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Report of the United Nations Commission on International Trade Law on the work of its thirty-first session

1-12 June 1998

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Note

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Contents

Introduction

1. The present report of the United Nations Commission on International Trade Law covers the Commission's thirty-first session, held in New York from 1 to 12 June 1998.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

Chapter I
Organization of the session

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its thirty-first session on 1 June 1998. The session was opened by the Under-Secretary-General for Legal Affairs, the Legal Counsel.

B. Membership and attendance

4. The General Assembly, by its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 28 November 1994 and on 24 November 1997, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1]

> Algeria (2001), Argentina (2004—alternating annually with Uruguay, starting 1998), Australia (2001), Austria (2004), Botswana (2001), Brazil (2001), Bulgaria (2001), Burkina Faso (2004), Cameroon (2001), China (2001), Colombia (2004), Egypt (2001), Fiji (2004), Finland (2001), France (2001), Germany (2001), Honduras (2004), Hungary (2004), India (2004), Iran (Islamic Republic of) (2004), Italy (2004), Japan (2001), Kenya (2004), Lithuania (2004), Mexico (2001), Nigeria (2001), Paraguay (2004), Romania (2004), Russian Federation (2001), Singapore (2001), Spain (2004), Sudan (2004), Thailand (2004), Uganda (2004), United Kingdom of Great Britain and Northern Ireland (2001), United States of America (2004) and Uruguay (2004—alternating annually with Argentina, starting 1999).

5. With the exception of Brazil, Burkina Faso, Fiji, the Sudan and Uganda, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Belarus, Benin, Bolivia, Canada, Côte d'Ivoire, Croatia, Czech Republic, Democratic Republic of the Congo, El Salvador, Gabon, Guinea, Indonesia, Iraq, Kuwait, Mongolia, Morocco, Myanmar, Poland, Republic of Korea, Republic of Moldova, Saudi Arabia, Slovakia, Sweden, Switzerland, Syrian Arab Republic, Tunisia, Turkey and Venezuela.

7. The session was also attended by observers from the following international organizations:

(a) United Nations system

United Nations Conference on Trade and Development
World Bank
International Monetary Fund

(b) Intergovernmental organizations

Hague Conference on Private International Law

(c) International non-governmental organizations invited by the Commission

Cairo Regional Centre for International Commercial Arbitration
Caribbean Law Institute Centre
Ibero-American Institute of International Economic Law
International Association of Lawyers
International Association of Ports and Harbours
International Bar Association
International Maritime Committee
Latin American Group of Lawyers for International Trade Law
University of the West Indies
World Association of Former United Nations Interns and Fellows

8. The Commission was appreciative of the fact that international non-governmental organizations that had expertise regarding the major items on the agenda of the current session had accepted the invitation to take part in the meetings. Being aware that it was crucial for the quality of texts formulated by the Commission that relevant non-governmental organizations should participate in the sessions of the Commission and its Working Groups, the Commission requested the Secretariat to continue to invite such organizations to its sessions based on their particular qualifications.

C. Election of officers [2]

9. The Commission elected the following officers:

Chairman:
Mr. Dumitru Mazilu (Romania)

Vice-Chairmen:
Mr. Louis-Paul Enouga (Cameroon)
Mr. Reinhard G. Renger (Germany)
Ms. Shahnaz Nikanjam (Islamic Republic of Iran)

Rapporteur:
Mr. Esteban Restrepo-Uribe (Colombia)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 632nd meeting, on 1 June 1998, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Privately financed infrastructure projects.
5. Electronic commerce.
6. Receivables financing: assignment of receivables.
7. Monitoring implementation of the 1958 New York Convention.
8. Case law on UNCITRAL texts (CLOUT).
9. Training and technical assistance.
10. Status and promotion of UNCITRAL legal texts.
11. General Assembly resolutions on the work of the Commission.
12. New York Convention Day and Uniform Commercial Law Information Colloquium.
13. Coordination and cooperation.
14. Other business.
15. Date and place of future meetings.
16. Adoption of the report of the United Nations Commission on International Trade Law.

E. Adoption of the report

11. At its 650th meeting, on 12 June 1998, the Commission adopted the present report by consensus.

Chapter II
Privately financed infrastructure projects

A. Background

12. At its twenty-ninth session, in 1996, the Commission decided to prepare a legislative guide on build-operate-transfer and related types of project.[3] The Commission reached that decision after recommendations by many States and consideration of a report prepared by the Secretary-General (A/CN.9/424), which contained information on work then being undertaken by other organizations in that field, as well as an outline of issues covered by relevant national laws. The Commission considered that it would be useful to provide legislative guidance to States preparing or modernizing legislation relevant to those projects. The Commission requested the Secretariat to review issues suitable for treatment in a legislative guide and to prepare draft materials for its consideration.

13. At its thirtieth session, in 1997, the Commission had before it a table of contents setting out the topics proposed to be covered by the legislative guide, which were followed by annotations concerning the issues suggested for discussion therein (A/CN.9/438). The Commission also had before it initial drafts of chapter I, "Scope, purpose and terminology of the guide" (A/CN.9/438/Add.1), chapter II, "Parties and phases of privately financed infrastructure projects" (A/CN.9/438/Add.2), and chapter V, "Preparatory measures" (A/CN.9/438/Add.3).

14. The Commission exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods for addressing them and considered a number of specific suggestions.[4] The Commission generally approved the line of work proposed by the Secretariat, as contained in documents A/CN.9/438 and Add.1-3. The Commission requested the Secretariat to seek the assistance of outside experts, as required, in the preparation of future chapters. The Commission invited Governments to identify experts who could be of assistance to the Secretariat in that task.

15. At the current session, the Commission had before it drafts of the introductory chapter, entitled "Introduction and background information on privately financed infrastructure projects", and of chapters I, "General legislative considerations", II, "Sector structure and regulation", III, "Selection of the concessionaire", and IV, "Conclusion and general terms of the project agreement" (A/CN.9/444/

Add.1-5, respectively), which had been prepared by the Secretariat with the assistance of outside experts and in consultation with other international organizations. The Commission was informed that initial drafts of chapters V to XI were being prepared by the Secretariat for consideration by the Commission at its thirty-second session, in 1999.

B. General remarks

16. It was pointed out that the annotated table of contents (A/CN.9/444) had been prepared by the Secretariat for the purpose of enabling the Commission to make an informed decision on the proposed structure of the draft legislative guide and its contents. For the purpose of distinguishing the advice provided by the legislative guide from the background discussion contained therein, each substantive chapter was preceded by the legislative recommendations pertaining to the matters dealt with in the chapter.

17. The Commission expressed its satisfaction at the commencement of the work of preparation of a legislative guide on privately financed infrastructure projects. It was observed that many Governments, and also international organizations and private entities, had expressed keen interest in the work of the Commission concerning such projects. The Commission was reminded of the importance of bearing in mind the need to keep the appropriate balance between the objective of attracting private investment for infrastructure projects and the protection of the interests of the host Government and the users of the infrastructure facility.

C. Structure of the draft legislative guide and issues to be covered

18. The Commission noted and generally approved the proposed structure of the draft legislative guide and the selection of issues suggested for discussion therein, as set out in document A/CN.9/444. It was observed that topics it was currently proposed to deal with separately in future chapters of the legislative guide might at a later stage be combined so as to simplify the structure of the guide (e.g. construction phase, operational phase) (see below, para. 201).

19. The Commission engaged in a general discussion concerning the presentation of the guide and the desirability of formulating legislative recommendations in the form of sample provisions for the purpose of illustrating possible legislative solutions for the issues dealt with in the legislative guide, as had been suggested at its thirtieth session.[5] It was noted that the legislative guide would, upon completion, constitute a useful tool for Governments in reviewing and modernizing their legislation pertaining to privately financed infrastructure projects, in particular in countries lacking experience in the execution of such projects. Support was expressed for the suggestion that the usefulness of the legislative guide might be enhanced by providing the reader, where appropriate, with model legislative provisions on issues discussed within the guide.

20. However, various speakers pointed out the potential difficulty and undesirability of formulating model legislative provisions on privately financed infrastructure projects in view of the complexity of the legal issues typically raised by those projects, some of which concerned matters of public policy, as well as the diversity of national legal traditions and administrative practices. It was also pointed out that, as currently formulated, the draft chapters of the legislative guide offered the necessary flexibility for national legislators, regulators and other authorities to take into account the local reality when implementing, as appropriate, the legislative recommendations contained therein. The suggestion was made that, from a practical perspective, the provision of model contractual clauses for project agreements might be a more useful alternative than the formulation of model legislative provisions.

21. Having noted the various views expressed, members felt that the Commission should keep under consideration the desirability of formulating model legislative provisions when discussing the legislative recommendations contained in the draft chapters and in that connection identify any issues for which the formulation of model legislative provisions would increase the value of the guide (for further discussion concerning the question of model legislative provisions and the presentation of the recommendations in general, see below, paras. 202-204).

22. The Commission exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods of addressing them. It was noted that, in dealing with individual topics, the draft legislative guide should distinguish between the following categories of issues: general legal issues under the laws of the host country; issues relating to legislation specific to privately financed infrastructure projects; issues that might be dealt with at the regulatory level; and issues of a contractual nature. Although a clear distinction might not always be feasible, it was considered that the draft legislative guide should focus primarily on issues relating to legislation specific to, or of particular importance for, privately financed infrastructure projects.

D. Consideration of draft chapters

Introduction and background information on privately financed infrastructure projects (A/CN.9/444/Add.1)

23. At its thirtieth session, the Commission had considered an initial draft of chapter I, "Scope, purpose and terminology of the guide" (A/CN.9/438/Add.1), which had contained information on the projects covered by, and on the purpose of, the legislative guide, as well as an explanation of terms frequently used therein. The Commission had also considered an initial draft of chapter II, "Parties and phases of privately financed infrastructure projects" (A/CN.9/438/Add.2), which had contained general background information on the concept of project finance, the parties to a privately financed infrastructure project and the phases of their implementation.

24. At its thirty-first session, the Commission was informed that, in the consultations that had been conducted by the Secretariat with outside experts and international organizations since the Commission's thirtieth session, it had been suggested that the usefulness of the legislative guide might be enhanced by distinguishing more clearly between the introductory portions and those remaining chapters of the legislative guide, which were intended to contain substantive discussion and legislative advice. For that purpose, the former draft chapters I and II had been combined into a single introduction, which took into account, as appropriate, the suggestions that had been made at the thirtieth session of the Commission as regards documents A/CN.9/438/Add.1 and 2.[6]

Section A. Introduction

1. Purpose and scope of the guide

25. A question was asked concerning the statement made in paragraph 5 that the legislative guide did not cover "privatization" transactions that did not relate to infrastructure development and operation, and the reason for such an exclusion. It was stated that the distinction made in the guide between privately financed infrastructure projects and other transactions for the "privatization" of state functions or property might not be justified in certain cases and that it was preferable not to exclude privatization transactions from the scope of the guide. In response to that suggestion, it was pointed out that, at its thirtieth session, the Commission had decided that the guide should not deal with transactions for the "privatization" of state property by means of the sale of state property or shares of state-owned entities to the private sector, because privatization gave rise to legislative issues that were different from legislative issues pertaining to privately financed infrastructure projects.

26. The Commission was reminded of the reasons why the guide did not cover projects for the exploitation of natural resources under "concessions", "permissions" or "licences" issued by the State. In that connection, it was suggested that the focus of the guide on infrastructure projects was sufficiently clear and that there was no need to elaborate on that point to the extent that the draft paper currently did.

2. Terminology used in the guide

27. As regards the presentation of the subsection, it was suggested that, for ease of reading, the terminology should be presented in a chart, rather than as part of the text. However, it was observed that the subsection on terminology contained not only definitions, but also explanations of the use of certain expressions that appeared frequently in the guide.

28. It was suggested that the use of expressions such as "private entity" or "private operator" in subsection 2 and throughout the guide might generate the erroneous impression that the legislative guide did not cover infrastructure projects that were carried out by public entities. It was proposed that the guide should instead use more neutral expressions and that the expressions currently used to refer to national authorities of the host country (e.g. "Government", "State" and "regulatory agency") should be reviewed in all language versions so as to ensure consistency and avoid ambiguities.

29. It was suggested that the notion of "project management contract" should be added to the portion of the text dealing with the definition of "turnkey" contract, and that the definition should mention the elements of fixed price and fixed time for the performance of the contract.

30. It was also suggested that the appropriateness, in some language versions, of the use of the expression "project consortium" should be reviewed, since that expression might be understood in a narrow sense in some legal systems (e.g. as a particular contractual arrangement). Furthermore, it was suggested that the use of the expressions "project company" and "shareholders of the project company" should also be reviewed, since in some language versions they might convey the erroneous impression that the guide only referred to a particular type of legal entity.

Section B. Background information on infrastructure projects

General comments

31. It was pointed out that the section discussed basic issues of privately financed infrastructure projects, such as private sector participation in public infrastructure and the concept of project finance. It also identified the main parties involved

in those projects and their respective interests and briefly described the evolution of a privately financed infrastructure project.

32. As a general comment, it was stated that some portions of section B were lengthy and could be usefully reduced. It was noted that the section was conceived as general background information on matters that were examined from a legislative perspective in the subsequent chapters of the guide. Once all chapters of the guide were available, some of the information contained in the section might be restructured or presented in a more concise way.

33. It was suggested that the sections should elaborate on the financial arrangements used in connection with privately financed infrastructure projects and should emphasize the use and essential characteristics of "non-recourse" and "limited-recourse" finance. It was also suggested that the draft legislative guide should stress the role that capital market financing, including financing obtained in the local market, might play in the development of infrastructure projects. Once such changes had been made, the section might need to be restructured.

