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

Note by the Secretariat

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## I. Introduction

1. At its thirty-third session (New York, 12 June-7 July 2000), the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at that session and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the Secretariat was authorized to finalize in the light of the deliberations of the Commission.<sup>1</sup> The Legislative Guide was published in all official languages in 2001.

2. At the same session, the Commission also considered a proposal for future work in that area. It was suggested that, although the Legislative Guide would be a useful reference for domestic legislators in establishing a legal framework favourable to private investment in public infrastructure, it would nevertheless be desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues.<sup>2</sup>

3. After consideration of that proposal, the Commission decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-fourth session. In order to assist the Commission in making an informed decision on the matter, the Secretariat was requested to organize a colloquium, in cooperation with other interested international organizations or international financial institutions, to disseminate knowledge about the Legislative Guide.<sup>3</sup>

4. The Colloquium on Privately Financed Infrastructure: Legal Framework and Technical Assistance was organized with the co-sponsorship and organizational assistance of the Public-Private Infrastructure Advisory Facility (PPIAF), a multi-donor technical assistance facility aimed at helping developing countries improve the quality of their infrastructure through private sector involvement. It was held in Vienna from 2 to 4 July 2001, during the second week of the thirty-fourth session of the Commission.

5. At its thirty-fourth session, in 2001, the Commission took note with appreciation of the results of the Colloquium as summarized in a note by the Secretariat (A/CN.9/488). The Commission expressed its gratitude to PPIAF for its financial and organizational support, to the various international intergovernmental and non-governmental organizations represented and to the speakers who participated at the Colloquium.

6. The various views that were expressed as to the desirability and feasibility of further work of the Commission in the field of privately financed infrastructure projects are reflected in the Commission's report on the work of its thirty-fourth session.<sup>4</sup> The Commission agreed that a working group should be entrusted with the task of drafting core model legislative provisions in the field of privately financed infrastructure projects. The Commission was of the view that, if further work in the field of privately financed infrastructure projects was to be accomplished within reasonable time, it was essential to carve out a specific area from among the many issues dealt with in the Legislative Guide. Accordingly, it was agreed that the first

session of such working group should identify the specific issues on which model legislative provisions, possibly to become an addendum to the Guide, could be formulated.<sup>5</sup>

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

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

9. The addenda to the present document contain a first set of draft model legislative provisions (hereinafter referred to as “draft model provisions”). Section II of the present document contains short explanatory notes on the draft model provisions, including an indication of the relationship between each model provision and the relevant portion of the UNCITRAL Legislative Guide, for the purpose of assisting the Working Group in its deliberations. Section III refers to matters dealt with in the UNCITRAL Legislative Guide on which no draft model provisions have been drafted.

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

10. The draft model provisions were prepared by the Secretariat following consultations with outside experts, as requested by the Commission and the Working Group. The draft model provisions develop further the legislative principles underlying those legislative recommendations contained in the UNCITRAL Legislative Guide on which the Working Group, at its fourth session, decided that draft model legislative provisions should be drafted. A few draft model provisions offer alternatives for legislators in enacting States. They are, on occasion, followed by footnotes intended to provide specific advice and guidance to legislators in enacting States regarding the policy issues relating to the relevant draft model provisions and options available for their implementation. For the user’s ease of reference, the arrangement of the draft model provisions follows as closely as possible the sequence of legislative recommendations in the UNCITRAL Legislative Guide.

## A. General provisions

### **Model provision 1. Preamble (see UNCITRAL Legislative Guide, legislative recommendation 1, and chap. I, “General legislative and institutional framework”, paras. 2-14)**

11. At its fourth session, the Working Group acknowledged that both provisions contained in legislative recommendation 1 were of a general nature and as such were not suitable for translation into legislative language. However, it was agreed that the substance of the recommendation might usefully be retained as a reminder of the broad objectives to be pursued in the field of privately financed infrastructure, possibly in a preamble or in explanatory notes to the model legislative provisions that the Working Group might decide to prepare (A/CN.9/505, para. 91).

12. Variant A reflects the substance of legislative recommendation 1 only. Variant B is more elaborate and includes a preambular paragraph reflecting the substance of legislative recommendation 14, which the Working Group also found worthy of being formulated in legislative language.

