in legislative recommendation 69.

233. Some support was expressed to retaining variant B, which was felt by some delegations to adequately emphasize the need for an enabling legislative provision for the contracting authority's freedom to choose the dispute settlement mechanisms. The prevailing view, however, was favourable of deleting variant B and retaining variant A, with some adjustments.

234. It was pointed out that, once enacted, the draft model provision would become an integral part of the enacting State's laws. Therefore, the reference, in variant A, to other laws of the enacting State was considered to potentially deprive the draft

model provision of its usefulness. While there was wide support to deleting the words "in accordance with the law of this State" in variant A, it was also pointed out that it would be inappropriate to suggest that the enacting State's laws on the matter, if any, could be ignored. It was noted that the laws of some countries 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. As currently drafted, however, variant A appeared to suggest that appropriate dispute settlement mechanisms needed in every case to be created by the parties themselves.

235. After considering various proposals to address those concerns, the Working Group agreed to delete the words "in accordance with the law of this State" in variant A and to include a footnote to the draft model provision to the effect that the enacting State might provide in its legislation dispute settlement mechanisms that were best suited to the needs of privately financed infrastructure projects.

236. With those amendments, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

Model provision 49. Disputes involving the concessionaire and its lenders, contractors and suppliers

237. The text of the draft model provision was as follows:

> "1. The concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.
>
> "2. The concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners."

238. The Working Group noted that the draft model provision reflected the substance of legislative recommendation 70.

239. The Working Group agreed that the draft model provision should be placed after draft model provision 50 and that its title should be changed to "other disputes". With those changes, the Working Group approved the substance of the draft model provision and referred it to the drafting group.

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

240. The text of the draft model provision was as follows:

> "[Where the concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.]"

241. It was pointed out that the draft model provision, which had been suggested for inclusion by experts consulted by the Secretariat, appeared in square brackets, as no draft model provision had been requested by the Working Group with respect to legislative recommendation 71 (see A/CN.9/505, para. 174).

242. The Working Group heard expressions of strong support for retaining the draft model provision, which was felt to be essential in a legislative text dealing with infrastructure projects. The draft model provision, it was noted, emphasized 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.

243. The Working Group thus agreed to remove the square brackets around the draft model provision, approved its substance and referred it to the drafting group.

Notes

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

[2] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 195-368.

[3] Ibid., para. 375.

[4] Ibid., para. 379.

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

[6] Ibid., para. 369.

Annex

Draft model legislative provisions on privately financed infrastructure projects

I. General provisions

Foreword

The following model legislative provisions (hereinafter referred to as "model provisions") have been prepared by the United Nations Commission on International Trade Law (UNCITRAL) as an addition to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (hereinafter referred to as "the Legislative Guide"), which was adopted by the Commission in 2000. The model provisions are intended to further assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. The user is advised to read the model provisions together with the legislative recommendations and the notes contained in the Legislative Guide, which offer an analytical explanation to the financial, regulatory, legal, policy and other issues raised in the subject area.

The model provisions consist of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects. While most model provisions relate to specific legislative recommendations contained in the Legislative Guide, they do not cover the entire range of issues dealt with in the legislative recommendations. In particular, no specific model provisions have been formulated on administrative or institutional matters, such as those dealt with in legislative recommendations 1 and 5-13.

The model provisions are designed to be implemented and supplemented by the issuance of regulations providing further details. Areas suitable for being addressed by regulations rather than by statutes are identified accordingly. Moreover, the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical, legal and financial expertise, appropriate human and financial resources and economic stability.

It should be noted that the model provisions do not deal with other areas of law that also have an impact on privately financed infrastructure projects but on which no specific legislative recommendations are made in the Legislative Guide. Those other areas of law include, for instance, promotion and protection of investments, property law, security interests, rules and procedures on compulsory acquisition of private property, general contract law, rules on government contracts and administrative law, tax law, and environmental protection and consumer protection laws.

For the user's ease of reference, the model provisions are preceded by headings and bear titles that follow as closely as possible the headings of relevant sections of the Legislative Guide and the titles of its legislative recommendations. However, with a view to ensuring uniformity of style throughout the model

provisions, a few headings and titles have been added and some of the original headings and titles have been modified so as to reflect the content of the model provisions to which they relate.

