# UNCITRAL CONSOLIDATED LEGISLATIVE RECOMMENDATIONS FOR THE DRAFT CHAPTERS OF A LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

## UNCITRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects

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*This Article details the work of the Commission on the subject of privately financed infrastructure (PFI), often called BOT. The Commission is expected to adopt its legislative guide on PFI at its plenary session in June-July in New York. Although there is something of a slow down in PFI projects at the present time, because of the recent Asian and other financial crises, the need for them remains great, as does the need for governments in the developing countries to have a legislative framework to attract private finance, select project concessionaires, and manage, regulate and settle disputes with respect to such projects. The Article favorably assesses the work of the Commission, but suggests that a final product in the nature of a 'model law' would have enhanced it even more.*



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## I. INTRODUCTION

Let us begin with some history of privately financed infrastructure projects (PFI), before describing the work of UNCITRAL with respect to them. To some readers such projects, whether in power, telecommunications, roads, or other sectors, will seem very new. They include BOT (build-operate-transfer), BOOT (build-own-operate-transfer), and similar acronym projects of recent times.[1] The beginning of the PFI era is commonly thought to have begun with the BOT bridges over the Bosphorus. However, the history is actually a much longer one. As early as Roman times, public infrastructure was often built and owned by private capital.[2] This was especially common in the nineteenth century; one need only think of the electric utilities, railroads, and urban transit of the United States, Britain, the Continent, Latin America, and elsewhere.[3] The nationalizations, anticolonialism, anticapitalism, and socialism that affected many parts of the world after World War II supplanted the earlier history. Much of the world became accustomed to Ministries of Post and Telephone and Telegraph (PTTs), state railroads, state airlines, and other government-owned utilities and infrastructure. Former colonies and other countries in Latin America and elsewhere accelerated their economic development, and their governments used the revenues for physical infrastructure and public services. For their large infrastructure projects during the cold war period, however, governments came to rely on funding sources such as foreign aid, the World Bank, and regional development banks. These projects included roads, ports, railroads, and power projects. During this period governments also contracted growing amounts of commercial debt.[4]

Three things have changed the world's intellectual and financial climates. First, the so-called Third World Debt Crisis of the early

1. *See* SYDNEY M. LEVY, BUILD, OPERATE, TRANSFER: PAVING THE WAY FOR TOMORROW'S INFRASTRUCTURE 16-17 (1996).
2. *See id.* at 19.
3. *See id.*
4. *See id.* at 21.

1980s raised questions about the creditworthiness of many countries. Second, the fall of the Soviet Union in 1989 served to discredit statist policies. Finally, the market gained renewed respectability during the administrations of Ronald Reagan and Margaret Thatcher. As a result of these events, foreign aid is reduced, and an increased scale of need for infrastructure dwarfs funds available from the multilateral agencies.[5]

Many countries are privatizing their existing state enterprises, infrastructure operations, and services provided by their ministries and public agencies. At the same time governments are looking to private finance, both foreign and domestic, for their new infrastructure projects. It is not just the developing countries, or the previously socialist countries of the East; countries such as the United Kingdom have also privatized many of their sectors and activities.[6] While the recent unfortunate ripple effects of the Asian financial crisis have dramatically slowed down contemplation of new PFI projects, it seems only a matter of time before the previous pace resumes.

In 1996 at its twenty-ninth session, the United Nations Commission on International Trade Law (UNCITRAL) decided to prepare a legislative guide on BOT and related types of projects.[7] The Commission reached its decision after recommendations were made by many States and consideration of a report prepared by the Secretary-General which contained information on the work then being undertaken by other organizations in the BOT field, as well as an outline of issues covered by relevant national laws.[8] The Commission considered that it would be useful to provide legislative guidance to states preparing or modernizing BOT and related legislation. The Commission requested that the Secretariat review issues for which a legislative guide would be suitable, and to prepare draft materials for consideration by the Commission.[9] The United States and the People's Republic of China were among the delegations recommending that UNCITRAL work on BOT. While recognizing that the United Nations had addressed the subject,[10] it was felt that UNCITRAL was qualified to add to the United Nations' work by

