

related topics of projects. Accordingly, the UNCITRAL Secretariat was directed to review issues suitable for being dealt with in a legislative guide and to prepare draft materials for consideration by the Commission. In accordance with the line-of-work that was subsequently approved by the Commission at its 30th Session (1997), the Secretariat at the 31st session presented the drafts of the introductory chapter and four other chapters (Chapters I, II, III and IV). Drafts of Chapters V-XI presently under preparation by the Secretariat are intended to be submitted to the Commission in 1999. The Commission, taking note of the Secretariat work, expressed satisfaction at the commencement of work towards the preparation of a legislative guide on the subject. It also generally approved the proposed structure of the draft legislative guide and the selection of issues suggested to be discussed therein.

On the subject of 'Electronic Commerce' the Commission had before it the Report of the Working Group on the work of its thirty-second session (A/CN.9/446). It may be recalled that the Commission, at its 30th Session (1997), entrusted the Working Group on Electronic Commerce with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. While taking note of the manifest difficulties faced by the Working Group in reaching a common understanding of the new legal issues associated with the use of digital and other electronic signatures, the Commission was of the view that the progress realised so far indicated that the draft Uniform Rules on Electronic Signatures were progressively being shaped into a workable structure. While examining a proposal made at the thirty-second session of the Working Group, that preliminary consideration might be given to undertaking the preparation of an international convention based on the provisions of the Model Law¹⁰ and of the draft Uniform Rules, the Commission

¹⁰ For an overview of the Commission's Model Law on Electronic Commerce, see Report and Selected Documents of the Thirty-sixth Session of AALCC, Tehran, 3-7 May, 1997, pp.329-38.

deemed it to be a premature exercise. Moreover, it was generally felt that the Working Group should not be distracted from this current task of preparing Uniform Rules.

On the subject of "Assignment in Receivables Financing", the Commission considered the reports of the twenty-seventh and twenty-eighth sessions of the Working Group on International Contract Practices, whose mandate is to prepare uniform law on assignment in receivables financing. The Commission noted that the Working Group had made substantial progress on a number of matters including the validity of assignments of future receivables and of receivables not identified individually (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. At the same time, it was noted that a number of issues were yet 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. While expressing appreciation for the work accomplished, the Commission requested the Working Group to proceed expeditiously with its work so as to complete it in the year 1999 and to submit the draft Convention for adoption by the Commission at its thirty-third session (2000).

While considering the item 'Monitoring of Implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards', the Commission reviewed the progress made in monitoring the legislative implementation of the Convention and called upon States Parties to the Convention that had not yet replied to the questionnaire of the Secretariat, to do so. It may be noted that the Commission during the current session held a special commemorative "New York Convention Day" on 10 June 1998, to celebrate the Fortieth Anniversary of the 1958 New York Convention. The Commission resolved to engage in a

consideration of possible future work in the area of arbitration at its 32nd Session (1999) and towards this end directed the Secretariat to prepare a note that would serve as a basis, for the consideration of the Commission. In this task, the Secretariat was to take account of the deliberations at the 'New York Convention Day'.

Privately-Financed Infrastructure Projects; Preparation of a Draft Legislative Guide

Privately-Financed Infrastructure Projects; Preparation of a Draft Legislative Guide

In the case of privately financed infrastructure projects, the government engages a private entity to develop, maintain and operate an infrastructural facility in exchange for the right to charge a price, whether to the public or to the government, for the use of the facility or the services or goods it generated. Such projects are considered to be significantly advantageous in two ways: (i) They would enable States to achieve substantial savings in public expenditure and to reallocate the resources that otherwise would have been invested in infrastructure in order to meet more pressing social needs; (ii) Since these projects are built and, during the concession period, operated by the project company, the State benefits from private sector expertise in operating and managing the relevant infrastructural facility.

As any successful implementation of privately-financed infrastructural projects requires a favourable legal framework that fostered the confidence of potential investors, while protecting public interest. It is against this backdrop that the Commission mandated the Secretariat to review issues suitable for being dealt with in a legislative guide.

