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Summary record of the 929th meeting

Held at the Vienna International Centre, Vienna, on Wednesday, 29 June 2011, at 9.30 a.m.

Acting Chairperson: Mr. Wiwen-Nilsson.....(Sweden)

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The meeting was called to order at 9.50 a.m.

Finalization and adoption of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/729 and Add.1 to 8)

1. **The acting Chairperson** invited **Mr. Fruhmann** (Austria) to report further on the results of the drafting group's discussions.

2. **Mr. Fruhmann** (Austria), referring to the definition of "procurement" contained in article 2 (h) of the draft revised text of the Model Law, said that the drafting group had felt that the words "the acquisition of goods, construction or services" did not define "the subject matter of the procurement" and that the latter text, contained in parentheses, should therefore be deleted. However, some participants had felt that "subject matter of the procurement" should be defined, but no consensus had been reached with regard to the possible wording of a definition. The issue of whether and how to define "subject matter of the procurement" had been considered a substantive one that should be considered in a meeting of the Commission.

3. With regard to article 15 (1), the drafting group proposed the replacement of the words "such time as will" with the words "a time period that will".

4. The United States delegation had stated that it would be proposing an article 15 bis on the clarification of qualification information and of submissions.

5. With regard to article 16 (1), the drafting group proposed that subparagraph (c)(ii) be deleted and subparagraph (c)(i) be absorbed into subparagraph (1)(c), which would then read "Notwithstanding ... set out in the solicitation documents, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State."

6. The drafting group proposed that the end of article 17 (3)(b) be amended to read "... as well as the desired or required time for the supply of the goods, for the completion of the construction or for the provision of the services;"

7. With regard to article 19 (1), the drafting group proposed that subparagraph (c) be deleted and paragraph (2) be amended to read "The decision of the

procuring entity to reject a submission in accordance with this article and reasons for the decision, and all communications with the supplier or contractor under this article, shall be included in the record of the procurement proceedings. The decision of the procuring entity and the reasons therefor shall be promptly communicated to the supplier or contractor concerned."

8. With regard to article 21 (7), the drafting group proposed the addition of the phrase " , unless extended under article 40, paragraph (2) " at the end.

9. With regard to article 23 (3), it proposed that the words "or permitted in the solicitation documents" be deleted and that the word "such" should be added after the words "no party to any". Thus, the second sentence of the paragraph would read "Unless required by law or ordered by the [name of court or courts] or [name of the relevant organ designated by the enacting State], no party to any such discussions, communications, negotiations or dialogue shall disclose ...".

10. With regard to article 24, it proposed that: in subparagraph (1)(r) the words "where the written procurement contract" be amended to read "where a written procurement contract"; in subparagraph (1)(s) the phrase " , or the basis for determining the price, " be deleted, the deletion to be explained in the Guide to Enactment; in the first sentence of paragraph (3) the phrases "of paragraph (1) of this article" and "or on cancellation" be deleted and the phrase " , unless the procuring entity determines that disclosure of such information would impede fair competition" be added after the words "become known to them", so that the first sentence would read "Except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) shall, on request, be made available to suppliers or contractors that presented submissions after the decision on acceptance of the successful submission has become known to them, unless the procuring entity determines that disclosure of such information would impede fair competition."; and in subparagraph (4)(b) the phrase " , and submission prices, " be deleted.

11. Lastly, the drafting group proposed that in article 29 (1)(a), the word "precision" be replaced with the word "detail".

12. **Mr. Wallace** (United States of America) asked whether the drafting group had concluded its consideration of the second sentence of paragraph (3) and its consideration of paragraph (4).

13. There was a need to clarify the relationship between article 29 (1)(a) and article 47. Perhaps that issue could be taken up during the consideration of article 47.

14. **Mr. Fruhmenn** (Austria), referring to the second sentence of paragraph (3), said that the issue regarding the type of information that might be disclosed remained to be discussed.

15. With regard to article 29 (1)(a), there had been no objection in the drafting group to the idea of redrafting article 29 (1)(a) in the light of article 47, and it had been decided that that idea would be taken up during the consideration of article 47.