### **Model provision 2. Definitions**

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

#### *Contracting authority*

14. By linking the notion of “contracting authority” to “concession agreement”, the proposed definition aims at avoiding the difficulty of referring to the entity having actual responsibility for the implementation of infrastructure projects.

#### *Concession agreement*

15. In view of the difficulty of offering a definition of “concession” that would be acceptable to various legal systems, the Secretariat suggests combining the notions of “project agreement” and “concession” in one single definition. The use of the words “concession agreement”, as compared to the corresponding notion of “project agreement”, which is used in the UNCITRAL Legislative Guide, would have the advantage of facilitating the incorporation of the draft model provisions in domestic legal systems, since the term “concession agreement”, which in the past was more widely used in civil law jurisdictions only, is being increasingly used in common law jurisdictions as well.

### **Model provision 3. Authority to enter into concession agreements, and model provision 4. Eligible infrastructure sectors (see UNCITRAL Legislative Guide, legislative recommendations 2-5, and chap. I, “General legislative and institutional framework”, paras. 15-22)**

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

## **B. Selection of the concessionaire**

### **Model provision 5. Rules governing the selection proceedings (see UNCITRAL Legislative Guide, legislative recommendation 14, and chap. III, “Selection of the concessionaire”, paras. 1-33)**

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

### **1. Pre-selection of bidders (for all draft model provisions in this section, see UNCITRAL Legislative Guide, legislative recommendation 15-17, and chap. III, “Selection of the concessionaire”, paras. 34-50)**

#### **Model provision 6. Purpose and procedure of pre-selection**

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

19. Paragraph 3 contains a few additional elements drawn from chapter III, paragraph 36, of the Legislative Guide. The elements referred to in paragraph 4 have been added to ensure the transparency as regards important information referred to in draft model provisions 7, 8, 9 and 29.

#### **Model provision 7. Pre-selection criteria**

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

#### **Model provision 8. Participation of consortia**

21. Paragraph 1 of the draft model provision reflects legislative recommendation 16. Paragraph 2 reaffirms essentially the restrictive approach taken by the Commission in the UNCITRAL Legislative Guide to the effect that each of the members of a qualified consortium may participate, either directly or through subsidiary companies, in only one bid for the project. However, the reference, in paragraph 2, to the possibility of an exception is intended to render the rule more flexible, as there may be cases where no project could be carried out without a certain company, in view of its particular expertise.

22. Paragraphs 1 and 2 have been added to reflect the advice contained in chapter III, “Selection of the concessionaire”, paragraph 40, of the UNCITRAL Legislative Guide.

#### **Model provision 9. Decision on pre-selection**

23. Although there is no specific legislative recommendation reflecting the substance of paragraph 1 of the draft model provision, this provision seems necessary to clarify the manner in which a decision on the qualifications of bidders

is arrived at. This provision is based on article 7, paragraph 5, of the UNCITRAL Model Procurement Law.

24. Paragraph 2 of the draft model provision reflects legislative recommendation 17, and paragraph 3 reflects legislative recommendation 25.

## **2. Procedure for requesting proposals**

25. For all draft model provisions in this section, see UNCITRAL Legislative Guide, legislative recommendations 18-27 and chapter III, “Selection of the concessionaire”, paragraphs 51-84.

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

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

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

### **Model provision 11. Content of the final request for proposals**

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

### **Model provision 12. Bid securities**

29. In consultations with experts, it was suggested that it might be useful to include a draft model provision dealing with bid securities, along the lines of the discussion in chapter III, paragraph 62, of the UNCITRAL Legislative Guide and article 37 (1) (f) of the UNCITRAL Model Procurement Law. The draft model provision appears in square brackets, as there was no specific legislative recommendation on this topic.

**Model provision 13. Clarifications and modifications**

30. The draft model provision reflects legislative recommendation 21. The additional language is intended to clarify the scope of modifications to the request for proposals.

**Model provision 14. Evaluation criteria**

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

32. In consultations with experts, it was suggested that subparagraph (d) of recommendation 22, “social and economic development potential offered by the proposals”, would be more appropriately placed among the commercial aspects of the proposals (recommendation 23). It therefore appears as paragraph 2 (g) in model provision 14. The Working Group may wish to consider this matter, in view of the fact that the UNCITRAL Legislative Guide refers to “social and economic development potential offered by the proposals” in connection with the criteria for the evaluation of the technical aspects of the proposal (see chap. III, para. 74 (f)).