Model provision 1. Preamble
[*see recommendation 1 and chap. I, paras. 2-14*]

WHEREAS the [Government] [Parliament] of ... considers it desirable to establish a favourable legislative framework to promote and facilitate the implementation of privately financed infrastructure projects by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;

WHEREAS the [Government] [Parliament] of ... considers it desirable to further develop the general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects;

[*Other objectives that the enacting State might wish to state*;].

Be it therefore enacted as follows:

Model provision 2. Definitions
[*see introduction, paras. 9-20*]

For the purposes of this law:

(a) "*Infrastructure facility*" means physical facilities and systems that directly or indirectly provide services to the general public;

(b) "*Infrastructure project*" means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(c) "*Contracting authority*" means the public authority that has the power to enter into a concession contract for the implementation of an infrastructure project [under the provisions of this law];[a]

(d) "*Concessionaire*" means the person that carries out an infrastructure project under a concession contract entered into with a contracting authority;

(e) "*Concession contract*" means the mutually binding agreement or agreements between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project;

(f) "*Bidder*" and "*bidders*" mean persons, including groups thereof, that participate in selection proceedings concerning an infrastructure project;[b]

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[a] It should be noted that the authority referred to in this definition relates only to the power to enter into concession contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as "regulatory agency" in subparagraph (h), may have the responsibility for issuing rules and regulations governing the provision of the relevant service.

[b] The term "bidder" or "bidders" encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority's request for proposals.

(g) "*Unsolicited proposal*" means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(h) "*Regulatory agency*" means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.[c]

Model provision 3. Authority to enter into concession contracts
[*see recommendation 2 and chap. I, paras. 15-18*]

The following public authorities have the power to enter into concession contracts[d] for the implementation of infrastructure projects falling within their respective spheres of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into concession contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authorities or a combination thereof*].[e]

Model provision 4. Eligible infrastructure sectors
[*see recommendation 4 and chap. I, paras. 19-22*]

Concession contracts may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].[f]

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[c] The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see recommendations 7-11 and chap. I, "General legislative and institutional framework", paras. 30-53).

[d] It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see legislative recommendation 6 and chap. I, "General legislative and institutional framework", paras. 23-29). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or regulation governing the activities of entities authorized to offer government support, to clearly identify which entities have the power to provide such support and what kind of support may be provided (see chap. II, "Project risks and government support").

[e] Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming the relevant public authorities. In a federal State, for example, such an enabling clause might refer to "the Union, the States [or provinces] and the municipalities". In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

[f] It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

II. Selection of the concessionaire

Model provision 5. Rules governing the selection proceedings
[*see recommendation 14 and chap. III, paras. 1-33*]

The selection of the concessionaire shall be conducted in accordance with [*model provisions 6-26*] and, for matters not provided herein, in accordance with [*the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive procedures for the award of government contracts*].[g]

1. Pre-selection of bidders

Model provision 6. Purpose and procedure of pre-selection
[*see recommendation 15 and chap. III, paras. 34-50*]

1. The contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure project.

2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [*the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the pre-qualification of suppliers and contractors*].

3. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and*

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[g] The user's attention is drawn to the relationship between the procedures for the selection of the concessionaire and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of privately financed infrastructure projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which was adopted by UNCITRAL at its twenty-seventh session, held in New York from 31 May to 17 June 1994 (hereinafter referred to as the "Model Procurement Law"). The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators to develop special rules suited for the selection of the concessionaire. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public, bid security and review procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, mutatis mutandis, supplement the practical elements of the selection procedure described herein.

contractors],[h] the invitation to participate in the pre-selection proceedings shall include at least the following:

(a) A description of the infrastructure facility to be built or renovated;

(b) An indication of other essential elements of the project, such as the services to be delivered by the concessionaire, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the concessionaire);

(c) Where already known, a summary of the main required terms of the concession contract to be entered into;

(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and

(e) The manner and place for solicitation of the pre-selection documents.

4. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors*],[i] the pre-selection documents shall include at least the following information:

(a) The pre-selection criteria in accordance with [*model provision 7*];

(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in [*model provision 8*];

(c) Whether the contracting authority intends to request only a limited number[j] of pre-selected bidders to submit proposals upon completion of the pre-selection proceedings in accordance with [*model provision 9, para. 2*], and, if applicable, the manner in which this selection will be carried out;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [this State] in accordance with [*model provision 29*].