1. Private sector and public infrastructure

34. The view was expressed that the portions of the sections dealing with historical aspects of private participation in infrastructure were not needed and should be deleted or moved to earlier parts of the text. In reply, it was said that paragraphs 31 to 34 of the draft chapter had a useful informative function, in particular in the light of the experience of those countries which had a tradition of awarding concessions for the construction and operation of infrastructure.

2. Forms of private sector participation

35. The paragraphs dealing with the forms of private sector participation did not elicit comment.

3. Financing infrastructure projects

36. The view was expressed that the guide should emphasize the importance of pledging shares of the project company for the purpose of obtaining finance to the project. However, it was suggested that the penultimate sentence of paragraph 48, which mentioned the shares of the project company among the collaterals provided by the borrowers, should be redrafted, since it seemed to imply that the project company would offer its own shares to guarantee the repayment of loans. Furthermore, it was noted that the laws of certain countries posed obstacles to the pledge, as a collateral to commercial loans, of certain categories of assets held by the project company but owned by the public entity that awarded the concession. Therefore, for purposes of clarity, it was suggested that the words "to the extent permitted by the laws of the host country" should be added at the end of the penultimate sentence of paragraph 48.

37. In connection with the distinction between "unsubordinated" and "subordinated" loans, in paragraphs 48 to 50, it was suggested that the guide should discuss possible implications of the laws of the host country for contractual arrangements establishing precedence of payment of certain categories of loan over the payment of any other of the borrower's liabilities.

38. With respect to paragraph 50, it was observed that companies wishing to have access to loans provided by investment funds and other so-called "institutional investors", such as insurance companies, collective investment schemes (e.g. mutual funds) or pension funds, typically had to fulfil certain requirements, such as having a positive credit rating. For purposes of clarity, it was suggested that those "institutional investors" should be dealt with separately from other sources of subordinated loans.

39. It was suggested that the guide should also mention the sale of shares in capital markets among the financing sources mentioned in paragraph 51.

40. It was suggested that the last sentence of paragraph 53 might not be needed, since all financial institutions, and not only Islamic financial institutions, would ordinarily review economic and financial assumptions of projects for which financing was sought and would follow closely all phases of its implementation.

41. It was suggested that export credit agencies and bilateral aid and financing agencies should be mentioned among the financing institutions referred to in paragraphs 54 to 56. In connection with paragraph 56, it was also suggested that mention should be made of the limited scope of the guarantees provided by international financial institutions and of the requirement typically imposed by them that counter-guarantees should be provided by the host Government.

4. Parties involved in infrastructure projects

42. In connection with paragraph 66, it was suggested that the guide should clarify that some countries might be precluded from favouring the employment of local personnel pursuant to international obligations on trade facilitation or regional economic integration.

43. It was suggested that a reference should be included in paragraph 77 to completion guarantees, which the project company might be required to provide so as to protect the lenders against pre-completion risks.

44. With regard to the methods of remuneration of the operating company, it was pointed out that, in the practice of some countries, other methods might be used, in addition to those referred to in paragraph 87. Those methods might include availability charges, whereby the operating company was paid for the services made available, regardless of actual usage; service charges relating to satisfactory maintenance and operation; and volume-related payments, whereby payments related to the intensity of usage, which might be calculated with the aid of sophisticated methods for measuring performance, and functioned as a bonus paid to the operator for intensive usage of the infrastructure.

45. With regard to the insurance arrangements for privately financed infrastructure projects, it was suggested that mention should be made in paragraph 89 that, in some countries, insurance underwriters structured comprehensive insurance packages aimed at avoiding certain risks being left uncovered owing to gaps between individual insurance policies. It was also suggested that a reference to re-insurance arrangements should be included in the same paragraph.

46. It was suggested that reference should be made, in paragraph 90, to the role of independent advisers in advising the lenders to the project.

5. Phases of execution

47. As a general comment, it was stated that, while containing useful information, paragraphs 93 to 110 anticipated to some extent issues that would be discussed in more detail in the substantive chapters of the legislative guide. It was therefore suggested that those paragraphs might need to be revised and restructured once the remaining draft chapters of the legislative guide had been prepared.

48. The suggestion was made that paragraph 98 should be clarified to the effect that competitive selection procedures were not only used for projects involving the construction of new infrastructure. At the same time, it was suggested that mention should be made in that paragraph that there might be instances where the host Government did not resort to competitive proposals for the award of infrastructure projects. In that regard, the Commission was informed of the particular connotation given in some legal systems to expressions such as "procurement" and "project award", which were not used in those legal systems in connection with the selection of public service providers. The Commission took note of that information and decided to revert to the issue when considering the draft chapter on the selection of the concessionaire (A/CN.9/444/Add.4).

49. In view of the fact that the financial arrangements in some privately financed infrastructure projects might contemplate direct payments by the Government to the project company (see A/CN.9/444/Add.1, para. 60), it was suggested that the words "is the sole source of funds" in the first sentence of paragraph 107 should be replaced with words such as "is the main source of funds" before "for repaying its debts".

Chapter I. General legislative considerations (A/CN.9/444/Add.2)

50. It was noted that the opening section of draft chapter I (previously numbered chap. III) discussed two issues concerning the general legal framework for privately financed infrastructure projects, namely, the legislative authorization for the host Government to undertake such projects and the legal regime to which they were subject. The second section of draft chapter I considered the possible impact of other areas of legislation on the successful implementation of those projects. The concluding section of draft chapter I discussed the possible relevance of international agreements entered into by the host country for domestic legislation governing privately financed infrastructure projects.

51. The Commission was reminded that, at its thirtieth session, it had been suggested that the chapter dealing with general legislative considerations should elaborate on the different legal regimes governing the infrastructure in question, as well as on the services provided by the project company, issues concerning which there were significant differences among legal systems. It had also been suggested that attention should be given to constitutional issues relating to privately financed infrastructure projects.[7] It was noted that draft chapter I reflected those suggestions and included some of the contents of former draft chapter V, "Preparatory measures" (A/CN.9/438/Add.3).

52. By way of a general comment, it was suggested that stronger language should be used in formulating legislative recommendations. The emphasis should be on the major objectives of legislation governing privately financed infrastructure projects; those objectives were to establish sufficient authority for the host Government to enter into transactions for the construction of infrastructure projects with private financing, to reduce the need for governmental approvals to a reasonable minimum and to foster coordination between different levels of government and among different governmental departments. It was agreed that the legislative guide should be drafted in such a way that it would not appear to promote the use of private financing for infrastructure projects, but would draw the attention of those Governments which opted for such transactions to the underlying legislative issues.

Constitutional issues (legislative recommendation 1 and paras. 1-4)

53. It was generally agreed that it was necessary not only to review constitutional restrictions to private sector participation in infrastructure development and operation, but also to address restrictions established by legislation and regulations subordinate to the constitution.

54. It was suggested that, since recommendation 1 was restricted to advice for a review of legislation, the advice could be expressed in stronger terms. However, a more reserved approach was advisable in discussing possible changes in constitutions and other legislation.

Legislative approaches (legislative recommendation 2 and paras. 5-8)

55. It was pointed out that, if the recommendations in the chapter were to be reformulated to emphasize the need for the host Government to have the authority to enter into transactions relating to privately financed infrastructure projects (see above, para. 52), recommendation 2 could be merged with recommendation 1. It was also observed that, in addition to sector-specific laws, some States had adopted laws governing individual privately financed infrastructure projects; it was suggested that that legislative approach might also need to be reflected in the guide. However, the view was expressed that such a legislative approach might not constitute a wise practice.

Legislative authority to grant concessions (legislative recommendations 3 and 4 and paras. 10 and 11)

56. It was suggested that legislative recommendations 1, 2, 3, 4 and possibly 5 and 6 should be combined. It was also suggested that attention should be drawn, in the context of the legislative recommendations referred to, or at another appropriate place, to the following: the ability of the host Government to conclude and carry out commitments relating to privately financed infrastructure projects; the ability of the Government to provide the site for such projects; the authority to initiate or carry out any necessary expropriations; the ability of the Government to convey property interests to private investors; the ability of the Government to agree to the encumbrance of state-owned property in order to create security interests; freedom of the Government to agree to arbitration and other methods of non-judicial settlement of disputes; the ability of the Government to give guarantees for the protection of investors' rights; and to allow linking of prices of services or goods generated by the privately operated infrastructure to price indices.

57. It was observed that paragraph 11 discussed methods of calculating and adjusting prices and that that discussion should not appear under the current title "Legislative authority to grant concessions".

Legal regime of privately financed infrastructure projects (legislative recommendation 5 and paras. 12-15)

58. It was suggested that the second sentence of legislative recommendation 5 should be reformulated so that it would, in a positive fashion, advise the establishment of rules and mechanisms that would facilitate the execution of privately financed infrastructure projects.

Ownership and use of infrastructure (legislative recommendation 6 and paras. 16-19)

59. No comments were made on legislative recommendation 6.

Legal status of public service providers (legislative recommendation 7 and paras. 20 and 21)

60. Apart from terminological suggestions relating to some language versions of the document, no substantive comments were made on recommendation 7.

Administrative coordination (legislative recommendations 8-11 and paras. 22-27)

61. It was suggested that the desirability of centralizing the issuance of licences should not be overemphasized, since the reasons for the distribution of administrative authority among various levels of government (e.g. local, regional and central) were typically not overridden by the existence of a privately financed infrastructure project; any possibility of delay that might result from such distribution of administrative authority should be countered, in particular, by making the process of obtaining licences more transparent and efficient.

62. It was suggested that, in the annotations accompanying the legislative recommendations, it should be indicated that, in addition to coordination among various levels of government and various governmental departments, there was a need for consistency in the application of criteria for the issuance of licences and for the transparency of the administrative process.

Other relevant areas of legislation (legislative recommendation 12 and paras. 28-62)

63. It was suggested that legislative recommendation 12 should be reformulated in order to avoid an unintended implication that some of the areas of law mentioned therein

(e.g. security law, company law and investment protection) were not immediately relevant to privately financed infrastructure projects.

64. It was also suggested that reference should be made wherever appropriate to laws on consumer protection or that issues relating to consumer protection should be discussed as a separate issue. Furthermore, it was requested that reference be made to the need to protect, wherever relevant, groups of indigenous people who might be adversely affected by privately financed infrastructure projects.

Investment protection (paras. 29-32)

65. It was suggested that the title of the subsection should be changed to "Investment promotion and protection".

66. As to paragraph 31, it was suggested that reference should be made to the need expressly to allow the transfer of foreign exchange in order to repay loans.

Property law (paras. 33-35)

67. It was observed that the title of the subsection did not refer to security interests.

68. It was suggested that the expression "reasonable proof" in paragraph 34 should be replaced by a stronger expression, such as "clear proof".

Rules and procedures on expropriation (paras. 36 and 37)

69. It was suggested that paragraph 36 should not imply that providing the land should always be the responsibility of the host Government. As a matter of terminology, it was suggested that the term "expropriation" might not be appropriate in some legal systems (see below, para. 183).

70. It was considered, with respect to the third sentence of paragraph 37, that it was inappropriate to refer to court proceedings as a source of delay without at the same time clarifying the benefits of, and public policy objectives sought to be achieved by, entrusting expropriation proceedings to courts. It was also suggested that the statement made in the last sentence of paragraph 37 should be qualified with words such as "to the extent permitted by law".

Intellectual property law (paras. 38 and 39)

71. It was proposed to refer in the subsection to the desirability of strengthening the protection of intellectual property rights in line with international instruments governing that area of law. With respect to the italicized text in paragraph 39, support was expressed for listing in the guide international instruments regarding intellectual property rights in discussing the benefits of establishing a legal framework for the protection of intellectual property rights.

72. It was suggested that paragraph 38 should reflect the fact that protection of patents was limited to the jurisdiction in which the patent was registered and that that protection did not automatically extend beyond that jurisdiction.

Security law (paras. 40-45)

73. It was stressed that reliable security offered to lenders was crucial for the success of privately financed infrastructure projects and that therefore the discussion of the law of security interests should be further developed either in the subsection on security law or elsewhere in the guide. For example, it was pointed out that it would be desirable to discuss the different types of security interest and the different types of asset that might be encumbered for the purpose of providing security and that in some legal systems the inalienability of public assets might constitute an obstacle to creating security interests in the context of privately financed infrastructure projects. It was, however, observed in a general way that, because of the significant differences between legal systems regarding the law of security interests, it would be difficult and probably inadvisable to discuss in more detail the technicalities of legislation in that area.

74. It was suggested that the second sentence of paragraph 40 should be reviewed so as to rearrange the different types of security interest according to their practical importance, and that reference should be made to the assignment of intangible assets other than receivables. It was also suggested that the penultimate sentence of paragraph 40 and its link with the last sentence of the paragraph should be reviewed.

75. It was proposed to address "step-in" rights in favour of creditors, which would allow them to take over the concession or the operation of the infrastructure project if the project company was in default of its obligations towards the creditors.

76. Another suggestion was to mention the work of the International Institute for the Unification of Private Law regarding security interests in mobile equipment, which might be relevant also in the context of privately financed infrastructure projects.

77. It was considered that the discussion in paragraph 41 should appropriately reflect the fact that in many countries no central registers of title existed.

Company law (paras. 46-49)

78. It was proposed that mention be made in the legislative recommendation and the annotations on company law of the fact that some national laws established an obligation for the project company to be incorporated as a particular type of commercial entity that was best suited to the various interests involved in the project and that some laws also contained mandatory rules regarding the definition of the registered activity of the project company.