5. *See id.* at 11.
6. *See id.* at 205.
7. *Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 32d Sess., at 1, U.N. Doc. A/CN.9/471(2000).
8. *See id.*
9. *See id.*
10. *Guidelines for Infrastructure Development Through Build-Operate-Transfer Projects*, United Nations Industrial Development Organization (1996) [hereinafter UNIDO Guidelines].

developing a specific legislative framework for host countries having difficulties in undertaking PFI-the term selected to cover BOT, BOOT, and other similar projects. UNCITRAL had previously prepared the *Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* (Construction Guide),[11] and *Model Law on Procurement of Goods, Construction and Service* (Model Procurement Law),[12] and this led the Secretariat and Commission to believe that we had the background to do the BOT work.

Two decisions were taken with respect to the nature and method of our work with which the author disagreed, and whose consequences the U.S. delegation to UNCITRAL, only somewhat successfully, sought to ameliorate. Rather than establish a working group, as is common practice in UNCITRAL and was the case with both the Construction Guide and the Model Procurement Law, it was decided that the Secretariat would prepare drafts with only the assistance of heavily relied upon experts, and submit them directly to the annual plenary Commission sessions. However, without the benefit of a working group where membership is the same as of the Commission, many countries did not have expert delegates for the plenaries. As a consequence, in my view, there has not been as rich an exchange among representatives of different legal systems and traditions as there could have been. This exchange is the hallmark of UNCITRAL—an essential element of what I think of as the UNCITRAL method.

The other decision with which the author disagrees relates to the nature of UNCITRAL's work preparing a "legislative guide," rather than model provisions or even a model law. This also had inevitable consequences for our work process. Rather than sharply focusing on creating precise legislative language, which would inevitably have joined the difficult issues and sharpened our recommendations, we spent several years on rather general and descriptive—in the words of one expert—"essay-like" text. Only recently have we prepared a somewhat concentrated set of legislative recommendations, which the Commission will consider this coming May and June at its next plenary session. However, these recommendations, while they may resemble the "concise legislative principles" the Commission finally

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11. U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, CONSTRUCTION GUIDE, U.N. Sales No. E.87.V.10 (1988).

12. *Model Law on Procurement of Goods, Construction and Services*, Along with an Accompanying Guide to Enactment, adopted by the Commission in New York, 31 May-17 June, 1994 [hereinafter Model Procurement Law].

called for, do not include "model provisions" which were also requested. Many countries are calling for a model law. We shall see what follows in this regard after the action of the Commission plenary on the guide and legislative recommendations.

What explains this decision not to follow the successful path of prior exercises?[13] Is it that there are not enough sound laws in existence to permit the "harmonization" which is UNCITRAL's basic craft? Are there not enough "best practices" for us to codify? Such practices are clearly emerging, and it has become UNCITRAL's usual goal to create legislative models based on them. Is it because the subject is difficult? While it may be a diffuse subject—and the legislative recommendations do address pretty much all of it—it is no more difficult than other matters the Commission is currently dealing with, such as Receivables Financing or Insolvency.[14] I suspect the reason is otherwise, and it sheds interesting light on the work of law harmonization.

Whereas in the past such work may have been driven by an attempt to reconcile doctrine—civil, common, socialist, and other—increasingly we see the effort to reach functional results, to respond to market demands, and to embody best practices, which may be quite detached from any doctrinal roots. In my view, this was not done sufficiently in this project. Here the market demand is clear: investors and lenders require an infrastructure project and package of contracts that is "bankable." This will not be the case if a host country lacks the framework to "negotiate" deals, or if the governing law allows the host government to alter matters too freely. It is believed that the "administrative law" of the civil law system applicable to "concessions," as opposed to the civil, commercial law of private contracts, or the common law system, permits such free alteration.[15] To some extent, it was the unwillingness of the Commission to face this fact which explains the form of the legislative guide.