5. For matters not provided in this [*model provision*], the pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification of suppliers and contractors*].[k]

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[h] A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 25, paragraph 2, of the Model Procurement Law.

[i] A list of elements typically contained in pre-qualification documents can be found in article 7, paragraph 3, of the Model Procurement Law.

[j] In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, "Selection of the concessionaire", paras. 48 and 49). See also footnote m.

[k] Procedural steps on pre-qualification proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the

Model provision 7. Pre-selection criteria
[*see recommendation 15 and chap. III, paras. 34-40, 43 and 44*]

In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria[l] that the contracting authority considers appropriate in the particular proceedings, as stated in the pre-selection documents. These criteria shall include at least the following:

(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

Model provision 8. Participation of consortia
[*see recommendation 16 and chap. III, paras. 41 and 42*]

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with [*model provision 7*] shall relate to the consortium as a whole as well as to its individual participants.

2. Unless otherwise [authorized by ... [*the enacting State indicates the relevant authority*] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium.[m] A violation of this rule shall cause the disqualification of the consortium and of the individual members.

3. When considering the qualifications of bidding consortia, the contracting authority shall consider the individual capabilities of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

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bidders' qualifications, can be found in article 7 of the Model Procurement Law, paragraphs 2-7.

[l] The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the Legislative Guide (see chap. III, "Selection of the concessionaire", paras. 43 and 44). The Legislative Guide suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they should be announced in advance, preferably in the invitation to the pre-selection proceedings.

[m] The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project.

Model provision 9. Decision on pre-selection

[*see recommendations 17 (for para. 2) and 25 (for para. 3) and chap. III, paras. 47-50*]

1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with [*model provisions 10-16*].

2. Notwithstanding paragraph 1, the contracting authority may, provided that it has made an appropriate statement in the pre-selection documents to that effect, reserve the right to request proposals upon completion of the pre-selection proceedings only from a limited number[n] of bidders that best meet the pre-selection criteria. For this purpose, the contracting authority shall rate the bidders that meet the pre-selection criteria on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings. In drawing up the list, the contracting authority shall apply only the manner of rating that is set forth in the pre-selection documents.

2. Procedure for requesting proposals

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

[*see recommendations 18 and 19 and chap. III, paras. 51-58*]

1. The contracting authority shall provide a set of the request for proposals and related documents issued in accordance with [*model provision 11*] to each pre-selected bidder that pays the price, if any, charged for those documents.

2. Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders when the contracting authority does not deem it to be feasible to describe in the request for proposals the characteristics of the project such as project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

3. Where a two-stage procedure is used, the following provisions apply:

(a) The initial request for proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications,

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[n] In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the Legislative Guide (see chap. III, "Selection of the concessionaire", para. 48). It should be noted that the rating system is used solely for the purpose of the pre-selection of bidders. The ratings of the pre-selected bidders should not be taken into account at the stage of evaluation of proposals (see model provision 15), at which all pre-selected bidders should start out on an equal standing.

performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;[o]

(b) The contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders. The contracting authority shall prepare minutes of any such meeting or discussion containing the questions raised and the clarifications provided by the contracting authority;

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to [*model provision 25*] the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with [*model provisions 11-16*].

Model provision 11. Content of the request for proposals
[*see recommendation 20 and chap. III, paras. 59-70*]

To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals*],[p] the request for proposals shall include at least the following information:

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[o] In many cases, in particular for new types of project, the contracting authority may not be in a position, at this stage, to have formulated a detailed draft of the contractual terms envisaged by it. Also, the contracting authority may find it preferable to develop such terms only after an initial round of consultations with the pre-selected bidders. In any event, however, it is important for the contracting authority, at this stage, to provide some indication of the key contractual terms of the concession contract, in particular the way in which the project risks should be allocated between the parties under the concession contract. If this allocation of contractual rights and obligations is left entirely open until after the issuance of the final request for proposals, the bidders may respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project (see chap. III, "Selection of the concessionaire", paras. 67-70; see further chap. II, "Project risks and government support", paras. 8-29).

[p] A list of elements typically contained in a request for proposals for services can be found in article 38 of the Model Procurement Law.