B. Background of earlier work:

Following the review of recommendations made by many States and a report by the Secretary-General containing

information on work being undertaken by other organisations, the Commission at its 29th Session (1996), decided to prepare a 'Legislative Guide' on build-operate-transfer (BOT) and related topics of projects. Accordingly, the Secretariat was requested to review issues for being dealt with in a legislative guide and to prepare draft materials to enable the Commission to make an informed decision on the proposed structure of the draft legislative guide and its contents.

At its 30th Session (1997), the Commission had before it a task of contents setting out the topics proposed to be covered by the legislative guide, which were followed by annotations concerning the issues suggested to be discussed therein. Further, the Commission had before it initial drafts of three chapters. The Commission exchanged views on the nature of the issues to be discussed in the draft legislative guide and possible methods of addressing them and considered a number of specific suggestions.¹¹ The Commission generally approved the line of work proposed by the Secretariat and requested the Secretariat to seek the assistance of outside experts, as required, in the preparation of future chapters.

At that session, pursuant to a recommendation by the Secretariat, the Commission decided to henceforth use the words "privately-financed infrastructure projects" to refer to its work in this field, rather than the words "build-operate-transfer" (BOT) which had thus far been used.

C. Consideration by the Commission at the Current Session

At the 31st Session, the Commission had before it drafts of the introductory chapter, entitled "Introduction and background information on privately financed infrastructure projects" and

¹¹ For an account of the Commission's work at its 30th Session, see AALCC's Notes and Comments on Selected Items before the fifty-second Session of the General Assembly of the United Nations (Doc. No. AALCC/UNGA/LIII/97/1) at pp.28-32.

of Chapter I, "General Legislative Considerations", Chapter II on "Sector Structure and Regulation", Chapter III on "Selection of the Concessionaire" and Chapter IV on "Conclusion and General Terms of the Project Agreement".¹² These were prepared by the Secretariat with the assistance of outside experts and in consultation with other international organisations. On this basis, the Commission considered the following two aspects:

- (i) Draft Chapters of the legislative guide;
- (ii) Structure and contents of the draft legislative guide.

(i) Draft Chapters

Given the fact that the Commission's work is in its formative stage, following paragraphs are limited to providing an overview of the broad trends as they emerge in the review of the Secretariat's work by the Commission.

(a) Introduction and background information on privately financed infrastructure projects

The introductory Chapter as currently presented to the Commission, consists of two sections on: (i) Purpose and Scope of the Guide; and (ii) Background Information on Infrastructure Projects. While elaborating on the purpose and scope of the guide, the Secretariat draft seeks to exclude "privatisation transactions" that did not relate to infrastructure development and operation. Such exclusion is in line with the decision of the Commission at its 30th Session, that the guide should not deal with transactions for the 'privatisation' of State property by means of sale of the privatisation gives rise to legislative issues that were different from legislative issues pertaining to privately financed infrastructure projects.

The section on background information of infrastructure projects discusses basic issues of privately financed infrastructure projects, such as private sector participation in

¹² A/CN.9/444/Add.1-5.

public infrastructure and the concept of project finance. Besides enumerating the forms of private sector participation, it further identified the main parties involved in those projects and their respective interests, and briefly discussed the evolution and phases of execution of a privately-financed infrastructure project.

(b) General Legislative Considerations (Chapter I)

At the 30th Session of the Commission it had been suggested that the Chapter dealing with general legislative considerations should elaborate on the different legal regimes governing the infrastructure in questions, as well on the services provided by the project company - issues in which there were significant differences among legal systems. It had been further suggested that attention should be given to constitutional issues relating to privately financed infrastructure projects.

Accordingly, the Secretariat draft of Chapter I (A/CN.9/444/Add.2) discussed the following three aspects:

- (i) The opening section discusses two issues concerning the general legal framework for privately financed infrastructure projects, viz. the legislative authorisation for the host Government to undertake such projects; and the legal regime to which such projects were subject.
- (ii) The second section considered the possible impact of other areas of legislation on the successful implementation of those projects. Such collateral areas of legislation include: laws relating to investment protection, property, expropriation, intellectual property, security, company law, contracts, insolvency, tax law, environmental protection and settlement of disputes.
- (iii) The concluding section discusses the possible relevance of international agreements entered into by the host

country for domestic legislation governing privately financed infrastructure projects.