79. It was proposed that paragraph 49 also mention directors of the project company as possible parties to agreements concerning the management of the project company.

80. It was observed that the legislative guide in many instances referred to project consortia and that those references were too narrow, in that a single entity might seek to obtain a concession, establish a project company and assume the responsibilities that in other cases were assumed by a consortium. It was observed that the legislative guide, in referring to the project company, often used terms that indicated a particular form of company; it was suggested that such terminology should be avoided, because various corporate forms were used for incorporating project operators, the common characteristic of which was that the liability of the company owners for the obligations of the company was limited to their stake in the company.

81. It was suggested that, in the section regarding company law, references should be made to the settlement of disagreements among owners of the project company, responsibility of directors and administrators, including criminal responsibility, and the protection of interested third persons.

Accounting practices (para. 50)

82. It was observed that the emphasis of paragraph 50 was on accounting practices and that, in line with the purpose of the guide, the discussion should be recast so as to focus on legislation.

Contract law (paras. 51 and 52)

83. It was considered that section 8 should indicate more clearly the types of contract envisaged in the section and, in particular, should distinguish between contracts between the project company and its suppliers or customers and the agreement between the host Government and the concessionaire, which was in some legal systems subject to administrative law, rather than contract law. It was suggested that reference should also be made to private international law, in the context of the discussion on law on commercial contracts.

Insolvency law (paras. 53 and 54)

84. It was suggested that the following should be addressed: the question of the ranking of creditors, the priority between the insolvency administrator and creditors, legal mechanisms for reorganization of the insolvent debtor, special rules designed to ensure the continuity of the public service in case of insolvency of the project company and provisions on avoidance of transactions entered into by the debtor shortly before the opening of the insolvency proceedings.

Tax law (paras. 55-57)

85. It was stated that the stability of the tax regime was crucial for the success of privately financed infrastructure projects. The suggestion was made to mention the possibility of agreements between the host Government and the investors or the project company establishing the stability of the tax regime applicable to the concession. It was noted that the authority to establish or increase taxes or enforce tax legislation might be decentralized, a circumstance that should be reflected in the section. The guide might also mention various forms of tax incentives granted to private investors (e.g. permanent incentives or incentives that were limited in time).

Environmental protection (paras. 58-60)

86. It was observed that environmental matters played an important role in privately financed infrastructure projects and that such matters were among the most frequent causes of dispute. It was suggested that the list of examples in the second sentence of paragraph 58 should be expanded by adding, for example, the coal-fired power sector, power transmission, roads and railways. It was also suggested that the section should refer to the desirability of adhering to treaties relating to the protection of the environment.

87. It was considered that the guide should avoid the impression of suggesting that laws designed to protect the environment were an obstacle to be removed in order to facilitate privately financed infrastructure projects. The same applied to the possibility for any individual person to initiate proceedings to review the compliance of the project with environmental laws, a possibility that had been provided for by a number of national laws and was being discussed in international forums.

Settlement of disputes (paras. 61 and 62)

88. It was suggested that the section should address the different types of dispute that might arise in the context of a privately financed infrastructure, namely, disputes arising in

relation to the selection of the concessionaire, disputes between the private companies involved in the construction and operation of the project and disputes between the host Government or the regulatory agency and the project company during the operational phase of the project. It was also suggested that reference should be made in the section to choice-of-law issues.

89. In response to a question, it was pointed out that the International Centre for Settlement of Investment Disputes had already been involved in the settlement of disputes arising from privately financed infrastructure projects and that cases considered by the Centre might provide valuable information that might usefully be reflected in the guide. It was suggested that other institutions administering arbitration proceedings, such as the International Chamber of Commerce, might also be referred to in the guide.

90. The view was expressed that, to the extent relevant to legislation, alternative methods of dispute settlement such as conciliation or mediation should be mentioned in the guide.

91. The view was also expressed that the guide should call upon States to make judicial proceedings more efficient and thereby make referral of disputes to state courts a more attractive option. A contrary view was that, in the context of privately financed infrastructure projects, the prospect of judicial settlement of disputes was frequently seen by international investors as an obstacle in negotiating such projects and that, therefore, that method of dispute settlement should not be promoted. It was added, however, that, even if arbitration was chosen as a method of settling disputes, efficient judicial protection of rights of interested parties remained crucial for the success of privately financed infrastructure projects. It was suggested that, in addition to the recognition and enforcement of foreign arbitral awards, the regime for the recognition and enforcement of foreign judgements should be mentioned in paragraph 61.

92. The view was expressed that the guide should refer to the UNCITRAL Model Law on International Commercial Arbitration as one of the examples of texts the adoption of which might provide a hospitable legal climate for the settlement of disputes.

National legislation and international agreements (legislative recommendation 13 and paras. 63-67)

93. It was suggested that the title of the recommendation (in particular the phrase "national legislation") should be reviewed in view of the fact that the recommendation and the annotation were directed primarily towards international treaties.

94. It was suggested that reference should be made in the guide to international instruments designed to eliminate corruption. The guide should also refer to environmental protection and it should be made clear that regional economic integration treaties were the source of certain national legislative provisions.

95. The view was expressed that it would be useful to refer to the World Trade Organization's Agreement on Government Procurement. That Agreement currently had some 25 contracting parties and efforts were under way to make it universally accepted.

Chapter II. Sector structure and regulation (A/CN.9/444/Add.3)

General remarks

96. The Commission was reminded of its deliberations during its thirtieth session, when it had been noted that issues pertaining to privately financed infrastructure projects also involved issues of market structure and market regulation and that consideration of those issues was important for the treatment of a number of individual topics proposed to be covered by the legislative guide.[8]

97. The Commission noted that, for the purpose of dealing with issues of competition, sector structure and regulation at the level of detail that had been envisaged by the Commission, a separate chapter had been prepared by the Secretariat. The Commission expressed its appreciation to the Private Sector Development Department of the World Bank for having contributed the substance of the draft chapter.

98. The Commission engaged in a general exchange of views regarding the scope and purpose of the chapter.

99. According to one view, the issues raised by privately financed infrastructure projects were not exclusively legal in nature, as they were closely related to considerations of economic and industrial policy as well. The inclusion of a discussion on competition in the legislative guide was welcome in view of the difficulties some countries had encountered in the aftermath of privatization processes in which private monopolies had succeeded state monopolies. In that connection, it was stated that the draft chapter contained useful background information that might assist national legislators to consider the various options available.

100. In another view, the discussion of policy issues contained in the draft chapter was excessively detailed and might convey the impression that the guide advocated certain specific policies. It was stated that the issue of sector structure, as well as the options available for achieving the desired structure, were essentially matters of national

economic policy, which should not figure prominently in the guide. It was also pointed out that in various legal systems a distinction was made between regulated sectors, such as electricity and telecommunications, in which the operators were authorized to provide services under a licence issued by the competent authorities, and other sectors in which the operators were awarded concessions through contractual arrangements entered into with the competent public entity. The Commission was urged to revise the draft chapter with a view to ensuring that it adequately reflected those distinctions. Concern was also expressed that the wording and character of the discussion contained in the draft chapter appeared to be excessively prescriptive and not in harmony with the nature and style of the remaining chapters.

101. The Commission considered possible ways to address the concerns that had been expressed. One proposal was to move the substance of the discussion on competition and sector structure, currently contained in sections A, "Market structure and competition", and B, "Legislative measures to implement sector reform", to the introductory part of the guide or simply to refer to a treatment of those issues elsewhere in the guide. It was also proposed to move the substance of the discussion on regulatory issues, currently contained in section C, "Regulation of infrastructure services", to a future chapter dealing with the operational phase. It was pointed out, in that connection, that further redrafting might subsequently be required so as to harmonize those portions with the remaining text of the guide. An alternative proposal was to combine sections A and B of the draft chapter in a separate part of the guide, possibly in the form of an annex, while moving most of section C to the future chapter dealing with the operational phase.

102. After deliberation, the Commission requested the Secretariat to rearrange the substance of the draft chapter as suggested in the first proposal referred to above in paragraph 101, taking into account the views expressed during the discussion. Without prejudice to that decision, the Commission proceeded to exchange views on the substance of the draft chapter.

Market structure and competition (legislative recommendation 1 and paras. 1-13)

103. It was suggested that the corresponding notes to legislative recommendation 1 should make clear that the review of the assumptions under which state monopolies had been established involved a review of the historical circumstances and political conditions that had led to the creation of such monopolies.

104. The view was expressed that it was important to refer in the corresponding notes to competition laws and other similar rules that protected the market from abusive or restrictive practices.

Abolition of legal barriers and obstacles (legislative recommendation 2 and paras. 15 and 16)

105. It was suggested that the draft chapter should take into account the fact that certain countries, in particular developing countries, might have a legitimate interest in promoting the development of certain sectors of national industry and might thus choose not to open certain infrastructure sectors to competition.

106. The view was expressed that the phrase "other legal impediments to competition" in recommendation 2 could be understood in an excessively broad sense, encompassing public policy rules, such as environmental or consumer protection rules. It was therefore suggested that the phrase should be qualified by adding words such as "that cannot be justified by reasons of public interest".

Restructuring infrastructure sectors (legislative recommendation 3 and paras. 18-21)

107. It was pointed out that the manner in which a country decided to organize a particular infrastructure sector constituted a matter of national economic policy. Accordingly, the inclusion in the legislative guide of a description of measures that had been taken in some countries to restructure various infrastructure sectors should be done in such a fashion as to avoid the impression that the guide advocated any particular model. It was also suggested that the guide should take into account the varying levels of economic and technological development of countries.

Transitional measures (legislative recommendations 4 and 5 and paras. 33-35)

108. It was pointed out that the restructuring of infrastructure sectors was a particularly complex exercise that not only involved transitional measures of a technical or legal nature, but required the consideration of a variety of political, economic and social interests. The draft chapter should also mention those other factors, as appropriate.

Controlling residual monopolies (legislative recommendations 6 and 7 and paras. 37-40)

109. In connection with the reference, in paragraphs 37 to 39 of the notes, to the use of competitive procedures for the choice of the operator, it was observed that, in some countries, concessions of public services had traditionally been regarded as involving a delegation of state functions and, as such, the delegating authority was not bound to follow the

same procedures that governed the award of public contracts. In those countries, concessions might be awarded after direct negotiations between the delegating authority and a concessionaire of its choice, subject to certain requirements, such as the previous publication of a notice to interested parties who wished to be invited to those negotiations. That reality, it was stated, was not adequately reflected in the above-mentioned paragraphs, which should be redrafted so as to avoid the impression that they prescribed the use of tendering or other competitive selection procedures as the only acceptable ones for the award of infrastructure projects. In reply it was stated that the guide should stress the need for competitive selection procedures.

110. As regards paragraph 40 of the notes, it was stated that in some cases the retention of geographical monopolies might be warranted for a transitional period only, a circumstance that should be mentioned in the guide.

Conditions for the award of licences and concessions (legislative recommendation 8 and para. 50)

111. The view was expressed that paragraph 50 of the notes might need to be revised so as to ensure its consistency with the advice provided in chapter III, "Selection of the concessionaire".

Interconnection and access regulation (legislative recommendation 9 and paras. 51-54)

112. It was observed that the text of the legislative recommendation and the corresponding notes did not distinguish adequately between obligations imposed on an operator pursuant to the applicable regulatory regime and contractual rights or obligations that might be provided in a bilateral concession agreement. Since the distinctions had various important implications in some legal systems, the legislative recommendation and the notes should be revised.

Price and profit regulation (legislative recommendations 10 and 11 and paras. 55-57);
Subsidies and universal service (legislative recommendation 12 and para. 62);
Performance standards (legislative recommendation 13 and para. 63)

113. Comments were made to the effect that the regulatory issues dealt with in recommendations 10 to 13 typically arose during the operational phase of the infrastructure and that it would therefore be more appropriate to address those issues in a future chapter concerning the operational phase, rather than in the second chapter of the legislative guide (see also above, paras. 100 and 101).

114. It was suggested that issues relating to consumer protection were not limited to the need to ensure universal access to the services provided by infrastructure operators and that the guide should include a discussion, as appropriate, of consumer protection.

Independence and autonomy of regulatory bodies (legislative recommendations 14 and 15 and paras. 67-71)

115. In response to questions as to the need for a discussion of the functions of regulatory bodies in the legislative guide, it was stated that it was of crucial importance for potential investors to be able to ascertain whether the regulatory regime would be fair and stable and would take appropriate account of the public interest and the interests of the project company. The notions of independence and autonomy of regulatory bodies encompassed two important elements that merited further elaboration in the notes corresponding to recommendations 14 and 15, namely, the functional autonomy of the regulatory body within the administrative structure of the host Government and its independence from the regulated industry.

116. It was pointed out that the reference in recommendation 15 to decisions made by the regulatory body on "technical" grounds might be interpreted in some legal systems as implying the strict application of a rule without consideration of the particular context in which the rule was being applied. It was suggested that it would be preferable to refer to "substantive" or "objective" grounds.

Sectoral attributions of regulatory bodies (legislative recommendation 16 and paras. 72 and 73)

117. It was observed that the attributions of regulatory bodies were not always limited to individual sectors, since in some countries they might also extend to several sectors within a given region.

Mandate of regulatory bodies (legislative recommendation 17 and para. 74)

118. The view was expressed that recommendation 17 might conflict with recommendation 15. It was noted that recommendation 15 (see above, para. 116) required that the regulatory bodies be given autonomy to take decisions on technical rather than political grounds. However, the general objectives that should guide the actions of regulatory bodies pursuant to recommendation 17 (e.g. the promotion of competition, the protection of users' interests, the satisfaction of demand, the efficiency of the sector, the financial viability of the public service providers, the safeguarding of the public interest or of public service obligations and the protection of investors' rights) were not of a strictly "technical" nature. It

was suggested that the notes should clarify the interplay between the two recommendations.