(a) General information as may be required by the bidders in order to prepare and submit their proposals;[q]

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;[r]

(c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;

(d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

Model provision 12. Bid securities
[*see chap. III, para. 62*]

1. The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.

2. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:[s]

(a) Withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;

(b) Failure to enter into final negotiations with the contracting authority pursuant to [*model provision 16, para. 1*];

(c) Failure to formulate a best and final offer within the time limit prescribed by the contracting authority pursuant to [*model provision 16, para. 2*];

(d) Failure to sign the concession contract, if required by the contracting authority to do so, after the proposal has been accepted;

(e) Failure to provide required security for the fulfilment of the concession contract after the proposal has been accepted or to comply with any other condition prior to signing the concession contract specified in the request for proposals.

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[q] A list of elements that should be provided can be found in chapter III, "Selection of the concessionaire", paragraphs 61 and 62, of the Legislative Guide.

[r] See chapter III, "Selection of the concessionaire", paragraphs 64-66.

[s] General provisions on bid securities can be found in article 32 of the Model Procurement Law.

Model provision 13. Clarifications and modifications

[*see recommendation 21 and chap. III, paras. 71 and 72*]

The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in [*model provision 11*]. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to [*model provision 25*] the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

Model provision 14. Evaluation criteria

[*see recommendations 22-23 and chap. III, paras. 73-77*]

1. The criteria for the evaluation and comparison of the technical proposals[t] shall include at least the following:

(a) Technical soundness;

(b) Compliance with environmental standards;

(c) Operational feasibility;

(d) Quality of services and measures to ensure their continuity.

2. The criteria for the evaluation and comparison of the financial and commercial proposals[u] shall include, as appropriate:

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

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

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

(d) The extent of financial support, if any, expected from a public authority of [*this State*];

(e) Soundness of the proposed financial arrangements;

(f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;

(g) The social and economic development potential offered by the proposals.

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[t] See chapter III, “Selection of the concessionaire”, paragraph 74.

[u] See chapter III, “Selection of the concessionaire”, paragraphs 75-77.

Model provision 15. Comparison and evaluation of proposals
[*see recommendation 24 and chap. III, paras. 78-82*]

1. The contracting authority shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set forth in the request for proposals.

2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.[v]

Model provision 15 bis. Further demonstration of fulfilment of qualification criteria
[*see recommendation 25 and chap. III, paras. 78-82*]

The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.[w]

Model provision 16. Final negotiations
[*see recommendations 26 and 27 and chap. III, paras. 83 and 84*]

1. The contracting authority shall rank all responsive proposals and invite for final negotiation of the concession contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals.

2. If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a concession contract, the contracting authority shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the bidder fails to formulate an offer acceptable to the contracting authority within the prescribed time limit, the contracting authority shall terminate the negotiations with the bidder concerned. The contracting authority shall then invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals. The contracting authority shall not resume

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[v] This model provision offers an example of an evaluation process that a contracting authority may wish to apply to compare and evaluate proposals for privately financed infrastructure projects. Alternative evaluation processes are described in chapter III, "Selection of the concessionaire", paragraphs 79-82, of the Legislative Guide, such as a two-step evaluation process or the two-envelope system. In contrast to the process set forth in this model provision, the processes described in the Legislative Guide are designed to allow the contracting authority to compare and evaluate the non-financial criteria separately from the financial criteria so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria. In order to ensure the integrity, transparency and predictability of the evaluation stage of the selection proceedings, it is recommended that the enacting State set forth in its law the evaluation processes that contracting authorities may use to compare and evaluate proposals and the details of the application of this process.

[w] Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

3. Negotiation of concession contracts without competitive procedures

Model provision 17. Circumstances authorizing award without competitive procedures
[*see recommendation 28 and chap. III, para. 89*]

Subject to approval by ... [*the enacting State indicates the relevant authority*],[x] the contracting authority is authorized to negotiate a concession contract without using the procedure set forth in [*model provisions 6-16*], in the following cases:

(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in [*model provisions 6-16*] would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of ...] [*the enacting State specifies a monetary ceiling*] [set forth in ...] [*the enacting State indicates the provisions of its laws that specify the monetary threshold below which a privately financed infrastructure project may be awarded without competitive procedures*];[y]

(c) Where the project involves national defence or national security;

(d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(e) In cases of unsolicited proposals falling under [*model provision 22*];

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[x] The rationale for subjecting the award of the concession contract without competitive procedures to the approval of a higher authority is to ensure that the contracting authority engages in direct negotiations with bidders only in the appropriate circumstances (see chap. III, "Selection of the concessionaire", paras. 85-96). The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

[y] As an alternative to the exclusion provided in subparagraph (b), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by applying the procedures described in article 48 of the Model Procurement Law.