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13. *See Model Procurement Law*, *supra* note 12; *UNCITRAL Model Law on Electric Commerce with Guide to Enactment*, adopted by the Commission in New York, 12 June 1996 [hereinafter *UNCITRAL Model Law on Electronic Commerce*].

14. *See Report of the Working Group on Insolvency Law on the Work of Its Twenty-Second Session*, U.N. Commission on International Trade Law, 33d Sess., U.N. Doc. A/CN.9/469 (2000); *Draft Convention on Assignment in Receivables Financing*, U.N. Commission on International Trade Law, 33d Sess., U.N. Doc. A/CN.9/472 (2000).

15. *Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 33d Sess., addendum pt. 2 at 7, U.N. Doc. A/CN.9/471/Add. 2 (1999) [hereinafter *Privately Financed Infrastructure Projects, Addendum 2*].

## II. THE PROBLEMS

The purpose of the legislative guide is to be of real use to legislators. It is not addressed to government negotiators of concessions, called "project agreements,"[16] or other contracts. The questions for legislators are these: what legislation must be in place, or enacted, and what changes must be made in existing legislation to attract private capital and participation in new infrastructure projects that serve the public?[17] The problems to be addressed are various, but include the basic decision to allow private capital into the provision of public services, a method of selection that is competitive but often quick. Other problems include the degree of government support whether through guarantees or otherwise, dispute settlement, and governing law.[18]

A word or two about nomenclature and scope: as already suggested, what the guide calls "PFI projects" are often called BOT, BOOT, and many other acronyms.[19] These acronyms refer to the contractual and ownership structures among the various parties to such projects.[20] The principal focus of the guide is not on the totality of privatization, but rather new or "greenfields" projects, which typically involve new physical infrastructure built for public use.[21] The finance method is typically project finance, with the lenders looking to the assets and, even more, the anticipated revenue stream of the project for security.[22] These BOT projects may resemble the concessions of the civil law, although the financial and other arrangements will often be novel and more elaborate.

## III. THE SOLUTIONS

The guide is divided into an introduction and seven chapters: general legislative and institutional framework; project risks and government support; selection of the concessionaire; construction and operation of infrastructure; duration, extension, and termination;

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16. *Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 33d Sess., addendum pt. 1 at 4, U.N. Doc. A/CN.9/471/Add. 1 (1999) [hereinafter *Privately Financed Infrastructure Projects, Addendum 1*].

17. *See id.* at 2.

18. *See id.*

19. *Id.* at 2, 5.

20. *See* UNIDO Guidelines, *supra* note 10.

21. *Privately Financed Infrastructure Projects Addendum 1*, *supra* note 16, at 3.

22. *See id.* at 7.

settlement of disputes; and other relevant areas of law.[23] Each of the first six substantive chapters supports one or more legislative recommendations, which, it is expected, will separately be combined and presented in the guide as Consolidated Legislative Recommendations.

### *A. Introduction and Background Information on Privately Financed Infrastructure Projects*

This section will include definitions, a discussion of the typical parties to a PFI transaction and project, some discussion of finance, and a description of the need for host country governments to be organized (e.g., "one-stop-shop") and have officials trained in dealing with PFI projects.

### *B. Chapter I: General Legislative and Institutional Framework*

This chapter deals with a number of basic matters, which are also reflected in the legislative recommendations of the chapter.

Countries are asked to examine their constitutions for barriers to entering into BOT projects,[24] or in the alternative, lack of authority to do so.[25] Broadly, countries fall into several groups, or in some cases have several problems, including: socialist and other countries which prohibit private participation in public sectors;[26] and common law countries which have not dealt with the matter and are unclear as to their power to proceed or, for example, to give guaranties, or are unsure, in the case of a federal system, as to the authority to act at different levels of government.