Powers of regulatory bodies (legislative recommendation 18 and paras. 75-78)

119. Except for editorial or linguistic comments, or the reiteration of general comments made earlier during the debate, such as a suggestion to include a reference to consumer protection, no specific comments were made in connection with recommendation 18 and the accompanying notes.

Composition of the regulatory body (legislative recommendations 19 and 20 and paras. 80 and 81)

120. The view was expressed that the guide should establish a clearer distinction between legislative advice and practical advice on the regulatory function. It was suggested that the substance of recommendation 19, which related to the ideal number of members in regulatory bodies that took the form of a commission, was not a matter for legislation. Similar examples could be found in other recommendations made in the draft chapter. In reply it was stated that in order to implement some of the practical advice given in the guide (e.g. as to the membership of the regulatory body) legislative provisions might be needed and that therefore it would be useful to discuss practical advice in the guide.

Disclosure requirements (legislative recommendation 21 and paras. 84-86)

121. The view was expressed that the disclosure requirements imposed on the operator under recommendation 21 (e.g. the obligation to provide the regulatory body with information on the operation of the company) might cause practical difficulties in connection with recommendations 22 and 23, which contemplated, *inter alia*, the accessibility by interested parties to regulatory decisions. The guide should address the legitimate concern of the regulated industry as to the confidentiality of proprietary information.

Sanctions (legislative recommendation 24 and para. 94);
Appeals (legislative recommendation 25 and para. 95)

122. Except for editorial or linguistic comments, or the reiteration of general comments made earlier during the debate, no specific comments were made in connection with recommendations 24 and 25 and the accompanying notes.

Chapter III. Selection of the concessionaire (A/CN.9/444/Add.4)

General remarks

123. It was noted that draft chapter III (previously chapter IV), which dealt with methods and procedures recommended for use in the award of privately financed infrastructure projects, also discussed issues raised by unsolicited proposals, as had been suggested at the thirtieth session of the Commission.[9]

124. It was felt that the overall purpose of the legislative guide was to assist host countries to stimulate the flow of investment in infrastructure projects by providing advice on essential elements of a favourable legal framework. One of those elements was the existence of appropriate selection procedures. One significant practical obstacle to the execution of privately financed infrastructure projects was the considerable length of time invested in negotiations between the public authorities of the host country and potential investors. By devising appropriate procedures for the award of privately financed infrastructure projects that were aimed at achieving efficiency and economy, while ensuring transparency and fairness in the selection procedures, the guide might become a helpful tool for the public authorities of host countries.

125. It was noted that no international legislative model had been devised specifically for competitive selection procedures in privately financed infrastructure projects. In that connection, it was suggested that the usefulness of the chapter might be enhanced by focusing the recommendations on issues of a legislative nature and formulating them as much as possible in language that lent itself to being incorporated into national legislation.

126. With regard to the preference expressed in the chapter for the use of competitive methods to select the concessionaire, comments were made to the effect that the guide should recognize more clearly that other methods might also be used, according to the legal tradition of the country concerned. It was observed that, in the legal tradition of certain countries, privately financed infrastructure projects involved the delegation, by the appropriate public entity, of the right and authority to provide a public service. As such, they were subject to a special legal regime that differed in many respects from the regime that applied generally to the award of public contracts for the purchase of goods, construction or services.

127. In those countries, for the award of public contracts for the purchase of goods or services, the Government had the choice of a number of procedures, which, as a general rule,

involved publicity requirements, competition and the strict application of pre-established award criteria. The most common procedure was the tendering method (*adjudication*), in which the contract was awarded to the tenderer offering the lowest price. While there also existed less rigid procedures, such as the request for proposals (*appel d'offres*), which allowed for consideration of other elements in addition to price (e.g. operating cost, technical merit and proposed completion time), negotiations were only resorted to under exceptional circumstances. However, those countries applied different procedures for the award of privately financed infrastructure projects. Given the very particular nature of the services required (e.g. complexity, amount of investment and completion time), the procedures used placed the accent on the delegating body's freedom to choose the operator who best suited its need, in terms of professional qualification, financial strength, ability to ensure the continuity of the service, equal treatment of the users and quality of the proposal. However, freedom of negotiation did not mean arbitrary choice and the laws of those countries provided procedures to ensure transparency and fairness in the conduct of the selection process.

128. In addition to the special procedures used in those countries for selecting the infrastructure operator, another notable difference had to do with the method of payment of the infrastructure operator, as distinct from the payment of a supplier or a work contractor. In practically every case, the payment for the performance of a public contract in those countries was made in the form of a price paid by the governmental agency to the supplier or contractor. In the case of privately financed infrastructure projects, however, the remuneration was spread out over a number of years and usually derived from the operation of the infrastructure, generally in the form of fees charged to the user. The duration of the project was calculated in such a way as to enable the operator to recoup the investment and ensure a return in the amount freely set in the project agreement.

129. In view of those considerations, it was suggested that the chapter should elaborate further on the fact that competitive procedures typically used for the procurement of goods, construction or services were not entirely suitable for privately financed infrastructure projects. It was noted that, while the selection procedures described in the chapter differed from the procurement methods provided in the UNCITRAL Model Law on Procurement of Goods, Construction and Services, further adjustments might still be required. Particular attention should be given to the need to avoid the use of terminology that in some legal systems was normally used in connection with procurement methods for the acquisition of goods, construction and services.

130. Support was expressed for the thrust of the chapter, which offered a structured and transparent framework for the exercise of administrative discretion in the selection of the concessionaire. However, when expressing a preference for competitive selection procedures, particular care should be taken to avoid the impression that the guide excluded the use of any other procedures.

Selection procedures covered by the guide (paras. 3-5)

131. In connection with paragraph 3 (a) of the notes, it was suggested that the text should make mention of the fact that, in many countries, the sale of shares of public utility enterprises required prior legislative authorization. It was also suggested that the offering of shares on stock markets should be mentioned among the disposition methods.

General objectives of selection procedures (paras. 6-14)

132. Support was expressed for including in the chapter a discussion of the objectives of economy, efficiency, integrity and transparency. It was observed that those objectives fostered the interests not only of the host Government, but also of the parties wishing to invest in infrastructure projects in the country. An important corollary of those objectives was the availability of administrative and judicial procedures for the review of decisions made by the authorities involved in the selection procedure, and it was suggested that the chapter should, at an appropriate place, include a discussion on that subject.

133. It was observed that the main purpose of privately financed infrastructure projects was for the host Government to obtain a higher quality of public services. It was therefore suggested that paragraph 8 should give more emphasis to the potential benefits of participation by foreign companies in selection proceedings.

134. It was pointed out that transparency required not only clarity of the rules and procedures for the selection of the concessionaire, but also that decisions were not improperly made. The chapter should therefore also include a discussion on appropriate measures to fight corrupt or abusive practices in the selection process. One of the measures it might be worthwhile mentioning in the guide was the so-called "integrity agreement" ("*acuerdo de integridad*"), whereby all companies invited to participate in the selection process undertook neither to seek to influence unduly the decisions of the public officials involved in the selection process nor otherwise to distort the competition by means of collusive or other illicit practices.

135. Various comments were made to the effect that adequate provisions to protect the confidentiality of proprietary information constituted one of the essential elements for fostering the confidence of investors in the selection procedures. It was therefore suggested that the issue should be mentioned in paragraph 10 and concrete recommendations included at appropriate places in the guide for the purpose of ensuring the confidentiality of proprietary information.

136. It was suggested that the text should mention the objectives of ensuring the continuous provision of public services and the universal access to public services among the objectives that governed the award of privately financed infrastructure projects.

Appropriate selection method (legislative recommendations 1 and 2 and paras. 15-25)

137. In connection with the discussion on the range of proponents to be invited, it was pointed out that the procurement guidelines of some multilateral financial institutions prohibited the use of pre-qualification proceedings for the purpose of limiting the number of bidders to a predetermined number.

138. It was suggested that paragraph 22 should mention that awarding authorities typically required that the bidders submit sufficient evidence that the technical solutions proposed had been previously tested and satisfactorily met internationally acceptable safety and other standards.

139. It was suggested that paragraph 24 should elaborate on the distinction between qualification and evaluation criteria.

140. It was suggested that paragraph 25 should caution against unrestricted negotiations between the awarding authority and the selected project consortium.

Preparations for selection proceedings (paras. 26-32)

141. It was suggested that paragraph 27 should include a reference to the role of independent advisers and the need to appoint them at the early stages of the project.

142. It was suggested that the expression "pre-feasibility studies", rather than "feasibility studies", should be used in the context of paragraphs 28 and 29. It was also suggested that it might be useful to refer in those paragraphs to the fact that, in some countries, it was found useful to provide for some public participation in the preliminary assessment of the environmental impact of a project and the various options available to minimize that impact. The suggestion was made that the text should reflect that an environmental impact assessment should ordinarily be carried out by the host Government as part of its feasibility studies.

143. The availability of standard documentation prepared in sufficiently precise terms was said to be an important element to facilitate the negotiations between project consortia and prospective lenders and investors. It was suggested that appropriate references to those circumstances should be included in paragraph 31.

Pre-qualification of project consortia (legislative recommendations 3-7 and paras. 33-46)

144. As a general comment, it was noted that preferred selection procedures described in the chapter consisted of relatively elaborate pre-qualification and final selection phases and a relatively short phase for the final negotiation of the project agreement. In the practice of some countries, however, there was more scope for negotiating the final agreement after the project consortium had been selected, in view of the complexity and scale of infrastructure projects. In that connection, the view was expressed that the preferred selection procedures described in the chapter, which were in many aspects inspired by the procurement methods provided for in the UNCITRAL Model Law on Procurement of Goods, Construction and Services, might require further adjustments so as to address the particular needs of privately financed infrastructure projects in an adequate manner.

145. It was noted that, beginning with paragraph 34, the reader was referred, in various instances, to provisions of the Model Law. It was suggested that, for ease of reading, it might be preferable to incorporate in the text, as appropriate, the substance of the relevant provisions of the Model Law. Eliminating the cross-references between the two texts might also serve to underscore the particular nature of the selection procedure described in the chapter.

146. It was observed that the nature of the proceedings described in paragraphs 33 to 36 differed in many respects from traditional pre-qualification proceedings, as applied in connection with the procurement of goods and services. In order to avoid the connotation of automatic qualification (or disqualification) that was inherent in those traditional pre-qualification proceedings, it was suggested that it would be more appropriate to use the phase "pre-selection proceedings" in the draft chapter.

147. It was proposed to include among the criteria mentioned in paragraph 36 additional criteria that might be particularly relevant for privately financed infrastructure projects, such as the ability to manage the financial aspects of the project and previous experience in operating public infrastructure or in providing services under regulatory oversight.

148. In connection with the last sentence of paragraph 37, the view was expressed that the requirements of a minimum

percentage of equity investment might not be in line with multilateral agreements governing trade in services.

149. It was suggested that paragraphs 39 and 40 should distinguish between subsidies or incentives available under national laws to certain industries and regions and preferences given to domestic companies over foreign competitors bidding for the same project. The text should make clear that the issue of domestic preferences only arose in cases where the awarding authority invited proposals from both national and foreign companies. However, it was also suggested that paragraphs 39 and 40 should mention the fact that the use of domestic preferences was not permitted under the guidelines of some international financial institutions and might be inconsistent with international obligations entered into by many States pursuant to agreements on regional economic integration or trade facilitation.

150. Comments were made in support of the reference in paragraph 42 to the practice of some countries of authorizing the awarding authority to consider arrangements for compensating pre-qualified proponents, if the project could not proceed for reasons outside their control, or for contributing to the costs incurred by them after the pre-qualification phase.

151. The view was expressed that paragraph 45 should be redrafted so as to avoid the undesirable impression that it advocated the use of an automatic rating system that might unnecessarily limit the awarding authority's discretion in assessing the qualifications of project consortia.

Procedures for requesting proposals (legislative recommendations 8-19 and paras. 47-80)

152. The question was asked whether the two-stage procedure described in paragraphs 47 to 52 implied that, after discussions with the project consortia, the awarding authority had to issue a set of specifications that indicated the expected input. It was suggested, in that connection, that even at the final stage of the procedure the awarding authority might wish to formulate its specifications only in terms of the expected output.

153. For purposes of clarity, it was suggested that the word "negotiations" in paragraphs 51 and 52 should be replaced with the word "discussions".

154. The proposal was made to emphasize in paragraph 60 the fact that evaluation criteria should give special importance to aspects related to the operation of the infrastructure and should not be focused on the construction phase.

155. In connection with the possibility of rejecting proposals on grounds such as the governmental policy for the sector concerned referred to in paragraph 62, it was suggested that any such grounds should be invoked only if they had been included by the awarding authority among the pre-qualification criteria.

156. It was proposed to include among the elements of the financial proposals mentioned in paragraph 67 the requirement that the project consortia submit letters of intent issued by the prospective lenders or other satisfactory evidence of their commitment to provide the financing to the project.

157. Questions were asked as to the purpose of requiring that the financial viability studies referred to in paragraph 68 (a) indicate the expected financial internal rate of return in relation to the effective cost of capital corresponding to the financing arrangements proposed. It was suggested that, from the perspective of the host Government, the key factors in evaluating proposals should be the quality of the services and the overall viability of the financial arrangements, rather than the net profit expected by the operator.