16. **Mr. D'Allaire** (Canada), referring to the first sentence of article 24 (3), questioned the proposed deletion of the phrase "of paragraph (1) of this article"; in his view that phrase added to the clarity of the text. The proposed addition of the phrase "unless the procuring entity determines that disclosure of such information would impede fair competition", was, in his view, unnecessary since the intention of not impending fair competition was covered in article 24 (4), the content of which was understood to apply to article 24 (3). The inclusion of the proposed additional text might raise the question of why the elements of article 24 (4) other than impediment to fair competition were not covered in the first sentence of article 24 (3).

17. **Ms. Nicholas** (Secretariat) said it was the Secretariat's understanding that the outstanding issue was that of the interaction between paragraphs (3) and (4) of article 24 and that that reference to fair competition might not be needed in both paragraphs. Consideration should perhaps also be given to the question of whether not impending fair competition should be added to the objective reasons for non-disclosure as set out in paragraph (4); any assessment of whether disclosure would impede fair competition was likely to be subjective.

18. **The acting Chairperson** suggested the addition of wording along the lines of "unless as stated in

subparagraph (4)(a)" in the first sentence of paragraph (3).

19. **Mr. Yukins** (United States of America), recalling that the issue of whether to define the term "subject matter of the procurement" (which appeared in parentheses in article 2 (h)) remained open, said that the term appeared in effect to be defined in article 17 (3)(b), article 36 (b) and article 38 (d). In his view, the language in article 36 (b) would be the most suitable and could be used provided that the phrase "if appropriate" were inserted after the word "including".

20. **The acting Chairperson** suggested that the issue be taken up by the drafting group in the light of what had just been said by the representative of the United States of America.

21. **Mr. Grand d'Esnon** (France) said that in his view the term "subject matter of the procurement" needed to be defined.

22. **Mr. D'Allaire** (Canada) said that he was not sure that whether the term "subject matter of the procurement" needed to be defined. It was not defined in Canadian legislation.

23. Caution would have to be exercised in framing a definition as there were — if he had counted correctly — 59 references to "the subject matter of the procurement" in the draft revised Model Law.

24. **The acting Chairperson** said that he could work with the Secretariat on drafting an appropriate definition.

25. **Ms. Nicholas** (Secretariat) said that "subject matter of the procurement" had been included in parenthesis in article 2 (h) because Working Group I had concluded that there should not be references to "goods, construction and services" in the revised Model Law.

26. She suggested that the Commission leave aside the issue of how to refer to "goods, construction and services" for the time being as the current discussion related to the use of the term "subject matter of the procurement" in the context of changing needs of the procuring entity.

27. **The acting Chairperson** said that it might be possible to draft a definition that covered both "goods, construction and services" and the meaning necessary

in order to provide for the changing needs of the procuring entity.

28. **Mr. D’Allaire** (Canada), supported by **Ms. González Lozano** (Mexico), said that in articles 64-69 there needed to be more consistency in the use of the words “reconsideration”, “review” and “appeal”. The word “reconsideration” should be used only with reference to the procuring entity, the word “review” should only be used with reference to the independent body, and the word “appeal” should only be used in the sense of judicial review.

29. **The acting Chairperson**, in response to a question from **Mr. D’Allaire** (Canada), recalled that the words “by way of an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the [name of the independent body] under article 66 of this Law, or an application to the [name of court or courts]” were to be deleted from article 63 (1).

30. As regards article 63 (2), the Guide to Enactment would state that there were different possibilities as to what the enacting State might wish in its own legal system.

31. **Mr. D’Allaire** (Canada), supported by **Mr. Fruhmann** (Austria), said that the words “lawful” and “unlawful” in article 66 (9) did not seem appropriate in such a text.

32. Supported by **Ms. González Lozano** (Mexico) and **Mr. Maradiaga Maradiaga** (Honduras), he said that article 69 could be deleted if article 63 were modified.

33. **The acting Chairperson** noted that footnote 14 might be moved to the Guide to Enactment.