Depending on the constitutional and statutory situation, a country wishing to have PFI should have laws that allow PFI[27] and specify which sectors are open to it and which entities may grant concessions.[28] As we shall see, it must also be clear whether ordinary commercial law, as opposed to administrative law, in civil law systems derived from Roman and French origins,[29] applies to the

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23. *See Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 33d Sess., Report of the Secretary General, at 2-4, U.N. Doc. A/CN.9/471 (2000).
24. *See Privately Financed Infrastructure Projects, Addendum 2*, *supra* note 15, at 5.
25. *See id.*
26. *See id.*
27. *See id.* at 8.
28. *See id.*
29. *See id.*

various contracts which constitute the "contractual matrix" characteristic of BOT and other similar projects.

Separate from the basic BOT law, countries wishing to attract investment for PFI will need other modern bodies of law, including a law on foreign direct investment and its typical protections, a security interest law, and others dealt with in Chapter VII of the guide.[30] As countries allow private interests to provide public services, they must also have in place the authority to regulate private concessionaires, competition law, and the capacity to determine the degree of exclusivity of concessions.[31] As a colleague has stated, we do not wish to replace public monopolies with private ones.[32]

### *C. Chapter II: Project Risks and Government Support*

This chapter deals with two subjects, one of which—risks—is not inherently legal. An understanding of it, however, is key to understanding PFI. In the complicated set of transactions that are characteristic of PFI, and in order to control costs and ensure performance, risks should be allocated to those who can best bear them.[33] Risks should not be unnecessarily created, for example, by unreliable dispute settlement in a court system thought to be corrupt or biased.[34] Furthermore, contractual obligations should follow accordingly. Thus, the relevant legislative recommendation suggests that the BOT law should not prevent a proper allocation of risks and obligations. Typically, both project sponsors and governments will have done extensive feasibility studies with respect to all technical, financial, and economic aspects of a project, and will have their views on the risks in the project and their proper allocation.

With respect to government support, the guide makes clear that governments must be able to provide assurances, such as take or pay commitments for the purchase of electricity from a concessionaire, and guaranties as against expropriation.[35] The guide also warns governments to be careful not to make so many guaranties as to jeopardize their overall fiscal condition.

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30. *See id.*
31. *See id.*
32. *See generally* PIERRE GUISLAIN, LES PRIVATISATIONS: UN DEFI STRATEGIQUE JURIDIQUE ET INSTITUTIONNEL (1995).
33. *See Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 33d Sess., addendum pt. 3 at 7, U.N. Doc. A/CN.9/471/Add. 3 (1999).
34. *See id.* at 8.
35. *See id.* at 13-14.

Given the basic *raison d'être* of the legislative guide—to enable governments to attract private capital and skills—and given the rigorous, virtually nonnegotiable requirements of the bank lenders, some delegates wanted a treatment more centered on finance. However, the current scheme consisting of some discussion of finance in the introduction, the treatment of risks and support in this chapter, and many references to lender requirements throughout the guide, such as security interest law and contractual rights in various chapters, is probably adequate for the guide's intended audience: country legislators.

### *D. Chapter III: Selection of the Concessionaire*

The reader will notice that the number of legislative recommendations in this chapter is far greater than in the others. A principal reason for this may be that UNCITRAL, having prepared its Model Procurement Law,[36] believed itself qualified to build on its detail in the guide. Indeed, procurement, namely the selection of the concessionaire, has been a problem in PFI projects.