158. It was suggested that paragraph 70 should clearly recommend the submission of tender securities by project consortia.

159. In connection with the last sentence of paragraph 72, it was observed that, while the criteria used for pre-qualifying consortia should not be weighted again at the evaluation phase, it was appropriate for the awarding authority to require, at any stage of the selection process, that the participants again demonstrate their qualifications in accordance with the same criteria used to pre-qualify them.

160. In response to a question concerning the need for providing in paragraph 75 that the proposals be opened at a time previously specified in the request for proposals, it was observed that such a requirement helped to minimize the risk that the proposals might be altered or otherwise tampered with and represented an important guarantee of the integrity of the proceedings.

161. It was suggested that, where a two-stage procedure had been used to request proposals, the awarding authority should also have the right to reject proposals that were found to deviate grossly from the first request for proposals. With regard to the assessment of the responsiveness of proposals, which was referred to in paragraph 76, it was suggested that paragraph 76 should make clear that "unresponsive" proposals were not only incomplete or partial proposals, but all proposals that deviated from the request for proposals.

162. Differing views were expressed regarding the relative importance of the proposed unit price for the expected output as an evaluation criterion. In one view, in order to foster objectiveness and transparency, the unit price should be regarded, wherever possible, as a decisive factor for choosing

between equally responsive proposals. According to another view, the notion of "price" could not have the same value for the award of privately financed infrastructure projects as it had in the procurement of goods and services. The remuneration of the concessionaire was often the combined result of charges paid by the users, ancillary revenue sources and direct subsidies or payments made by the public entity awarding the contract. Furthermore, non-price criteria, such as the quality of services, including the guarantees offered for ensuring its continuity and universality, needed to be taken fully into account. In that context, while the unit price for the expected output retained its role as an important element of comparison of proposals, it could not be regarded as the most important factor. It was felt that the guide should elaborate on those issues, as suggested in the note following paragraph 77.

163. It was suggested that the text of the legislative recommendations did not cover the entirety of the subject matter discussed in the corresponding notes. It was therefore suggested that additional recommendations should be formulated to reflect, in particular, the issues covered in paragraph 77.

164. With regard to the final negotiations referred to in paragraphs 78 and 79, the view was expressed that the legislative guide should distinguish more clearly between the negotiation of the final contract, after the project has been awarded, and the procedure to request proposals. It was suggested that the reference in paragraph 53 to the invitation of proposals with respect to the revised specifications and contractual terms might imply that the terms of the contract were open to negotiation even prior to the final award. Such a situation was considered inadvisable, since the proposals should address technical and financial aspects of the project, but not the terms of the contract. In response, it was stated that knowledge of certain contractual terms, such as the risk allocation envisaged by the awarding authority, were important in order for the participating consortia to formulate their proposals and discuss the "bankability" of the project with potential lenders. It was therefore advisable to provide the participating consortia with a draft of the contract as early as possible.

165. It was proposed to add the words "or the consumers" after the words "to the detriment of the host Government" in paragraph 78.

Direct negotiations (legislative recommendations 20-24 and paras. 81-93)

166. Support was expressed for the inclusion, in paragraphs 81 to 84, of a discussion on possible advantages and disadvantages of direct negotiations for the award of privately financed infrastructure projects.

167. It was suggested that paragraphs 81 to 84 should elaborate on possible methods for ensuring transparency and introducing elements of competition in direct negotiations.

168. It was noted that the list of exceptional circumstances authorizing the use of direct negotiations contained in paragraph 85 was not exhaustive and that other circumstances might exist that justified the use of direct negotiations. They included, for instance, the following: reasons of national defence; cases where there was only one source capable of providing the required service (e.g. because it involved the use of patented technology or special know-how); lack of experienced personnel or of an adequate administrative structure to conduct competitive selection procedures; or cases where a higher administrative authority of the host country had authorized such an exception for reasons of public interest. It was suggested that paragraph 85 should make clear that the list provided therein was for illustrative purposes only.

169. The question was asked as to how likely would there be an urgent need for ensuring immediate provision of the service that justified the recourse to direct negotiations rather than to competitive selection procedures. In response, it was noted that such an exceptional authorization was needed, for instance, in cases of interruption in the provision of a given service or where an incumbent concessionaire failed to provide the service at acceptable standards, when engaging in a competitive selection procedure would be impractical in view of the urgent need to ensure the continuity of the service. Questions were raised, however, as to the appropriateness of using the technique of private financing in case of urgency.

170. In response to a question concerning the reasons for limiting the application of paragraph 85 (a) to cases where the circumstances giving rise to the urgency were neither foreseeable by the awarding authority nor the result of dilatory conduct on its part, it was observed that such a limitation was intended to ensure the accountability of the awarding authority.

171. Support was also expressed for the consideration given in paragraphs 87 to 93 to the issues raised by unsolicited proposals. It was observed that unsolicited proposals had been used in a number of countries and that it was desirable to formulate concrete recommendations as to how to deal with such proposals. In that connection, it was suggested that the entity submitting an unsolicited proposal should generally be required to meet essentially the same qualification criteria as would be required of the proponents participating in the competitive selection procedure described in the chapter. It

was also suggested that unsolicited proposals should meet acceptable technical and quality standards in order to be considered by the awarding authority.

172. It was suggested that the word "Government" in paragraph 88 might be interpreted in a narrow meaning and exclude local or municipal authorities. It was proposed to replace it with words such as "public entities" or "public enterprises" so as to take into account that other entities of the host country might have the power to negotiate unsolicited proposals.

173. The view was expressed that the legislative recommendations concerning unsolicited proposals were in fact not of a legislative nature and should therefore be kept only in the notes.

Review procedures (para. 94)

174. It was noted that the availability of administrative or judicial remedies was an essential element in ensuring the transparency and fairness of a selection procedure. It was therefore suggested that the guide should elaborate on the issue of review procedures, mentioning procedures and remedies typically available under national laws, and that it might be useful to formulate appropriate legislative recommendations.

Record of selection proceedings (legislative recommendation 25 and paras. 95-99)

175. The need to protect the confidentiality of privileged and proprietary information, as referred to in paragraphs 95 and 96, was noted. It was suggested that a discussion should be included of what kind of information should be available to the public and what information should be reserved for the host Government and the proponents.

Chapter IV. Conclusion and general terms of the project agreement (A/CN.9/444/Add.5)

176. The Commission noted that the opening section of draft chapter IV (previously chapter VI) dealt with general considerations concerning the project agreement, discussing, in particular, the different approaches taken by national legislations to the project agreement (from those which scarcely referred to the project agreement to those which contained extensive mandatory provisions concerning clauses to be included in the agreement). The remaining sections dealt with rights and obligations of the project company that, in addition to being dealt with in the project agreement, might be usefully addressed in the legislation, as they might affect the interests of third parties.

Section A. General considerations (legislative recommendations 1 and 2 and paras. 1-6)

177. The suggestion was made to indicate in paragraph 2 advantages and disadvantages of the legislative approaches discussed.

178. It was considered that the guide should stress the need for clarity as to the persons or governmental agencies that had the authority to enter into commitments on behalf of the Government at different stages of negotiation and to sign the project agreement. In that discussion, due regard should be given to the fact that different levels of government (e.g. federal, provincial or municipal) might be involved in a given privately financed infrastructure project.

179. The view was expressed that the guide should point out the disadvantages of subjecting the entry into force of the project agreement to prior approval through an ad hoc act of parliament. It was noted in reply that, in some cases or in some States, good reasons existed for providing for legislative approval of individual privately financed infrastructure projects. There was general agreement that legislative approval did not mean that parliament would be called upon to modify individual provisions in the project agreement.

180. It was observed that what the guide defined as the "project agreement" in practice often consisted of more than one separate agreement between the host Government and the project company.

Section B. General terms of the project agreement

1. The project site (legislative recommendation 3 and paras. 8-12)

181. It was suggested that the second sentence of paragraph 10, which appeared to discourage the Government unduly from providing the project company with the land needed for privately financed infrastructure projects, should be reviewed.

182. It was proposed to replace the reference in paragraph 11 to "the more expeditious" expropriation procedure by "the more efficient" procedure in order to avoid creating an unintended impression that the protection of interests of the affected owners could be overridden by the desirability of rapid expropriation proceedings.

183. The view was expressed that the term "expropriation" in the English version should be replaced, because in some legal systems it carried a negative connotation and might suggest confiscation without prompt and adequate compensation. Alternative expressions suggested included "eminent domain", "compulsory acquisition" and "expropriation against just compensation". It was agreed that the

language to be used should avoid the negative connotation referred to and that it should be readily understood in different legal systems.

2. Easements (legislative recommendation 4 and paras. 13-16)

184. It was suggested that paragraph 14 should refer to the public interest and other conditions for obtaining an easement through expropriation.

3. Exclusivity (legislative recommendation 5 and paras. 17-21)

185. As regards the second sentence of paragraph 21, the view was expressed that the advice therein might be understood as suggesting that the parties should leave the question of subsequent changes in the host Government's policies to general clauses in the project agreement dealing with changes of circumstance. It was suggested that such an understanding should be avoided and that the guide should instead promote certainty and predictability with respect to the consequences of changes in the host Government's policies.

186. It was suggested that the question of exclusivity dealt with in recommendation 5 gave rise to important policy issues and involved interests of consumers and other public interests and that, therefore, the question should not be left entirely to the negotiation between the parties in the context of a given project. Legislation on the question of exclusivity might, for example, deal with the length of periods for which the host Government might commit itself to respecting the project company's exclusive rights in providing the public service.

187. The suggestion was made that the discussion relating to exclusivity (e.g. para. 17, first sentence, and para. 19, first sentence) should be reviewed to make it explicit who was the beneficiary of exclusivity and who might be the potential competitors.

188. It was proposed that paragraph 18 should not use the phrase "general enabling legislation", since many States did not have legislation that could be categorized as general enabling legislation.

4. Legal status of the concessionaire (legislative recommendations 6-8 and paras. 20-34)

189. With respect to the first sentence of paragraph 22, it was considered necessary to clarify the phrase "legal status" of the concessionaire so as to coordinate the treatment of that matter with paragraphs 20 and 21 of draft chapter I, "General legislative considerations" (A/CN.9/444/Add.2), and to make clear to what extent the project agreement might deal with the question of whether the concessionaire was to be established as an independent entity. It was noted that, in practice, project companies were typically incorporated as legal entities separate from the project sponsors, but that, from the viewpoint of legislation, that did not always need to be the case.

190. In connection with the last sentence of paragraph 32, the suggestion was made that some co-owners of the project company might be concerned about the risks arising from the involvement of the company in other projects awarded to it in a separate selection process.

191. As regards the third sentence of paragraph 33, the question was raised whether the legislative guide should endorse the requirement of a positive vote by the host Government and whether some of the objectives underlying the requirement could be achieved by less intrusive means.

192. It was suggested that some original members of the project consortium and shareholders in the project company might have a legitimate interest in being replaced by other entities as shareholders and that there was no need to give the host Government an unqualified prerogative to approve such replacements.

5. Assignment of the concession (legislative recommendations 9 and 10 and paras. 35-38)

193. It was considered desirable for legislation to allow the parties to agree on "step-in" rights, that is, the right to have the concession transferred to the lenders or to another entity appointed by them if the project company is in default of its obligations. In that context, it was stated that, where the Government was to be given the right to withhold approval of the assignment of a concession, that right should be subject to the reservation that consent must not be unreasonably withheld. A similar restriction should exist as regards the right of the host Government to approve the granting of a subconcession by the concessionaire (para. 37).

194. It was pointed out, however, that the requirement of prior governmental approval for the assignment of the concession existed in many legal systems and was found to be justified by reasons of public interest. The public entities concerned had a legitimate interest in preventing the transfer of the responsibility to provide public services to entities that had not been selected by them.

195. The suggestion was made that the words "Except for assignment as security to lenders," should be inserted at the beginning of recommendation 9.

6. Security interests (legislative recommendations 11-13 and paras. 39-45)

196. Statements were made to the effect that, in practice, lenders expected to obtain the widest possible security over the assets of the project company, including the intangible assets. The availability of such security was considered crucial for the availability of financing for privately financed infrastructure projects. In view of that, the legislative guide should advise that legal obstacles to giving such security should be eliminated from legislation.

197. It was observed, however, that in many instances the assets managed by the project company remained in the ownership of the State, that such ownership was inalienable and that it was therefore not possible to use those assets as security.

198. As to the possibility of establishing security interests in the ownership shares of the project company, it was noted that in some legal systems the pledge of shares was either prohibited or restricted; moreover, it was likely that the circumstances under which the creditors would be prompted to invoke the security interest in the shares would also cause the value of the shares to drop sharply, which made that type of security uncertain and potentially illusory. It was observed, however, that the creditors' objective in obtaining shares as security was not to sell them in case of the project company's default, but to take over the control of the project company. The possibility of using shares in the project company as security was crucial for the "bankability" of privately financed infrastructure projects and States would be well advised to adopt special legislation on the matter in order to facilitate such projects. It was noted, however, that the pledge of shares of the project company raised essentially the same concerns as arose where the project company itself or the concession was assigned to another entity or consortium.

199. To the extent it was possible to create a security interest in the shares of the project company and for the creditors to take over the project company in case of default, it was noted that it was desirable to clarify whether, in the case of a "step-in" by creditors, the obligations of the host Government and of the previous project sponsors were in any way affected.