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

(g) In other cases where the [*the enacting State indicates the relevant authority*] authorizes such an exception for compelling reasons of public interest.[aa]

Model provision 18. Procedures for negotiation of a concession contract
[*see recommendation 29 and chap. III, para. 90*]

Where a concession contract is negotiated without using the procedures set forth in [*model provisions 6-16*] the contracting authority shall:[bb]

(a) Except for concession contracts negotiated pursuant to [*model provision 17, subpara. (c)*], cause a notice of its intention to commence negotiations in respect of a concession contract to be published in accordance with [*the enacting State indicates the provisions of any relevant laws on procurement proceedings that govern the publication of notices*];

(b) Engage in negotiations with as many persons as the contracting authority judges capable[cc] of carrying out the project as circumstances permit;

(c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

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[z] The enacting State may wish to require that the contracting authority include in the record to be kept pursuant to [*model provision 25*] a summary of the results of the negotiations and indicate the extent to which those results differed from the project specifications and contractual terms of the original request for proposals, and that it state the reasons therefor.

[aa] Enacting States that deem it desirable to authorize the use of negotiated procedures on an ad hoc basis may wish to retain subparagraph (g) when implementing the model provision. Enacting States wishing to limit exceptions to the competitive selection procedures may in turn prefer not to include the subparagraph. In any event, for purposes of transparency, the enacting State may wish to indicate here or elsewhere in the model provision other exceptions, if any, authorizing the use of negotiated procedures that may be provided under specific legislation.

[bb] A number of elements to enhance transparency in negotiations under this model provision are discussed in chapter III, “Selection of the concessionaire”, paragraphs 90-96, of the Legislative Guide.

[cc] Enacting States wishing to enhance transparency in the use of negotiated procedures may establish, by specific regulations, qualification criteria to be met by persons invited to negotiations pursuant to [*model provisions 17 and 18*]. An indication of possible qualification criteria is contained in [*model provision 7*].

4. Unsolicited proposals[dd]

Model provision 19. Admissibility of unsolicited proposals
[*see recommendation 30 and chap. III, paras. 97-109*]

As an exception to [*model provisions 6-16*], the contracting authority[ee] is authorized to consider unsolicited proposals pursuant to the procedures set forth in [*model provisions 20-22*], provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

Model provision 20. Procedures for determining the admissibility of unsolicited proposals
[*see recommendations 31 and 32 and chap. III, paras. 110-112*]

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall promptly inform the proponent whether or not the project is considered to be potentially in the public interest.[ff]

2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications[gg] and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

[dd] The policy considerations on the advantages and disadvantages of unsolicited proposals are discussed in chapter III, "Selection of the concessionaire", paragraphs 98-100, of the Legislative Guide. States that wish to allow contracting authorities to handle such proposals may wish to use the procedures set forth in model provisions 22-24.

[ee] The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the regulatory system of the enacting State, a body separate from the contracting authority may have the responsibility for entertaining unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes a, c and w and the references cited therein).

[ff] The determination that a proposed project is in the public interest entails a considered judgement regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the infrastructure sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks.

[gg] The enacting State may wish to provide in regulations the qualification criteria that need to be met by the proponent. Elements to be taken into account for that purpose are indicated in [*model provision 7*].

3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the contracting authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the contracting authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

Model provision 21. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights
[*see recommendation 33 and chap. III, paras. 113 and 114*]

1. Except in the circumstances set forth in [*model provision 17*], the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with [*model provisions 6-16*] if the contracting authority considers that:

(a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and

(b) The proposed concept or technology is not truly unique or new.

2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit in a manner described by the contracting authority in the request for proposals in consideration for the development and submission of the proposal.