For many governments there is novelty and complexity to the projects.[37] Rather than the traditional two-party employer-contractor relationship of a construction contract, we have, at a minimum, the four-party relationship of government, project company or concessionaire, lenders, and contractor. Rather than simply procuring civil works, the government is making a deal for a "super-service" which may create a private utility and may help shape the scope of its activities. The private utility raises and manages the finances, operates the infrastructure, provides the service to the public, and is subject to intricate public regulation, with consequences for the shape of government, economy, and society.[38] Governments are only now learning to shape the selection process in a manner that attracts sufficient numbers of proposals. Negotiations—a misnomer—are costly and timely, or lack transparent competition and thus are subject to criticism for arbitrariness and worse.[39] The guide contemplates, as the usual method, a variant of the services selection in the Model Procurement Law, that is to say, not formal tendering where the

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36. *See Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 33d Sess., addendum pt. 4 at 15, U.N. Doc. A/CN.9/471/Add. 4 (1999) [hereinafter *Privately Financed Infrastructure Projects, Addendum 4*].

37. *See id.* at 15.

38. *See id.* at 20.

39. *See id.* at 17.

lowest price bidder gets the award, but rather a request for a proposal method. By contrast to the traditional construction contractor, in BOT the concessionaire may not be paid at all but rather, for example, collect tolls from users of a road.

The proposal method involves several stages including best and final offers, and the award based on a consideration of financial and nonfinancial factors.[40] To be sure, more objective award criteria are possible: lowest price to be charged to users per kilowatt-hour of electricity, or least subsidy required from government. In all cases, the method should be structured, and not the product of mere "negotiation." Solicitation documents should include contract documents so that all proposers have the same deal in mind and the government is comparing "apples to apples," thus fulfilling a basic requirement of sound procurement. The bidders should have their financing lined up earlier, with lenders committing, at least preliminarily, to the agreed contract documents. There will be tension: competitive transparent selection takes time and costs each bidder; yet transaction costs in terms of time and money must be reduced. Unsolicited proposals, and the attendant possibility of noncompetitive selection, is another problem for which an agreed upon best practice has not yet been developed.[41] The guide takes a cut at this by distinguishing between proposals involving unique technology or exclusive rights where informal negotiations may be allowed and those that do not involve such technology or rights. The latter will be subject to the normal structured competitive method, with possibly some premium for the original proposer.

Many delegates are troubled by the possibility that the final version of Chapter III will be too permissive in allowing "direct negotiations," not structured, possibly even permitting sole source negotiation too readily. We shall have to see what the Commission decides at the plenary session.

### *E. Chapter IV: Construction and Operation of Infrastructure*

This chapter deals with the project agreement, the construction phase, operations and related monitoring or regulation by government, and such matters as force majeure and performance guaranties.[42]

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40. *See id.* at 14-15.

41. *See Privately Financed Infrastructure Projects Addendum 4, supra* note 36, at 15, 17.

42. *See Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects Addendum*, U.N. Commission on

As previously noted, the legislative guide is not a guide to negotiating the project agreement. Nor is it an operations guide for the government as employer/owner, or for the contractor or operator of the project. As an aid for legislators, the message of the guide would appear to be to enable free bargaining between the parties to the maximum extent possible, and elimination from the law of any obstacles to such bargaining. This message is subject to a certain ambiguity regarding the working of the administrative law with respect to concessions in certain civil law countries, which gives government powers of alteration of projects, and may inhibit lending or add to its cost.

Free bargaining covers, of course, the government and most significantly the lenders who, while not parties to the project agreement, will have some virtually nonnegotiable requirements with respect to it, such as recognition of their right to step in should the project and their prospects of repayment turn sour. A sound BOT law should enable the concessionaire to collect fees for the provision of public services.[43] It may require a project company to be set up under local law and the making of provision for property law aspects such as eminent domain, easements, and security interests.[44] Other issues addressed are the aforementioned step-in rights of lenders, acceptance of construction, operation, monitoring and regulation, and the extent and consequences of any government right to alter project scope and services.

One must remember the unilateral right of government under the administrative law of certain civil law countries to alter the project scope and services. This can be troublesome to lenders and undermine free bargaining.[45] The law should allow the project agreement to handle the matter and consequences of force majeure and similar contingencies. Allowing maximum contractual freedom with respect to performance guaranties that may also be necessary.