7. Duration (legislative recommendation 14 and paras. 46 and 47)

200. It was considered that legislation should not establish a maximum number of years for which concessions might be granted. Such mandatory provisions were in practice found to be an obstacle to agreeing to commercially reasonable solutions. Such maximum limits also could not take into account the possibility of changed circumstances that would require an extension of the concession. It was observed that the right of the host Government to purchase the concession from the concessionaire presented another possibility for dealing in a flexible manner with the duration of the concession.

Section C. Specific terms (para. 48)

201. With respect to paragraph 48, which indicated issues to be dealt with in the latter chapters of the guide, general suggestions were made to the effect that the anticipated chapters might be usefully combined and that care should be taken to distinguish clearly between the issues that were to be dealt with by legislation and those which were to be negotiated by the parties.

E. Considerations on the finalization of the draft chapters

202. It was suggested that the legislative recommendations to be included in the various chapters of the legislative guide should be supplemented, where appropriate, with sample model legislative provisions, possibly with alternative solutions. It was considered that such model provisions would make the legislative guide more practical and more readily usable. The suggestion, it was explained, was not to prepare a model law, but to facilitate as much as possible the task of legislators in countries wishing to set up a favourable legal framework for privately financed infrastructure projects.

203. The countervailing view was that the subject matter dealt with in the guide touched upon a number of public law and policy issues and that it would therefore be difficult to attempt to formulate model provisions that adequately took into account the differences between legal systems and the variety of policy options. The importance of affording sufficient flexibility to legislators in countries wishing to promote private investment in infrastructure was stressed. For that purpose, a clear set of legislative recommendations followed by an explanatory discussion of the pertinent issues and the possible options available might be a more useful tool than a set of model provisions that certain legislators might regard as being difficult to adjust to domestic conditions.

204. After considering the different views expressed, the Commission requested the Secretariat to draft the legislative recommendations in the form of concise legislative principles, thereby reducing the number of recommendations, and, where deemed feasible and appropriate, to formulate sample provisions for illustrative purposes for consideration by the Commission.

205. It was also suggested that the guide should not stray from legislative advice on privately financed infrastructure projects and that it should not attempt to give negotiating and contractual advice. The discussion on negotiating and contractual issues should be presented only to the extent necessary to explain the need for a particular legislative solution. It was suggested that the guide should, where appropriate, refer to other publications containing contractual advice, such as the United Nations Industrial Development Organization Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects and publications of the World Bank.

206. The Commission considered the method that should be followed in the finalization of the legislative guide, including the question whether the preparation of future chapters should be entrusted to a working group. After deliberation, it was agreed that the possible need for a working group should be considered at the thirty-second session of the Commission. It was also agreed that, at the present stage, it was desirable to allow the Secretariat to proceed in the preparation of future chapters for submission to the next session of the Commission. Such preparation, as well as the revision of existing drafts, should be carried out with the assistance of outside experts, as had been done thus far. The Secretariat was requested to make all reasonable efforts to obtain the advice of experts from both the public and the private sectors and to consult with experts from developing and developed countries as well as from countries with economies in transition.

Chapter III
Electronic commerce

A. Draft uniform rules on electronic signatures

207. It was recalled that the Commission, at its thirtieth session, in May 1997, had entrusted the Working Group on Electronic Commerce with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. With respect to the exact scope and form of such uniform rules, it was generally agreed at that session that no decision could be made at such an early stage of the process. In addition, it was felt that, while the Working Group might appropriately focus its attention on issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the uniform rules to be prepared should be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce. Thus, the uniform rules should not discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, those uniform rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, in particular where cross-border certification was sought.[10]

208. At the current session, the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/446). The Commission expressed its appreciation of the efforts accomplished by the Working Group in its preparation of draft uniform rules on electronic signatures. It was noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues arising from the increased use of digital and other electronic signatures. It was also noted that a consensus was still to be found as to how those issues might be addressed in an internationally acceptable legal framework. However, it was generally felt by the Commission that the progress achieved so far indicated that the draft uiform rules on electronic signatures were progressively being shaped into a workable structure. The Commission reaffirmed the decision made at its thirty-first session as to the feasibility of preparing such uniform rules[11] and expressed its confidence that more progress could be accomplished by the Working Group at its thirty-third session (New York, 29 June-10 July 1998) on the basis of the revised draft prepared by the Secretariat (A/CN.9/WG.IV/WP.76). In the context of that discussion, the Commission noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.

209. The Commission noted that, at the close of the thirty-second session of the Working Group, a proposal had been made that the Working Group might wish to give preliminary consideration to undertaking the preparation of an international convention based on provisions of the Model Law on Electronic Commerce and of the draft uniform rules. The Working Group had agreed that the topic might need to be taken up as an item on the agenda of its thirty-third session on the basis of more detailed proposals possibly to be made by interested delegations. However, the preliminary con-

clusion of the Working Group had been that the preparation of a convention should in any event be regarded as a project separate from both the preparation of the uniform rules and any other possible addition to the Model Law. Pending a final decision as to the form of the uniform rules, the suggestion to prepare a convention at a later stage should not distract the Working Group from its current task, which was to focus on the preparation of draft uniform rules on digital and other electronic signatures, and from its current working assumption that the uniform rules would be in the form of draft legislative provisions. It had been generally understood in the Working Group that the possible preparation of a draft convention should not be used as a means of reopening the issues settled in the Model Law, which might have a negative effect on the increased use of that already successful instrument (A/CN.9/446, para. 212).

210. The Commission noted that a specific and detailed proposal for the preparation of a convention had been submitted by a delegation to the Working Group for consideration at a future session (A/CN.9/WG.IV/WP.77). Diverging views were expressed in that connection. One view held that a convention based on the provisions of the Model Law was necessary, since the latter might not suffice to establish a universal legal framework for electronic commerce. Owing to the nature of the instrument, the provisions of the Model Law were subject to variation by any national legislation that enacted them, thus detracting from the desired harmonization of the legal rules applicable to electronic commerce. The opposite view was that, owing to the rapidly changing technical background of electronic commerce, the matter did not easily lend itself to the rigid approach suggested by an international convention. It was pointed out that the Model Law was of particular value as a collection of principles, which could be enacted in domestic legislation through various formulations to accommodate the increased use of electronic commerce.

211. The prevailing view was that it would be premature to undertake the preparation of the suggested convention. Delegations of various countries indicated that law reform projects based on the provisions of the Model Law were currently under way in their countries. Concern was expressed that the preparation of an international convention based on the Model Law might adversely affect the widespread enactment of the Model Law itself, which, only two years after its adoption by the Commission, was already being implemented in a significant number of countries. Moreover, it was generally felt that the Working Group should not be distracted from its current task, namely, the preparation of draft uniform rules on electronic signatures, as agreed by the Commission. Upon concluding that task, the Working Group would be welcome, in the context of its general advisory function with respect to the issues of electronic commerce, to make proposals to the Commission for future work in that area. It was suggested by the proponents of a convention that the matter might need to be further discussed at a future session of the Commission and in the context of the Working Group, possibly through informal consultations. It was recalled that, while possible future work might include the preparation of a convention, other topics had also been proposed, such as the issues of jurisdiction, applicable law and dispute settlement on the Internet.[12]

B. Incorporation by reference

212. At various stages in the preparation of the Model Law, it had been suggested that the text should contain a provision aimed at ensuring that certain terms and conditions that might be incorporated in a data message by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data message. That effect was generally referred to as "incorporation by reference".[13]

213. At its thirtieth session, in May 1997, the Commission endorsed the conclusion reached by the Working Group at its thirty-first session that many aspects of battle-of-forms and adhesion contracts would need to be left to applicable national laws for reasons involving, for example, consumer protection and other public policy considerations (see A/CN.9/437, para. 155).[14]

214. At its thirty-second session, the Working Group discussed the issue of incorporation by reference on the basis of various texts that were proposed as possible additions to the Model Law. That discussion was recorded in the report of the Working Group on the work of its thirty-second session (A/CN.9/446, paras. 14-23), together with the text of the various proposals that were considered by the Working Group. At the close of that discussion, the Working Group adopted the text of the following draft provision:

> "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is incorporated by reference in a data message."

The Working Group decided that it should be presented to the Commission for review and possible insertion as a new article 5 *bis* of the Model Law, and requested the Secretariat to prepare an explanatory note to be added to the guide to enactment of the Model Law (A/CN.9/446, para. 24). A draft text prepared pursuant to that decision for possible insertion in the guide to enactment of the Model Law is set forth in

annex II to the note prepared by the Secretariat (A/CN.9/450).

215. At the current session, the Commission noted that the text adopted by the Working Group embodied a minimalist approach to the issue of incorporation by reference. Consistent with the earlier deliberations of the Working Group (A/CN.9/437, para. 155, and A/CN.9/446, paras. 14-23), it did not attempt to achieve any substantial unification of the existing rules of domestic law regarding that issue. Instead, it restated in the context of incorporation by reference the general principle of non-discrimination embodied in article 5 of the Model Law. The text adopted by the Working Group was aimed at facilitating incorporation by reference in electronic commerce by removing the uncertainty that might prevail in certain jurisdictions as to whether the rules applicable to traditional paper-based incorporation by reference also applied in an electronic environment. Another aim of the provision was to make it clear that consumer-protection or other national or international law of a mandatory nature (e.g. rules protecting weaker parties in the context of contracts of adhesion) should not be interfered with.

216. It was widely felt in the Commission that, as currently drafted, the text presupposed a certain degree of familiarity of enacting States with the concept of incorporation by reference. However, although the expression "incorporation by reference" had been used consistently by the Working Group as a concise way of referring to a complex range of legal and factual situations, it might not convey the same meaning in all enacting States. With a view to reducing the difficulties that might arise in the interpretation of the text, it was suggested that a more descriptive language might be used along the following lines, consistent with the formulation adopted by the Working Group:

> "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purported to give rise to such legal effect, but is merely referred to in that data message."

217. Various alternative texts were proposed, based on a more positive formulation of effects to be given to incorporation by reference. However, it was generally felt that any attempt to establish a positive rule on issues of incorporation by reference might result in interfering with existing rules by which domestic legislation dealt with the issue of incorporation by reference. The Commission generally agreed that such interference should be avoided and that the minimalist approach adopted by the Working Group should be maintained. In the context of that discussion, the view was expressed, however, that a provision dealing with incorporation by reference based on such an approach was unnecessary altogether.

218. After discussion, the Commission found the substance of the proposed text (see above, para. 216) to be generally acceptable. As a matter of drafting, it was suggested that the provision might need to indicate more clearly that incorporation by reference should be distinguished from a mere reference. The following text was proposed:

> "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is referred to within that data message as forming part of that message."

219. After discussion, the Commission decided to retain the original proposal (see above, para. 216), subject to the substitution of the word "purporting" for the word "purported".

220. As to the placement of the additional provision, while it was suggested that the text should be added as a new part III of the Model Law, it was generally agreed that the insertion of the text as a new article 5 *bis*, as suggested by the Working Group, was more appropriate.

221. With respect to the draft additional section prepared by the Secretariat for insertion in the guide to enactment of the Model Law (see A/CN.9/450, annex II), the Secretariat was requested to ensure that the text indicated clearly that the newly adopted article 5 *bis* was not to be interpreted as creating a specific legal regime for incorporation by reference in an electronic environment. Rather, by establishing a principle of non-discrimination, it was to be construed as making the domestic rules applicable to incorporation by reference in a paper-based environment equally applicable to incorporation by reference for the purposes of electronic commerce.

Chapter IV
Assignment in receivables financing

222. It was recalled that the Commission had considered legal problems in the area of assignment at its twenty-sixth to twenty-eighth sessions (1993-1995)[15] and had entrusted, at its twenty-eighth session, in 1995, the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing.[16]

223. The Working Group commenced its work at its twenty-fourth session (Vienna, 13-24 November 1995) and continued it at its twenty-fifth and twenty-sixth sessions (New York, 8-19 July, and Vienna, 11-22 November 1996,

respectively). It was noted that, at its twenty-fourth session, the Working Group had been urged to strive for a legal text aimed at increasing the availability of lower-cost credit (A/CN.9/420, para. 16). In addition, it was noted that, at its twenty-fifth and twenty-sixth sessions, the Working Group had decided to proceed with its work on the assumption that the text being prepared would take the form of a convention (A/CN.9/432, para. 28) and would include private international law provisions (A/CN.9/434, para. 262).

224. At its thirty-first session, the Commission had before it the reports of the twenty-seventh and twenty-eighth sessions of the Working Group (A/CN.9/445 and A/CN.9/447). At the outset, the Commission noted that its work on receivables financing had attracted the interest of the international trade and finance community, since it had the potential of increasing access to lower-cost credit. In addition, the Commission noted that the Working Group had made substantial progress on a number of other matters, including the validity of assignments of future receivables and of receivables not identified individually (i.e. bulk assignments), as well as of assignments concluded despite an anti-assignment clause contained in the contract under which the assigned receivables arose, and the debtor-protection issues. In particular, the Commission noted that, at its twenty-eighth session, the Working Group had adopted the substance of the provisions dealing with the relationship between the assignor and the assignee, as well as the provisions dealing with the debtor's protection (draft articles 14-16 and 18-22, respectively) and requested the Secretariat to revise the provision dealing with the right of the assignee to payment and with proceeds-related issues (draft article 17; see A/CN.9/447, paras. 161-164 and 68, respectively).

225. At the same time, it was noted that a number of issues remained to be resolved, including those relating to the scope of the draft convention, public policy issues arising in the context of the protection of the debtor, conflicts of priority among several claimants and private international law issues.