Model provision 22. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights
[*see recommendations 34 and 35 and chap. III, paras. 115-117*]

1. If the contracting authority determines that the conditions of [*model provision 21, para. 1 (a) and (b)*] are not met, it shall not be required to carry out a selection procedure pursuant to [*model provisions 6-16*]. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2-4.[hh]

2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [*the enacting State indicates a certain amount of time*].

3. If no proposals in response to an invitation issued pursuant to paragraph 2 are received within [a reasonable period] [the amount of time specified

[hh] The enacting State may wish to consider adopting a special procedure for handling unsolicited proposals falling under this model provision, which may be modelled, mutatis mutandis, on the request-for-proposals procedure set forth in article 48 of the Model Procurement Law.

in paragraph 2 above], the contracting authority may engage in negotiations with the original proponent.

4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in [*model provision 18*]. In the event that the contracting authority receives a sufficiently large number of proposals, which appear prima facie to meet its infrastructure needs, the contracting authority shall request the submission of proposals pursuant to [*model provisions 10-16*], subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with [*model provision 21, para. 2*].

5. Miscellaneous provisions

Model provision 23. Confidentiality of negotiations
[*see recommendation 36 and chap. III, para. 118*]

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to [*model provisions 10, para. 3, 16, 17, 18 or 22, para. 3*] shall be confidential. Unless required by law or by a court order, no party to the negotiations shall disclose to any other person, apart from its agents, subcontractors, lenders, advisers or consultants, any technical, price or other information that it has received in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

Model provision 24. Notice of contract award
[*see recommendation 37 and chap. III, para. 119*]

Except for concession contracts awarded pursuant to [*model provision 17, subpara. (c)*], the contracting authority shall cause a notice of the contract award to be published in accordance with [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices*]. The notice shall identify the concessionaire and include a summary of the essential terms of the concession contract.

Model provision 25. Record of selection and award proceedings
[*see recommendation 38 and chap. III, paras. 120-126*]

The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with [*the enacting State indicates the provisions of its laws on public procurement that govern record of procurement proceedings*].[ii]

[ii] The content of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, are discussed in chapter III, "Selection of the concessionaire", paragraphs 120-126, of the Legislative Guide. The content of such a record for the various types of project award is further set out in article 11 of the Model Procurement Law. If the laws of the enacting State do

Model provision 26. Review procedures
[*see recommendation 39 and chap. III, paras. 127-131*]

A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts or failures to act in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].[jj]

III. Construction and operation of infrastructure

Model provision 27. Contents of the concession contract
[*see recommendation 40 and chap. IV, paras. 1-11*]

The concession contract shall provide for such matters as the parties deem appropriate, such as:

(a) The nature and scope of works to be performed and services to be provided by the concessionaire [*see chap. IV, para. 1*];

(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire's rights under the concession contract [*see recommendation 5*];

(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project [*see recommendation 6*];

(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with [*model provision 29*] [*see recommendation 42 and draft model provision 29*];

(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with [*model provisions 30-32*] [*see recommendations 44 and 45 and draft model provisions 30-32*];

(f) The remuneration of the concessionaire, whether consisting of tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; and payments, if any, that may be made by the contracting authority or other public authority [*see recommendations 46 and 48*];

(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the

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not adequately address these matters, the enacting State should adopt legislation or regulations to that effect.

[jj] Elements for the establishment of an adequate review system are discussed in chapter III, "Selection of the concessionaire", paragraphs 127-131, of the Legislative Guide. They are also contained in chapter VI of the Model Procurement Law. If the laws of the enacting State do not provide such an adequate review system, the enacting State should consider adopting legislation to that effect.

procedures for testing and final inspection, approval and acceptance of the infrastructure facility [*see recommendation 52*];

(h) The extent of the concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users [*see recommendation 53 and draft model provision 37*];

(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements [*see recommendation 54, subpara. (b)*];

(j) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations [*see recommendation 54, subpara. (a)*];

(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled [*see chap. IV, paras. 73-76*];

(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons [*see recommendation 56*];

(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project [*see recommendation 58, subparas. (a) and (b)*];

(n) Remedies available in the event of default of either party [*see recommendation 58, subpara. (e)*];

(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession contract owing to circumstances beyond its reasonable control [*see recommendation 58, subpara. (d)*];

(p) The duration of the concession contract and the rights and obligations of the parties upon its expiry or termination [*see recommendation 61*];

(q) The manner for calculating compensation pursuant to [*model provision 46*] [*see recommendation 67*];

(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire [*see recommendations 41 and 69 and draft model provisions 28 and 48*].