(c) **Sector Structure and Regulation (Chapter II)**

The Commission at its 30th Session had 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. Accordingly, the draft chapter as presented by the Secretariat to the current session contains references to the following aspects:

- (i) Market structure and competition;
- (ii) Restructuring infrastructure sectors;
- (iii) Controlling residual monopolies;
- (iv) Conditions for award of licences and concessions;
- (v) Price and profit regulation, subsidies, performance standards; and
- (vi) Regulatory bodies - Powers, Composition and Autonomy.

The Commission engaged in a general exchange of views regarding the scope and purpose of the chapter. While it was broadly agreed that the draft chapter contained useful background information that might assist national legislators to consider the various options available, a view was expressed that the discussion of policy issues were excessively detailed and might convey the impression that the guide advocated certain specific policies. It was pointed out that the issues of sector structure were essentially matters of national economic policy which should not figure prominently in the guide. Secondly, it was pointed out that in various legal systems a

distinction was made between regulated sectors, such as electricity and telecommunications, in which the operators were authorised 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.

The Commission requested the Secretariat to rearrange the substance of the draft chapter on the following lines, taking into account the views expressed during the discussion. Thus, the sections on 'Competition and sector structure'; and 'legislative measures to implement sector reform' 'regulation of infrastructure services' could be incorporated in a future chapter dealing with the operational phase.

On issues of abolition of legal barriers and the restructuring of infrastructure sectors, it was felt that the legitimate interests of developing countries and the varying levels of economic and technological development of countries should be taken note of in the preparation of the legislative guide.

(d) **Selection of the Concessionaire (Chapter III)**

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 proposed legislative guide could become a helpful tool for the public authorities of host countries.

Thus, the draft chapter submitted to the Commission at the current session (A/CN.9/444/Add.4) includes: general

objectives of selection procedures, appropriate selection method, preparations for selection proceedings, pre-qualification of project consortia, procedures for requesting proposals, direct negotiations, review procedures; and of selection proceedings.

With regard to the preference expressed in the Chapter for the use of competitive methods to select the concessionaire, interventions were made by participating delegations to the effect that the guide should more clearly recognise, that in accordance with the legal tradition of the country concerned, other methods might also be used.

The distinct and special features of selection procedures for privately financed infrastructure projects was highlighted by the delegates, who called for a clear distinction between selection procedures for privately financed infrastructure projects and other procurement contracts. In this context, it was pointed out that in the legal tradition of some countries, privately financed infrastructure projects invited the delegation by the appropriate public entity of the right and authority to provide a public service. As such, from the regime that applied generally to the award of public interests for the purchase of goods, construction or services. Secondly, another prominent difference was with the method of payment of the infrastructure operator, as distinct from the payment of a supplier or a works contractor. Thus, generally the payment for performance of a public contract was made in the form of a price paid by the governmental agency to the supplier or contractor. However, in the case of privately financed infrastructure projects the remuneration was spread out over a number of years and derived from the operation of the infrastructure, generally in the form of fees charged to the user.

In the light of these 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. The Commission noted that though 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, the need to avoid using certain technologies which in some legal systems was normally used in connection with procurement methods of goods, construction and services, required due attention.

(e) Conclusion and general terms of the project agreement (Chapter IV)

The Commission noted that the draft chapter IV (A/CN.9/444/Add.5) as presented by the Secretariat, in its opening section dealt with general considerations concerning the project agreement, discussing in particular, the different approaches taken by national legislation concerning the project 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 usefully be addressed in the legislation, as they might affect the interests of third parties.

The Commission was of the view 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 negotiations and to sign the project agreement. Due regard was to be given to the fact that different levels of government (federal, provincial or municipal) might be involved in a given privately financed infrastructure project.