226. As to the scope of application, the view was widely shared that it was too wide and that it should be limited to contractual receivables assigned for the purpose of obtaining financing. It was observed that such an approach would be in line with the overall purpose of the project to facilitate receivables financing and thus to increase the availability of lower-cost credit. In addition, it was stated that, under such an approach, the draft convention would be more acceptable to a number of States, which were prepared to introduce specific legislation to address the needs of modern financing transactions but not to make a general overhaul of their assignment law. Moreover, under such an approach, practices that were already functioning well on the basis of well-established rules would not be interfered with. With respect to the territorial scope of application of the draft convention, it was observed that a

solution based on a choice-of-law approach similar to that followed in the United Nations Convention on Contracts for the International Sale of Goods would not be appropriate.

227. With regard to public policy concerns, it was observed that it would be preferable for the draft convention to introduce such a high threshold for the protection of the debtor that it would meet the concerns of all States and would make it unnecessary for them to have to fall back on a general public policy reservation, which could jeopardize the certainty achieved by the convention and thus have an adverse impact on the cost and the availability of credit.

228. As to prior conflicts, wide support was expressed for the approach taken in the draft convention combining substantive and private international law priority rules. It was stated that allowing States to choose, by way of a declaration, between a priority rule based on the time of assignment and a rule based on the time of registration, which would take effect only upon establishment of a suitable registration system, would increase the acceptability of the draft convention.

229. With regard to the private international law provisions contained in the draft convention, the Commission welcomed the holding of a meeting of experts by the Hague Conference on Private International Law in cooperation with the Secretariat of the Commission. The Commission noted that, at that meeting, it had been confirmed that the private international law priority provisions contained in the draft convention would be appropriate, provided that their application was limited to the transactions falling under the scope of the draft convention. In addition, it was noted that the Permanent Bureau of the Conference would prepare and submit to the Working Group a report of that meeting (see also below, paras. 269 and 270).

230. In the discussion, broad support was expressed in favour of the working assumption of the Working Group that the text being prepared should take the form of a convention. It was noted that, in view of the differences existing in the various legal systems in the field of assignment, a convention would provide the appropriate degree of unification, introducing the certainty and predictability needed for credit to be made available on the basis of receivables.

231. The Commission expressed appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously so as to complete it in 1999 and to submit the draft convention for adoption by the Commission at its thirty-third session (2000).

Chapter V

Monitoring the implementation of the 1958 New York Convention

232. It was recalled that the Commission, at its twenty-eighth session in 1995, had approved the project, undertaken jointly with Committee D of the International Bar Association, aimed at monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[17] It was stressed that the purpose of the project, as approved by the Commission, was limited to that aim and, in particular, its purpose was not to monitor individual court decisions applying the Convention. In order to be able to prepare a report on the subject, the Secretariat had sent to the States parties to the Convention a questionnaire relating to the legal regime in those States governing the recognition and enforcement of foreign awards.

233. Up until the current session of the Commission, the Secretariat had received 54 replies to the questionnaire. The Commission called upon the States parties to the Convention that had not yet replied to the questionnaire to do so as soon as possible or, to the extent necessary, to inform the Secretariat about any new developments since their previous replies to the questionnaire. The Secretariat was requested to prepare, for a future session of the Commission, a note presenting the findings based on the analysis of the information gathered.

234. In connection with that discussion, it was observed that the Convention had become an essential factor in the facilitation of international trade and that, besides the legislative enactment of the Convention, it would be useful for the Commission also to consider its interpretation. Such consideration, together with information to be prepared by the Secretariat for that purpose, would serve to promote the Convention and facilitate its use by practitioners. It was stressed that information on the interpretation of the Convention was not available in all the official languages of the United Nations and that, therefore, the Commission was the appropriate body to prepare it. The Commission did not take any decision regarding that suggestion.

235. It was noted that, later during the session, on 10 June 1998, the Commission would hold a special commemorative New York Convention Day in order to celebrate the fortieth anniversary of the Convention (see below, para. 257); on that occasion, attention would also be paid to legal issues that were not covered by the Convention and with respect to which the Commission might wish to consider whether any work by it would be desirable and feasible and, if so, what form it should take. The Commission considered that it would be

useful to engage in such a consideration of possible future work in the area of arbitration at its twenty-second session, in 1999, and requested the Secretariat to prepare, for that session, a note that would serve as a basis for the considerations of the Commission. Considerations at the New York Convention Day and at the Congress of the International Council for Commercial Arbitration (Paris, 3-6 May 1998) might be taken into account in the preparation of the note.

Chapter VI
Case law on UNCITRAL texts

236. The Commission noted with appreciation that, since its thirtieth session in 1997, five additional sets of abstracts with court decisions and arbitral awards relating to the United Nations Convention on Contracts for the International Sale of Goods and to the UNCITRAL Model Law on International Commercial Arbitration had been published (A/CN.9/SER.C/ABSTRACTS/13-17). The Commission also noted with appreciation that a search engine had been placed on the Web site of the UNCITRAL secretariat on the Internet (http://www.un.or.at/uncitral) to enable users of case law on UNCITRAL texts (CLOUT) to carry out searches into CLOUT cases and other documents. The Secretariat was encouraged to continue its efforts to increase the availability of UNCITRAL documents through the Internet in all six official United Nations languages.

237. The Commission also noted that the work of the Secretariat in editing abstracts, storing decisions and awards in their original form, translating abstracts into the other five United Nations languages, publishing them in all six United Nations languages, forwarding abstracts and full texts of decisions and awards to interested parties upon request and establishing and operating the CLOUT search engine had substantially increased in tandem with the number of decisions and awards covered by CLOUT. The Commission therefore requested that adequate resources be made available to the Secretariat for the effective operation of CLOUT.

238. The Commission expressed its appreciation to the national correspondents and to the Secretariat for their work and urged States to cooperate with the Secretariat in the operation of CLOUT and to facilitate the carrying out of the tasks of the national correspondents. The Commission emphasized the importance of CLOUT for the purpose of promoting the uniform application of the legal texts that resulted from its work. It was generally agreed that, by being issued in all six United Nations languages, CLOUT constituted an invaluable tool for practitioners, academics and government officials. In order to ensure that CLOUT became a system covering in a comprehensive way all case law available on UNCITRAL texts, the Commission urged the States that had not yet appointed a national correspondent to do so. In addition, the Commission urged States to ensure that CLOUT information was made available to national judges, arbitrators, practitioners and academics.

Chapter VII
Training and technical assistance

239. The Commission had before it a note by the Secretariat (A/CN.9/448) outlining the activities undertaken since the previous session and indicating the direction of future activities being planned. It was noted that UNCITRAL seminars and briefing missions for government officials were designed to explain the salient features and utility of international trade law instruments of UNCITRAL.

240. It was reported that since the previous session the following seminars and briefing missions had been held: Stellenbosch, South Africa (11 March 1997); Cartagena and Bogotá (14 and 15 and 17 and 18 April 1997, respectively); Quito (21 and 22 April 1997); Lima (24-26 April 1997); Thessaloniki, Greece (12 and 13 September 1997); Nicosia (9 and 10 October 1997); Dubai (10 December 1997); and Valletta (24 and 25 February 1998). The Secretariat reported that for the remainder of 1998 and up to the next session of the Commission, in May 1999, seminars and briefing missions were being planned in Africa, Asia, Latin America and eastern Europe.

241. The Commission expressed its appreciation to the Secretariat for the activities undertaken since its past session and emphasized the importance of the training and technical assistance programme for promoting awareness of its work and disseminating information on the legal texts it had produced. It was pointed out that seminars and briefing missions were particularly useful for developing countries lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL. The Commission noted the relevance of uniform commercial law, in particular legal texts prepared by UNCITRAL, in the economic integration efforts being undertaken by many countries and emphasized the important role that the training and technical assistance activities of the Secretariat might play in that context.

242. The Commission noted the various forms of technical assistance that might be provided by the Secretariat, such as review of preparatory drafts of legislation, assistance in the preparation of drafts, comments on reports of law reform commissions and briefings for legislators, judges, arbitrators and other end-users of UNCITRAL legal texts embodied in

national legislation. The Commission encouraged the Secretariat to devise ways to address the continuing and significant increase in the importance being attributed by Governments, by domestic and international business communities and by multilateral and bilateral aid agencies to improving the legal framework for international trade and investment.

243. The Commission emphasized the importance of cooperation and coordination between development assistance agencies providing or financing legal technical assistance with the Secretariat, with a view to avoiding situations in which international assistance might lead to the adoption of national laws that would not represent internationally agreed standards, including UNCITRAL conventions and model laws.

244. The Commission took note with appreciation of the contributions made by Greece and Switzerland towards the seminar programme. The Commission also expressed its appreciation to those other States and organizations which had contributed to the Commission's programme of training and assistance by hosting seminars. Stressing the importance of extrabudgetary funding for carrying out training and technical assistance activities, the Commission appealed once more to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia so as to facilitate planning and to enable the Secretariat to meet the increasing demands in developing countries and newly independent States for training and assistance.

245. Concern was expressed that the majority of the participants in the internship programme of the Secretariat were nationals of developed countries. An appeal was made to all States to consider supporting programmes that sponsored the participation of nationals of developing countries in the internship programme.

Chapter VIII
Status and promotion of UNCITRAL texts

246. The Commission, on the basis of a note by the Secretariat (A/CN.9/449), considered the status of the conventions and model laws emanating from its work, as well as the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Commission noted with pleasure the new actions of States after 30 May 1997 (date of the conclusion of the thirtieth session of the Commission) regarding the following instruments:

(a) *Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974, as amended by the Protocol of 11 April 1980*. New action by the Republic of Moldova; number of States parties: 17;

(b) *[Unamended] Convention on the Limitation Period in the International Sale of Goods (New York, 1974)*. New action by the Republic of Moldova; number of States parties: 23;

(c) *United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)*. Number of States parties: 25;

(d) *United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*. New actions by Croatia, Greece, Latvia and Mongolia; number of States parties: 52;

(e) *United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)*. The Convention has two States parties. It requires eight more adherences for entry into force;

(f) *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)*. The Convention has one State party. It requires four more adherences for entry into force;

(g) *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)*. The Convention has two States parties. It requires three more adherences for entry into force;

(h) *UNCITRAL Model Law on International Commercial Arbitration, 1985*. New jurisdictions that have enacted legislation based on the Model Law: Germany, Iran (Islamic Republic of), Lithuania and Oman;

(i) *UNCITRAL Model Law on International Credit Transfers, 1992*;

(j) *UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994*. New jurisdictions that have enacted legislation based on the Model Law: Kyrgyzstan and Slovakia;

(k) *UNCITRAL Model Law on Electronic Commerce, 1996*;

(l) *UNCITRAL Model Law on Cross-Border Insolvency, 1997*;

(m) *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*. New actions

by Armenia, El Salvador, Lebanon, Nepal and Paraguay; number of States parties: 117.

247. Appreciation was expressed for those legislative actions on the texts of the Commission. A request was directed to States that had enacted or were about to enact a model law prepared by the Commission, or were considering legislative action regarding a convention resulting from the work of the Commission, to inform the secretariat of the Commission thereof. Such information would be useful to other States in their consideration of similar legislative actions. The UNCITRAL Model Law on Cross-Border Insolvency and the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit were mentioned as examples of texts with respect to which such information was particularly desirable.

248. Representatives and observers of a number of States reported that official action was being considered with a view to adherence to various conventions and to the adoption of legislation based on various model laws prepared by UNCITRAL.

249. It was noted that, despite the universal relevance and usefulness of those texts, a great number of States had not yet enacted any of them. In view of the broad support for the legislative texts emanating from the work of the Commission among practitioners and academics in countries with different legal, social and economic systems, the pace of adoption of those texts was slower than it needed to be. An appeal was directed to the representatives and observers participating in the meetings of the Commission and its working groups to contribute, to the extent they in their discretion deemed appropriate, to facilitating consideration by legislative organs in their countries of texts of the Commission.

Chapter IX
General Assembly resolutions on the work of the Commission

250. The Commission took note with appreciation of General Assembly resolution 52/158 of 15 December 1997, in which the Assembly expressed its appreciation to the Commission for completing and adopting the Model Law on Cross-Border Insolvency. In paragraph 3 of the resolution, the Assembly recommended that all States review their legislation on cross-border aspects of insolvency to determine whether the legislation met the requirements of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency.

251. In addition, the Commission took note with appreciation of General Assembly resolution 52/157, also of 15 December 1997, on the report of the Commission on the work of its thirtieth session, held in 1997. In particular, it was noted that, in paragraph 6, the Assembly reaffirmed the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in that field, and, in that connection, called upon all bodies of the United Nations system and invited other international organizations to bear in mind the mandate of the Commission and the need to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and recommended that the Commission, through its secretariat, continue to maintain close cooperation with the other international organs and organizations, including regional organizations, active in the field of international trade law.

252. The Commission also noted with appreciation the decision of the General Assembly, in paragraph 7 of resolution 52/157, to reaffirm the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission, and that, in paragraph 8, the Assembly expressed the desirability for increased efforts by the Commission, in sponsoring seminars and symposia, to provide such training and assistance.

253. The Commission also noted with appreciation the appeal by the General Assembly, in paragraph 8 (b) of resolution 52/157, to Governments, the relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions to the UNCITRAL Trust Fund for Symposia and, where appropriate, to the financing of special projects. Furthermore, it was noted that the Assembly appealed, in paragraph 9 of the resolution, to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and the European Bank for Reconstruction and Development, as well as to Governments in their bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

254. It was also appreciated that the Assembly appealed, in paragraph 10 of resolution 52/157, to Governments, the relevant United Nations organs, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its

working groups, to make voluntary contributions to the trust fund for granting travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General. (That trust fund had been established pursuant to General Assembly resolution 48/32 of 9 December 1993.) The Commission noted with appreciation the decision of the Assembly, in paragraph 11, to continue, in the competent Main Committee during the fifty-second session of the Assembly, its consideration of granting travel assistance to the least developed countries that were members of the Commission, at their request and in consultation with the Secretary-General.