Model provision 28. Governing law
[*see recommendation 41 and chap. IV, paras. 5-8*]

The concession contract is governed by the law of this State unless otherwise provided in the concession contract.[kk]

Model provision 29. Organization of the concessionaire
[*see recommendations 42 and 43 and chap. IV, paras. 12-18*]

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*this State*], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statutes and by-laws and significant changes therein shall be set forth in the concession contract.

Model provision 30. Ownership of assets[ll]
[*see recommendation 44 and chap. IV, paras. 20-26*]

The concession contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. The concession contract shall in particular identify which assets belong to the following categories:

(a) Assets, if any, that the concessionaire is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the concession contract;

[kk] Legal systems provide varying answers to the question as to whether the parties to a concession contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the Legislative Guide (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 5-8), in some countries the concession contract may be subject to administrative law, while in others the concession contract may be governed by private law (see also Legislative Guide, chap. VII, "Other relevant areas of law", paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the execution of an infrastructure project (see generally Legislative Guide, chap. VII, "Other relevant areas of law", sect. B).

[ll] Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see "Introduction and background information on privately financed infrastructure projects", paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 20-26). Irrespective of the host country's general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the concessionaire's ability to create security interests in project assets for the purpose of raising financing for the project (ibid., paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the concessionaire, upon expiry or termination of the concession contract or at any other time.

(b) Assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

(c) Assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the concession contract.

Model provision 31. Acquisition of rights related to the project site
[*see recommendation 45 and chap. IV, paras. 27-29*]

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the execution of the project shall be carried out in accordance with [*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*].

Model provision 32. Easements[mm]
[*see recommendation 45 and chap. IV, para. 30*]

The concessionaire shall [have] [be granted] the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

Model provision 33. Financial arrangements
[*see recommendation 46 and chap. IV, paras. 33-51*]

The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or the services it provides. The concession contract shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [in accordance with the rules established by the competent regulatory agency].[nn]

[mm] The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 30-32). The alternative wording offered within the first set of square brackets in the model provision is intended to reflect those options.

[nn] Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the Legislative Guide as "tariffs", may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, "Project risks and government support", paras. 30-60). The cost at which public services are provided is typically an element of

Model provision 34. Security interests
[*see recommendation 49 and chap. IV, paras. 52-61*]

1. Subject to any restriction that may be contained in the concession contract,[oo] the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

(a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;

(b) A pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the facility or the services it provides.

2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*this State*].

Model provision 35. Assignment of the concession contract
[*see recommendation 50 and chap. IV, paras. 62 and 63*]

Except as otherwise provided in [*model provision 34*], the rights and obligations of the concessionaire under the concession contract may not be assigned to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the concession contract, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire's technical and financial capability as necessary for providing the service.

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the Government's infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of "reasonableness", "fairness" or "equity" (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 36-46).

[oo] These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.

Model provision 36. Transfer of controlling interest[pp] in the concessionaire
[*see recommendation 51 and chap. IV, paras. 64-68*]

Except as otherwise provided in the concession contract, a controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which consent of the contracting authority shall be given.

Model provision 37. Operation of infrastructure
[*see recommendation 53 and chap. IV, paras. 80-93 (for para. 1) and recommendation 55 and chap. IV, paras. 96 and 97 (for para. 2)*]

1. The concession contract shall set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

(a) The modification of the service so as to meet the demand for the service;

(b) The continuity of the service;

(c) The provision of the service under essentially the same conditions for all users;

(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

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

Model provision 38. Compensation for specific changes in legislation
[*see recommendation 58, subpara. (c) and chap. IV, paras. 122-125*]

The concession contract shall set forth the extent to which the concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

Model provision 39. Revision of the concession contract
[*see recommendation 58, subpara. (c) and chap. IV, paras. 126-130*]

1. Without prejudice to [*model provision 38*], the concession contract shall further set forth the extent to which the concessionaire is entitled to a revision of the concession contract with a view to providing compensation in the event that the cost

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[pp] The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.

of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:

(a) Changes in economic or financial conditions; or

(b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

(a) Occur after the conclusion of the contract;

(b) Are beyond the control of the concessionaire; and

(c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.