As regards 'assignment of the concession' it was considered desirable for legislation to allow the parties to agree on "step-in" rights, i.e. the rights to have the concession transferred to the lenders or to another entity appointed by them if the Project Company was 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.

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. In many instances the assets managed by the Project Company remained in the ownership of the State, and therefore it is not possible to use those assets as security. To the extent it was possible to create a security interest in the shares of the project company, it was felt desirable to clarify whether, in case of a "step-in" by creditors in event of default, the obligations of the host Government and of the previous project sponsors was in any way affected.

It was considered that legislation should not establish a maximum number of years for which concessions might be granted, as in practice it was an obstacle to agreeing to commercially reasonable solutions. The right of the Government to purchase the concession from the concessionaire, was cited as another reason for flexibility in the duration of the concession.

(ii) Structure of the draft legislative guide and issues to be covered

The Commission noted and generally approved the proposed structure of the draft legislative guide and the selection of issues suggested to be discussed therein as set out in document A/CN.9/444. 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 in the legislative guide, as had been suggested at its 30th session. A view was expressed that legislative recommendations should

be supplemented with sample model legislative provisions, possibly with alternative solutions. After considering the different views expressed, the Commission requested the Secretariat to draft the legislative recommendations in the form of concise legislative principles and, where deemed feasible and appropriate, formulate sample provisions for illustrative purposes for consideration by the Commission.

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 among 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.

The Commission was informed that the initial drafts of chapter V to XI was currently being prepared by the Secretariat for consideration by the Commission at its thirty-second session in 1999.

Electronic Commerce: Draft Uniform Rules on Electronic Signatures

A. Background

The Commission at its 30th Session (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. Though it was agreed that it was too early to take any decision on the exact scope and form of such uniform rules, it was felt that the Working Group might focus its attention on the issues of digital signatures, in view of the important role played by public-key cryptography in the emerging electronic-commerce practice. The proposed uniform rules, it was agreed, should not discourage the use of other authentication techniques. In

dealing with public-key cryptography, the uniform rules was to accommodate various levels of security and to recognise the various legal effects and levels of liability corresponding to the various types of services provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognised 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, particularly where cross-border certification was sought.

B. Consideration by the Commission at its current session:

At the current session, the Commission had before it report of the Working Group on the work of its thirty-second session (A/CN.9/446). While taking cognisance of the manifest difficulties experienced by the Working Group in reaching a common understanding of the new legal issues associated with the increased use of digital and other electronic signatures, the Commission noted with satisfaction that the Working Group had become recognised 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. Following are the two issues that engaged the deliberations of the Commission at the current session:

- (i) Proposal to formulate an international convention based on the provisions of the Model Law on Electronic Commerce and of the draft Uniform Rules;
- (ii) Issue of Incorporation by Reference.

(i) Formulation of an International Convention

The Commission noted that, at the close of the thirty-second session of the Working Group, a proposal¹³ had been

¹³ A/CN/WG.IV/WP.77.

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 and of the draft Uniform Rules. The Commission witnessed divergent views being expressed in this regard. One view expressed was that a Convention based on the provisions of the Model Law was necessary, since the UNCITRAL Model Law on Electronic Commerce might not suffice to establish a universal legal framework for electronic commerce. The opposite view was that, owing to the rapidly changing technical background of electronic commerce, the matter did not lend itself to the rigid approach suggested by an international convention.

The prevailing view at the Commission, however was that, it would be premature to undertake the preparations of the suggested convention. Concern was expressed that the preparation of an international convention might adversely affect the widespread implementation of the Model Law on Electronic Commerce, which only two years after its adoption was already being followed in a significant number of countries. The discussions at the Commission broadly favoured the position adopted by the Working Group. It was felt that the Working Group should not be distracted from its current task of preparing draft Uniform Rules on Electronic Signatures. Upon concluding that task, the Working Group in the context of its general advisory function with respect to issues of electronic commerce, could make proposals to the Commission for future work in that area.

(ii) Incorporation by Reference:

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 recognised as having the same degree of legal effectiveness as if they had been fully related in the list of