255. The Commission welcomed the request by the General Assembly, in paragraph 12 of the resolution, to the Secretary-General to ensure the effective implementation of the programme of the Commission. The Commission, in particular, hoped that the Secretariat would be allocated sufficient resources to meet the increased demands for training and assistance. The Commission noted with regret that, despite the above-mentioned request of the Assembly, the secretariat of the Commission was generally short of funds for the publication of the *UNCITRAL Yearbook* and brochures containing texts resulting from the work of the Commission.

256. The Commission also noted with appreciation that the General Assembly, in paragraph 13 of the resolution, stressed the importance of bringing into effect the conventions emanating from the work of the Commission, and that, to that end, it urged States that had not yet done so to consider signing, ratifying or acceding to those conventions.

Chapter X
New York Convention Day and Uniform Commercial Law Information Colloquium

257. During its thirty-first session, on 10 June 1998, the Commission held a special commemorative New York Convention Day in order to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The opening speech was made by the Secretary-General of the United Nations. In addition to speeches by former participants in the diplomatic conference that adopted the Convention, leading arbitration experts gave reports on matters relating to the significance of the Convention; its promotion, enactment and application; the interplay between the Convention and other international legal texts on international commercial arbitration (such as the UNCITRAL Model Law on International Commercial Arbitration and the European Convention on International Commercial Arbitration, Geneva, 1961); and legal issues that were not covered by the Convention. In the reports, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any work by the Commission would be desirable and feasible (see also above, para. 235).

258. On 11 June 1998, the Commission held the Uniform Commercial Law Information Colloquium, in which representatives of States members of the Commission and observers and some 250 invited persons participated. At the Colloquium, leading experts presented their insights and assessment of legal issues relating to electronic commerce, privately financed infrastructure projects, receivables financing and cross-border insolvency. The Colloquium was designed to provide condensed information on current topics in those legal areas and exchange views that might be useful in the consideration of those issues by the Commission.

259. The Commission expressed the wish that the Secretariat publish reports from the New York Convention Day and the Colloquium as expeditiously as possible.

Chapter XI
Coordination and cooperation

A. Transport law

260. It was recalled that, at the thirtieth session (26 February-8 March 1996) of the Working Group on Electronic Data Interchange (later renamed the Working Group on Electronic Commerce), it had been observed in various contexts that existing national laws and international conventions left significant gaps regarding issues such as the functioning of bills of lading and seaway bills, and the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage. Some States had provisions on those issues, but the fact that those provisions were disparate and that many States lacked them constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and created the need for uniform provisions addressing the issues particular to the use of new technologies.[18]

261. As a result of those considerations in the Working Group, it had been proposed, at the twenty-ninth session of the Commission, in 1996, that the Commission should include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea with a view to establishing the need for uniform rules in the areas where no such rules existed, and with a view to achieving greater uniformity of laws than had so far been achieved. It had been suggested at that session that the Secretariat should be requested to solicit views and suggestions on those difficulties not only from Governments but in particular also from the intergovernmental and non-governmental organizations representing the various interests in the international carriage of goods by sea. It was thought that an analysis of those views and suggestions would enable the Secretariat to present, at a future session, a report that would allow the Commission to take an informed decision as to the desirable course of action. Such an information-gathering exercise by the Secretariat should encompass a broad range of issues in the carriage of goods by sea and in related areas such as terminal operations and multi-modal carriage.

262. Several reservations had been expressed at that session with regard to the suggestion. One had been that the issues to be covered were numerous and complex, which would unduly strain the limited resources of the Secretariat. Furthermore, the continued coexistence of different treaties governing the liability in the carriage of goods by sea and the slow process of adherence to the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) made it unlikely that adding a new treaty to the existing ones would lead to a greater harmony of laws. In addition, it had been pointed out that any work that included the reconsideration of the liability regime was likely to discourage States from adhering to the Hamburg Rules, which would be an unfortunate result. It had been stressed that, if any investigation were to be carried out, it should not cover the liability regime, since the Hamburg Rules had already provided modern solutions. It had been stated in reply, however, that, although some aspects of liability might be involved, the review of the liability regime was not the main objective of the suggested work; rather, what was necessary was to provide modern solutions to the issues that were not dealt with in treaties adequately, or at all.

263. Given the differing views, the Commission had not included the consideration of the suggested issues on its current agenda. Nevertheless, it had decided that the Secretariat should be the focal point for gathering information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems. Such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee, the International Chamber of Commerce, the International Union of Marine Insurance, the International Federation of Freight Forwarders' Associations, the International Chamber of Shipping and the International Association of Ports and Harbours.

264. At its thirty-first session, the Commission heard a statement on behalf of the International Maritime Committee to the effect that it welcomed the invitation to cooperate with the Secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information. That analysis would allow the Commission to take an informed decision as to the desirable course of action.

265. It was said that the exploratory work would not focus on the liability regime but would rather be based on a broad assessment of the current problems and needs arising from modern trade practices relating to the international carriage of goods and from the use of new transport and communication methods. The Commission was informed that the International Maritime Committee had already taken steps, in consultation with the Secretariat, to organize the collection and analysis of such information. The work would from the outset involve a broad spectrum of international organizations interested in the international carriage of goods. Such a thorough and broadly based approach to the issues was time-consuming but was considered indispensable for obtaining complete and accurate information about the current practices and problems and for arriving at a balanced assessment of the desirability and feasibility of work towards internationally harmonized legal solutions.

266. Strong support was expressed by the Commission for the exploratory work being undertaken by the International Maritime Committee and the Secretariat. The Commission expressed its appreciation to the Committee for its willingness to embark on that important and far-reaching project, for which few or no precedents existed at the international level; the Commission was looking forward to being apprised of the progress of the work and to considering the opinions and suggestions resulting from it.

267. Subsequently, a statement was made on behalf of the International Association of Ports and Harbours in support of considering the impact of new transport techniques on the law of carriage of goods and expressing willingness to contribute to the work of searching for harmonized legal solutions.

B. Trade and development

268. A representative of the United Nations Conference on Trade and Development (UNCTAD) recalled several instances of cooperation with the Commission. The Commission was informed that UNCTAD was currently interested in cooperating with the Commission with respect to rules relating to electronic commerce. UNCTAD was particularly interested in the question of how better to integrate developing countries in international electronic commerce. It was hoped that the secretariat of the Commission would be able to participate in those activities of UNCTAD; besides electronic commerce, the collaboration between the two organizations could extend to areas such as the settlement of disputes in the fields of trade and investment. The Commission expressed its appreciation for the work of UNCTAD, reiterated its desire to cooperate with it and endorsed plans of cooperation between the secretariats of the two organizations.

C. Private international law in the area of receivables financing

269. The Commission was informed that the Hague Conference on Private International Law had organized, in cooperation with the Secretariat, a meeting of experts at The Hague in order to consider private international law issues arising in the context of the draft convention on assignment in receivables financing currently being prepared by the Commission's Working Group on International Contract Practices. At that meeting, experts had considered private international law issues connected with the substantive law provisions of the draft convention; the private international law priority provisions supplementing the substantive law priority provisions of the draft convention; and the private international law provisions that were potentially aimed at also covering transactions that fell outside the scope of the draft convention. In addition, with a view to assisting the UNCITRAL Working Group, the Bureau of the Conference would prepare a report of the meeting and submit it to the Working Group.

270. The Commission welcomed the cooperation with the Hague Conference. It was felt that such cooperation was necessary for the optimal utilization of the resources available to the respective organizations to the benefit of the process of law unification.

D. International Association of Lawyers

271. It was stated on behalf of the International Association of Lawyers that the Association would continue to publicize the work of the Commission through its committees and through conferences and seminars it organized. In addition, the Association was prepared to offer expert assistance to the Commission in a number of areas in which the latter was currently active, including the area of privately financed infrastructure projects. The Commission was appreciative of the statement and looked forward to strengthened cooperation with the Association.

Chapter XII
Other business

A. Bibliography

272. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/452) and the guide to enactment of the UNCITRAL Model Law on Cross-Border Insolvency (A/CN.9/442).

273. The Commission stressed that it was important for it to have as complete as possible information about publications, including academic theses, commenting on the results of its work. It therefore requested Governments, academic institutions and other relevant organizations to send copies of such publications to the Secretariat.

B. Willem C. Vis International Commercial Arbitration Moot

274. It was reported to the Commission that the Institute of International Commercial Law at Pace University School of Law, New York, had organized the fifth Willem C. Vis International Commercial Arbitration Moot (Vienna, 4-9 April 1998). Legal issues that the teams of students participating in the Moot dealt with were based, *inter alia*, on the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on International Credit Transfers. Some 58 teams from law schools in some 30 countries participated in the 1998 Moot. The sixth Moot is to be held in Vienna from 26 March to 1 April 1999.

275. The Commission heard the report with interest and appreciation. It regarded the Moot, with its international

participation, as an excellent method of teaching international trade law and disseminating information about current uniform texts.

C. Date and place of the thirty-second session of the Commission

276. It was decided that the Commission would hold its thirty-second session in Vienna from 17 May to 4 June 1999.

D. Sessions of working groups

277. The Commission approved the following schedule of meetings for its working groups:

(a) The Working Group on International Contract Practices is to hold its twenty-ninth session in Vienna from 5 to 16 October 1998 and its thirtieth session in New York from 1 to 12 March 1999;

(b) The Working Group on Electronic Commerce is to hold its thirty-third session in New York from 29 June to 10 July 1998 and its thirty-fourth session in Vienna from 8 to 19 February 1999.

Notes

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the General Assembly at its forty-ninth session, on 28 November 1994 (decision 49/315), and 19 at its fifty-second session, on 24 November 1997 (decision 52/314). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-ninth session will expire on the last day prior to the opening of the thirty-fourth session of the Commission, in 2001, while the term of those members elected at the fifty-second session will expire on the last day prior to the opening of the thirty-seventh session of the Commission, in 2004.

[2] The election of the Chairman took place at the 632nd meeting, on 1 June 1998, the election of the Vice-Chairmen at the 639th meeting, on 4 June 1998, and the election of the Rapporteur at the 636th meeting, on 3 June 1998. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (*Yearbook of the United Nations Commission on International Trade Law*, vol. I: *1968-1970* (United Nations publication, Sales No. E.71.V.1), part two, chap. I, sect. A)).

[3] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 225-230.

[4] Ibid., *Fifty-second Session, Supplement No. 17* and corrigendum (A/52/17 and Corr.1), paras. 231-246.

[5] Ibid., para. 235.

[6] Ibid., paras. 238-243.

[7] Ibid., para. 237 (a).

[8] Ibid., para. 236.

[9] Ibid., para. 237 (b).

[10] Ibid., para. 250.

[11] Ibid., paras. 249 and 250.

[12] Ibid., para. 251.

[13] For earlier discussion of the issue of incorporation by reference by the Commission, by the Working Group on Electronic Commerce, and in notes prepared by the Secretariat, see ibid., paras. 248-250; ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), paras. 222 and 223; A/CN.9/450; A/CN.9/446, paras. 14-24; A/CN.9/437, paras. 151-155; A/CN.9/421, paras. 109 and 114; A/CN.9/407, paras. 100-105 and 117; A/CN.9/406, paras. 90, 178 and 179; A/CN.9/360, paras. 90-95; A/CN.9/350, paras. 95 and 96; A/CN.9/333, paras. 66-68; A/CN.9/WG.IV/WP.74; A/CN.9/WG.IV/WP.71, paras. 77-93; A/CN.9/WG.IV/WP.69, paras. 30, 53, 59, 60 and 91; A/CN.9/WG.IV/WP.66; A/CN.9/WG.IV/WP.65; A/CN.9/WG.IV/WP.55, paras. 109-113; and

A/CN.9/WG.IV/WP.53, paras. 77 and 78).

[14] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* and corrigendum (A/52/17 and Corr.1), paras. 249-251.

[15] Ibid., *Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 297-301; ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), paras. 208-214; and ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 374-381.

[16] Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 374-381.

[17] Ibid., paras. 401-404, and ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), paras. 238-243.

[18] Ibid. para. 210, and A/CN.9/421, paras. 104-108.

Annex

List of documents before the Commission at its thirty-first session

A. General series

A/CN.9/443	Provisional agenda, annotations thereto and scheduling of meetings of the thirty-first session
A/CN.9/444 and Add.1-5	Draft chapters of a legislative guide on privately financed infra-structure projects
A/CN.9/445	Report of the Working Group on International Contract Practices on the work of its twenty-seventh session
A/CN.9/446	Report of the Working Group on Electronic Commerce on the work of its thirty-second session
A/CN.9/447	Report of the Working Group on International Contract Practices on the work of its twenty-eighth session
A/CN.9/448	Training and technical assistance
A/CN.9/449	Status of conventions and model laws
A/CN.9/450	Possible addition to the UNCITRAL Model Law on Electronic Commerce: draft provision on incorporation by reference
A/CN.9/452	Bibliography of recent writings related to the work of UNCITRAL

B. Restricted series

A/CN.9/XXXI/CRP.1and Add.1-19	Draft report of the United Nations Commission on International Trade Law on the work of its thirty-first session
A/CN.9/XXXI/CRP.2	Note by the delegation of France
A/CN.9/XXXI/CRP.3	Note by the delegation of France