The chapter also includes a legislative recommendation with respect to the governing law of the project agreement. The recommendation states that unless otherwise provided, the project agreement is governed by the law of the host country.[46] Presumably the contract documents in the request for proposals can specify

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International Trade Law, 33d Sess., addendum pt. 5 at 5, U.N. Doc. A/CN.9/471/Add. 5 (1999) [hereinafter *Privately Financed Infrastructure Projects, Addendum 5*].

43. *See id.* at 9.

44. *See id.* at 11, 13-14.

45. *E.g.*, Republic of Turkey, Law No. 4446, effective Aug. 13, 1999.

46. *See Privately Financed Infrastructure Projects, Addendum 5*, *supra* note 42, at 6.

another law, although it seems unlikely that foreign law would govern a country's public infrastructure projects.[47] More realistic is the question of whether the country's commercial law or its administrative law[48] will govern. This is more than an academic issue for many countries. For example, Turkey has been frustrated by rulings of its Constitutional Court which had the effect of stopping private investment in its energy sector resulting in frequent "brownouts." The country recently amended its constitution not only to permit international arbitration for concession contracts and agreements related to public services, but also to subject the Council of State, the supreme court for administrative law matters, to legislation. This makes it possible to eliminate certain mandates and presumably allows the application of ordinary Turkish commercial law to PFI projects.[49] In the past, certain countries in Latin America have similarly removed the jurisdiction of their councils of state over foreign loan agreements, allowing the application of commercial or private law, rather than the administrative law. The latter gives government unilateral powers over contract and induces lenders not to lend.[50]

The chapter also includes a legislative recommendation with respect to governing law clauses in contracts between the concessionaire and others, which opts for freedom of contract, or party autonomy, except where that would violate the host country's public policy.[51] It is to be noted, however, that the courts of some civil law countries have held that such agreements are subject to administrative law and therefore the exclusive jurisdiction of the administrative courts. In one case, this philosophy was even extended to the project company's shareholder agreement.

### *F. Chapter V: Duration, Extension and Termination of the Project Agreement*

This chapter deals with two quite different situations: the term of the concession specified in the project agreement,[52] and termination because of breach, convenience of government, or force majeure,

47. *See id.*
48. *See Privately Financed Infrastructure Projects, Addendum 1*, *supra* note 16.
49. *See supra* note 45.
50. *E.g.*, Colombia debt rescheduling.
51. *See Privately Financed Infrastructure Projects Addendum 5*, *supra* note 42, at 5.
52. *See Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 33d Sess., addendum pt. 6 at 5, U.N. Doc. A/CN.9/471/Add. 6 (2000) [hereinafter *Privately Financed Infrastructure Projects, Addendum 6*].

including the obligations and consequences surrounding termination in either situation.[53]

The first situation raises important policy issues with respect to PFI, especially of the BOT and BOOT variety. Currently, depending on country and sector, one may have short concession periods, lasting ten or fifteen years, or long periods lasting, say, ninety-nine years. The term may be set by the predicted life of the physical infrastructure assets, the time needed to amortize loans, or by political resistance to longer terms.

The question does arise, however, why include the "T" in BOT or BOOT? As non-American governments, populations, and users become accustomed to efficient, economical, private utilities, will they not ask, why return to government control? One might retain the threat of re-tendering to keep the private company on its toes. But why not just allow market competition and regulation? Thus the electric power market is increasingly characterized by unbundling into generation, transmission, and distribution and sales. Assuming there is sufficient capacity to prevent a monopoly or oligopoly, such unbundling will permit competition. So why not just have BO (built-operate) or BOO (build-own-operate) with no "T" or return to government control? This would complete privatization, as we have in the United States in telecommunications with AT&T, MCI Worldcom, and the "baby bells."