33. Subparagraph (f) of paragraph 2 has been aligned with subparagraph (c) of draft model provision 11.

**Model provision 15. Comparison and evaluation of proposals**

34. The draft model provision reflects the substance of legislative recommendation 24. The title has been changed to reflect more accurately the scope of the model provision. A new provision, in paragraph 1, has been added to clarify the sequence of actions by the contracting authority in evaluating proposals.

**Model provision 16. Final negotiations**

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

36. At the last session of the Working Group, it was suggested that a model legislative provision based on legislative recommendation 27 should explicitly identify the circumstances under which the contracting authority might consider it “apparent” that negotiations with the selected bidder would not result in entering into an agreement (see A/CN.9/505, para. 59). Such level of detail is not contained in article 44, subparagraph (e) of the UNCITRAL Model Procurement Law, on which the draft model provision is based. In the Secretariat’s consultations with outside experts, it was suggested that no additional language was needed. The Working Group may wish to consider whether additional language is nevertheless desirable.

- 3. Concession award without competitive procedures (for all draft model provisions in this section, see UNCITRAL Legislative Guide, legislative recommendations 28-29, and chap. III, “Selection of the concessionaire”, paras. 85-96)**

**Model provision 17. Circumstances authorizing award without competitive procedures**

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

38. The additional language contained in subparagraph (a) was included so as to align the provision with the discussion in chapter III, paragraph 89 (a), of the UNCITRAL Legislative Guide.

39. Subparagraph (f) includes a suggestion that was made in the Secretariat’s consultations with outside experts to the effect that negotiations following unsuccessful attempts to begin competitive procedures should not depart from the original project specifications and contract terms.

40. At the last session of the Working Group, it was suggested that subparagraph (g) should be expanded by adding the words “or other cases of the same exceptional nature, as defined by the law” (see A/CN.9/505, para. 63). The Working Group may wish to consider whether such an addition, which is reflected in the draft model provision, is strictly necessary, or whether such a possibility is already covered under the first phrase of subparagraph (g).

**Model provision 18. Procedures for negotiation of a concession agreement**

41. The draft model provision reflects the substance of legislative recommendation 29. The original subparagraph (c) of legislative recommendation 29 is now subsumed in the general provision on notice of project awards under draft model provision 24.

- 4. Unsolicited proposals (for all draft model provisions in this section, see UNCITRAL Legislative Guide, legislative recommendations 30-35, and chap. III, “Selection of the concessionaire”, paras. 97-117)**

**Model provision 19. Admissibility of unsolicited proposals**

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

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

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

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

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

**Model provision 22. Unsolicited proposals involving proprietary concepts or technology**

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

**5. Miscellaneous provisions****Model provision 23. Confidentiality of negotiations (see UNCITRAL Legislative Guide, legislative recommendation 36, and chap. III, "Selection of the concessionaire", para. 118)**

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

**Model provision 24. Notice of project award (see UNCITRAL Legislative Guide, legislative recommendation 37 and chap. III, "Selection of the concessionaire", para. 119)**

47. The draft model provision reflects legislative recommendation 37.

**Model provision 25. Record of selection and award proceedings (see UNCITRAL Legislative Guide, legislative recommendation 38, and chap. III, "Selection of the concessionaire", paras. 120-126)**

48. The draft model provision reflects legislative recommendation 38.

**Model provision 26. Review procedures (see UNCITRAL Legislative Guide, legislative recommendation 39, and chap. III, "Selection of the concessionaire", paras. 127-131)**

49. The draft model provision reflects legislative recommendation 39.

**C. Construction and operation of infrastructure****Model provision 27. Contents of the concession agreement (see UNCITRAL Legislative Guide, legislative recommendations 40-41, and chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 1-11)**

50. The Working Group was of the view that various matters dealt with in chapter IV of the UNCITRAL Legislative Guide were contractual in nature and did not require specific draft model provisions (see A/CN.9/505, paras. 110-116). At the same time, however, the Working Group agreed that it would be useful to formulate

a model legislative provision that listed essential issues that needed to be addressed in the project agreement. It requested the Secretariat to prepare an initial draft of such a model provision on the basis of the headings that preceded recommendations 41-68, with the adjustments that might be required so as to spell out clearly, but without unnecessary details, the various topics that needed to be covered by project agreements (para. 114).