2. The concession contract shall establish procedures for revising the terms of the concession contract following the occurrence of any such changes.

Model provision 40. Takeover of an infrastructure project by the contracting authority

[*see recommendation 59 and chap. IV, paras. 143-146*]

Under the circumstances set forth in the concession contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

Model provision 41. Substitution of the concessionaire

[*see recommendation 60 and chap. IV, paras. 147-150*]

The contracting authority may agree with the entities extending financing for an infrastructure project on the substitution of the concessionaire by a new entity or person appointed to perform under the existing concession contract upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession contract or other similar circumstances.[qq]

[qq] The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority.

IV. Duration, extension and termination of the concession contract

1. Duration and extension of the concession contract

Model provision 42. Duration and extension of the concession contract
[*see recommendation 62 and chap. V, paras. 2-8*]

1. The term of the concession contract, as stipulated in accordance with [*model provision 27, subpara. (p)*] shall not be extended except as a result of the following circumstances:

(a) Completion delay or interruption of operation due to circumstances beyond either party's reasonable control;

(b) Project suspension brought about by acts of the contracting authority or other public authorities; or

(c) [*Other circumstances, as specified by the enacting State.*][rr]

2. The term of the concession contract may further be extended to allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the concession contract, if the concessionaire would not be able to recover such costs during the original term.

2. Termination of the concession contract

Model provision 43. Termination of the concession contract by the contracting authority
[*see recommendation 63 and chap. V, paras. 14-27*]

The contracting authority may terminate the concession contract:

(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

(b) For [compelling][ss] reasons of public interest, subject to payment of compensation to the concessionaire, the terms of the compensation to be as agreed in the concession contract;

(c) [*Other circumstances that the enacting State might wish to add in the law.*]

Model provision 44. Termination of the concession contract by the concessionaire
[*see recommendation 64 and chap. V, paras. 28-33*]

The concessionaire may not terminate the concession contract except under the following circumstances:

[rr] The enacting State may wish to consider the possibility of authorizing a consensual extension of the concession contract pursuant to its terms, for compelling reasons of public interest.

[ss] [Possible situations of a compelling reason of public interest are discussed in chapter V, "Duration, extension and termination of the project agreement", paragraph 27, of the Legislative Guide.]

(a) In the event of serious breach by the contracting authority or other public authority of their obligations in connection with the concession contract;

(b) If the conditions for a revision of the concession contract under [*model provision 39, para. 1*] are met, but the parties have failed to agree on a revision of the concession contract; or

(c) If the cost of the concessionaire's performance of the concession contract has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the contracting authority or other public authorities, such as those referred to in [*model provision 27, subparas. (h) and (i)*], and the parties have failed to agree on a revision of the concession contract.

Model provision 45. Termination of the concession contract by either party
[*see recommendation 65 and chap. V, paras. 34 and 35*]

Either party shall have the right to terminate the concession contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The parties shall also have the right to terminate the concession contract by mutual consent.

3. Arrangements upon expiry or termination of the concession contract

Model provision 46. Financial arrangements upon expiry or termination of the concession contract
[*see recommendation 67 and chap. V, paras. 43-49*]

The concession contract shall stipulate how compensation due to either party is calculated in the event of termination of the concession contract, providing, where appropriate, for compensation for the fair value of works performed under the concession contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

Model provision 47. Wind-up and transfer measures
[*see recommendation 68 and chap. V, paras. 50-62*]

The concession contract shall set forth, as appropriate, the rights and obligations of the parties with respect to:

(a) Mechanisms and procedures for the transfer of assets to the contracting authority, where appropriate;

(b) The transfer of technology required for the operation of the facility;

(c) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

(d) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire.

V. Settlement of disputes

Model provision 48. Disputes between the contracting authority and the concessionaire
[*see recommendation 69 and chap. VI, paras. 3-41*]

Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract.[tt]

Model provision 49. Disputes involving customers or users of the infrastructure facility
[*see recommendation 71 and chap. VI, paras. 43-45*]

Where the concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

Model provision 50. Other disputes
[*see recommendation 70 and chap. VI, para. 42*]

1. The concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.

2. The concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

[tt] The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of privately financed infrastructure projects.