In the BOT situation, the legislative guide notes that the project agreement should set out the obligations of the concessionaire with respect to the maintenance and transfer of assets at the end of the term, any payment owing to the concessionaire, and any training or transfer of technology obligations.[54]

With respect to the various situations of premature termination, a last-resort remedy discouraged with respect to breach or force majeure, the guide suggests that the law of the country anticipate these contingencies, provide for "buy out" by the concessionaire in exceptional circumstances, and that the details of asset transfer and payment be covered in the project agreement.[55]

### *G. Chapter VI: Settlement of Disputes*

This chapter deals with an array of possible disputes. These disputes can arise between the concessionaire and the government

53. *See id.* at 6.
54. *See id.* at 18.
55. *Id.* at 15-16.

contracting authority, the concessionaire and other parties, the concessionaire and other concessionaires with respect, for example, to interconnection issues or access to the concessionaire's common carrier facilities, disputes between consumer and users, and disputes involving regulatory matters.[56] Because we are early into the BOT era we have not had definitive experience or developed best practices with the various phases of concessionaire-government disputes. In the developmental phase, including the case of the unsolicited proposal, a dispute may require court adjudication because there is no contractual submission to another forum. The selection phases may involve challenge or protest proceedings. The four-party construction phase may involve an engineer-adjudicator, dispute review boards, and arbitration. The operations phase may involve regulatory oversight and administrative and judicial appeals. Finally, termination may again involve the mechanisms of the construction phase and courts.[57]

### *H. Chapter VII: Other Areas of Law*

This chapter discusses the many other areas of law that a country must have in place if it is to attract and handle PFI projects properly. Some of these have already been mentioned and include foreign investment; tax; company law; security interests which allow, for example, a nonpossessory lien on an intangible or future asset, most specifically accounts receivable; eminent domain; and, indeed, every area of law that a modern economy requires.[58]

## IV. CONCLUSION

As the Commission has not acted finally on the draft chapters of the legislative guide, it is a bit early to pass final judgment on it. As I suggested at the beginning of the piece, I think we could have aimed a bit higher in what is an area of intense importance to many countries but also one of considerable difficulty. In my view, UNCITRAL has a simple mandate in a project of this nature which is of particular interest to developing countries: to be of the greatest usefulness possible. This, in turn, has two elements: education and ease of use.

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56. *See Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 33d Sess., addendum pt. 7 at 3, U.N. Doc/ A/CN.9/471/Add. 7 (2000).

57. *See id.* at 5.

58. *See Privately Financed Infrastructure Projects: Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects*, U.N. Commission on International Trade Law, 33d Sess., addendum pt. 8 at 3-15, U.N. Doc. A/CN.9/471/Add. 8 (1999).

The texts of the introduction and seven chapters, after four years of work, will reach a very high, organized and comprehensive educational standard. The legislative recommendations, however, while also educational, in my view do not fully meet the "ease of use" standard that they might have. They will undoubtedly be of use to governments wishing to review or adopt a BOT law dealing with the core requirements to enter into BOT projects and arrangements. But ease of use,[59] entailed that we develop a model law, or at least a checklist of issues and model provisions. Either would make the task easier for legislatures confronted with the need to draft such a law. Experience has shown on many occasions that the combination of the high standard of UNCITRAL drafting, and the accompanying imprimatur of the United Nations, can ensure such usefulness.[60]

Nonetheless, UNCITRAL can be satisfied that it has done very comprehensive and solid work on a host country legislative framework for PFI projects. It will be interesting to see whether UNCITRAL proceeds to do further work that is of use to countries wrestling with the challenges of BOT, BOOT, BO, BOO, and other privately financed infrastructure projects.

59. This is not just my view. The November 14-16, 1999, BOT Conference in Cairo recommended the enactment by Egypt of a BOT law. In addition, the UN's Economic Commission for Europe has called for a model law, for use in Russia and other of its 55 member countries.

60. *See Model Procurement Law*, *supra* note 12; *UNCITRAL Model Law on Electronic Commerce*, *supra* note 13.