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

(a) Subparagraph (a) is partly based on chapter IV, paragraph 1 of the UNITRAL Legislative Guide;

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

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

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

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

(f) Subparagraph (f) refers to matters dealt with in legislative recommendations 46 and 48;

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

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

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

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

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

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

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

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

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

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

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

(r) Subparagraph (r) refers to matters dealt with in legislative recommendations 41 and 69 and in draft model provisions 28 and 48.

**Model provision 28. Governing law (see UNCITRAL Legislative Guide, legislative recommendation 41, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 1-11)**

52. The draft model provision reflects the substance of legislative recommendation 41.

**Model provision 29. Organization of the concessionaire (see UNCITRAL Legislative Guide, legislative recommendations 42-43, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 12-18)**

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

**Model provision 30. Ownership of assets; model provision 31. Acquisition of project site; and model provision 32. Easements (see UNCITRAL Legislative Guide, legislative recommendations 44-45, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 19-32)**

54. Draft model provision 30 reflects the substance of legislative recommendation 44. Draft model provisions 31 and 32 reflect the substance of legislative recommendation 45, which have been reformulated in two separate provisions for ease of reading.

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

55. The draft model provision reflects the substance of legislative recommendation 46.

**Model provision 34. Security interests (see UNCITRAL Legislative Guide, legislative recommendation 49, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 52-61)**

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

**Model provision 35. Assignment of the concession agreement (see UNCITRAL Legislative Guide, legislative recommendation 50, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 62-63)**

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

**Model provision 36. Transfer of controlling interest in the concessionaire (see UNCITRAL Legislative Guide, legislative recommendation 51, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 64-68)**

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

**Model provision 37. Operation of infrastructure (see UNCITRAL Legislative Guide, legislative recommendations 53 and 55, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 80-93 and 96-97, respectively)**

59. Model provision 37, paragraph 1, reflects the substance of legislative recommendation 53. Paragraph 2, reflecting the substance of legislative recommendation 55, has been added following suggestions by outside experts (see also para. 79).

**Model provision 38. Compensation for specific changes in legislation; model provision 39. Revision of the concession agreement; model provision 40. Takeover of an infrastructure project by the contracting authority; and model provision 41. Substitution of the concessionaire (see UNCITRAL Legislative Guide, legislative recommendations 56-60, and chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 98-150)**

60. Draft model provisions 38 and 39 reflect legislative recommendation 58 (c). A number of elements have been added in both model provisions, however, so as to reflect the depth of the discussion in paragraphs 121 to 130 of chapter IV of the UNCITRAL Legislative Guide.

61. Draft model provision 40 reflects legislative recommendation 59 and draft model provision 41 reflects legislative recommendation 60.

#### **D. Duration, extension and termination of the concession agreement**

**Model provision 42. Duration and extension of the concession agreement (see UNCITRAL Legislative Guide, legislative recommendations 61-62, and chap. V, “Duration, extension and termination of the project agreement”, paras. 2-8)**

62. The draft model provision reflects the substance of legislative recommendations 61 and 62.

**Model provision 43. Termination of the concession agreement by the contracting authority; model provision 44. Termination of the concession agreement by the concessionaire; and model provision 45. Termination of the concession agreement by either party (see UNCITRAL Legislative Guide, legislative recommendations 63-65, and chap. V, “Duration, extension and termination of the project agreement”, paras. 9-35)**

63. Draft model provision 43 reflects the substance of legislative recommendation 63, draft model provision 44 reflects the substance of legislative recommendation 64 and draft model provision 45 reflects the substance of legislative recommendation 65.

**Model provision 46. Financial arrangements upon expiry or termination of the concession agreement; and model provision 47. Wind-up and transfer measures (see UNCITRAL Legislative Guide, legislative recommendations 66-68, and chap. V, “Duration, extension and termination of the project agreement”, paras. 36-62)**

64. Model provision 46 reflects the substance of legislative recommendation 67 and model provision 47 reflects the substance of legislative recommendation 68, with the addition of subparagraph (a) so as to cover the generality of the matters referred to in paragraphs 37 to 42 of chapter V of the UNCITRAL Legislative Guide.

## **E. Settlement of disputes**

**Model provision 48. Disputes between the contracting authority and the concessionaire (see UNCITRAL Legislative Guide, legislative recommendation 69, chap. VI, “Settlement of disputes”, paras. 3-41)**

65. The draft model provision offers two variants to reflect the policy stated in legislative recommendation 69.

**Model provision 49. Disputes involving the concessionaire and its lenders, contractors and suppliers (see UNCITRAL Legislative Guide, legislative recommendation 70, and chap. VI, “Settlement of disputes”, para. 42)**

66. Model provision 49 reflects the substance of legislative recommendation 70.

**Model provision 50. Disputes involving customers or users of the infrastructure facility (see UNCITRAL Legislative Guide, legislative recommendation 71, and chap. VI, “Settlement of disputes”, paras. 43-45)**

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

### **III. Matters not covered in the draft model legislative provisions**

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

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

68. No model provision was drafted to implement legislative recommendation 5, which provides as follows:

“The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction.”

69. Although the Working Group, at its last session, found that a model provision on the matter would be useful, the experts agreed that it was not feasible to transform the legislative recommendation into a model legislative provision. As an alternative, the issue of the degree of exclusivity of the concession might be mentioned among the contents of the concession agreement (see model provision 27 (a)).

70. Given the complexity of the issues and the various policy options mentioned in the legislative recommendation, the experts agreed that it would be better to keep it as a footnote to the text of the model provision dealing with the authority to enter into concession agreements (see model provision 3).

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

71. Legislative recommendation 6 provides as follows:

“Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.”

72. At its last session, the Working Group found that a model provision on the matter would be useful. Given the complexity of the issues and the various policy options mentioned in the legislative recommendation, the experts agreed that it would be better to keep it as a footnote to the text of the model provision dealing with the authority to enter into concession agreements (see proposed footnote to draft model provision 3).

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

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

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

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

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

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

75. Legislative recommendation 13 provides as follows:

“The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide.”

76. At its last session, the Working Group found that a model provision on the matter would be useful (see A/CN.9/505, paras. 106-108). However, in view of the complexity of the issues and the various policy options mentioned in the legislative recommendation, the experts agreed that it would be better to keep it as a footnote to the text of the model provision dealing with the authority to enter into concession agreements (see proposed footnote to model provision 3). The matter is, however, referred to in draft model provision 27, subparagraph (f).

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

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

77. No specific model provision was requested by the Working Group with respect to legislative recommendations 47 and 48 (see A/CN.9/505, para. 129).

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

78. No specific provision was requested by the Working Group (see A/CN.9/505, para. 138). The matter is, however, referred to in draft model provision 27, subparagraph (g).

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

79. No specific provision was requested by the Working Group with respect to legislative recommendations 54 and 55 (see A/CN.9/505, paras. 142 and 144). Those matters are, however, referred to in draft model provision 27, subparagraphs (h)-(j).

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

80. No specific provision was requested by the Working Group with respect to legislative recommendations 56 and 57 (see A/CN.9/505, para. 146). However, the subject referred to in legislative recommendation 56 is mentioned in draft model provision 27, subparagraph (l).

81. Furthermore, no specific provision was further requested by the Working Group with respect to legislative recommendation 58 (a), (b), (d) and (e) (see A/CN.9/505, para. 148). Nevertheless, for the sake of ensuring the completeness of the list contained in draft model provision 27, the matters referred to in legislative recommendation 58 (a) and (b) are mentioned in subparagraph (m) of the draft model provision. Likewise, the matters referred to in legislative recommendation 58 (d) and (e) are mentioned in subparagraphs (n) and (o) of draft model provision 27.

**D. Matters dealt with in chapter V, “Duration, extension and termination of the project agreement”, of the UNCITRAL Legislative Guide (see UNCITRAL Legislative Guide, legislative recommendations 66-68, and chap. V, “Duration, extension and termination of the project agreement”, paras. 36-62)**

82. No specific provision was requested by the Working Group with respect to legislative recommendation 66 (see A/CN.9/505, para. 160).

*Notes*

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

<sup>2</sup> *Ibid.*, para. 375.

<sup>3</sup> Ibid., para. 379.

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

<sup>5</sup> Ibid., para. 369.

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