34. **Mr. Fruhmann** (Austria) said that the present wording of article 66 (8) suggested that “all documents relating to the procurement proceedings” would have to be delivered to the reviewing body. That might be complicated if the amount of documentation was large and if classified information was involved. Perhaps the words “or grant access to all documents” could be inserted, so that the paragraph read “... the procuring entity shall provide the [name of the independent body] with all documents or grant access to all documents relating to the procurement proceedings ...”.

35. He asked whether the Guide to Enactment would explain what was meant by “any governmental

authority” in article 67 (1) and whether the Guide would address the question of the right, in a federal State, of the government of a region unaffected by that procurement to participate in proceedings relating to that procurement.

36. As regards article 67 (3), perhaps the drafting group could consider whether there should be a provision in the revised Model Law to the effect that restricted access to classified information might be possible in some cases.

37. **Mr. Wallace** (United States of America) said that if article 69 were deleted, article 63 (2) should provide for a reference to the judicial authority that would consider the appeal.

38. **Mr. Yukins** (United States of America) said, in response to the suggestion made by the representative of Austria regarding article 66 (8), that it was inappropriate that a representative of the reviewing body should have to visit premises of the procuring entity and ask for permission to examine documents. If a procuring entity knew that it might have to deliver documents to a reviewing body, it would no doubt keep them in electronic form so that they could be delivered easily.

39. Regarding the words “lawful” and “unlawful” in article 66 (9), the use of formulations such as “in accordance with this Law” and “in violation of this Law” might be feasible. In practice, however, the reviewing body would usually be considering the appeal in the light not only of legislation based on the Model Law but also of other applicable legislation. The full scope of potential reviews seemed to be efficiently captured by the words “lawful” and “unlawful”.

40. In his view, without the words “lawful” and “unlawful” in article 66 (9) the reviewing body could have too much scope for reversing decisions of the procuring entity.

41. **The acting Chairperson** said, regarding article 66 (8), that language could probably be found that did not imply that representatives of reviewing bodies would have to visit the premises of procuring entities. Perhaps the article could state that, where delivering documents was impractical, access to the documents should be provided through, for example, guidance on where to find the documents in electronic form.

42. **Mr. D’Allaire** (Canada) said that, while he understood the concern that the reviewing body could have too much scope for reversing decisions of the procuring entity if the words “lawful” and “unlawful” were removed from article 66 (9), there was a conceptual difficulty in that it was impossible to be sure that a decision was lawful or unlawful at the time when an application for review was made.

43. **Ms. Andres** (Canada) said that the drafting group should consider whether some of article 66 (4) was superfluous given the contents of article 66 (3), although the element relating to “urgent public interest considerations” might need to be retained. Similarly, the drafting group should consider whether article 66 (5)(a) could be deleted on the grounds of redundancy.

44. **Mr. Yu** (China), noting that article 64 (1) stated that the procuring entity “shall not enter into a procurement contract ...”, while article 65 (3) stated that “the procuring entity shall ... Decide ... whether the procurement proceedings shall be suspended”, asked what actions the procuring entity was free to take in the light of urgent public interest considerations if the procurement proceedings had been suspended.

45. **Ms. Nicholas** (Secretariat) said that the representative of China had in effect highlighted the tension that existed between, on one hand, the right of a supplier or contractor to challenge a decision or action of the procuring entity and, on the other, the interest of the public in a continuation of the procurement proceedings. Article 64 (1) and (2) represented an attempt to resolve that tension. The issue had been the subject of lengthy discussion in Working Group I.

46. Ways in which a procurement contract could enter into force were provided for in article 21, and the text of the draft revised Guide to Enactment relating to article 21 made it clear that differences in that respect might well exist between countries with different legal traditions.

47. **The acting Chairperson** said that, given the many possibilities envisaged in article 21, perhaps article 64 (1) should be amended to read something like “The procuring entity shall not take any action whose effect would be to bring a procurement contract ... into force” or “The procuring entity shall not take any action for the purpose of entering into a procurement contract ...”.

48. **Mr. Jezewski** (Poland), referring to article 66 (9), suggested that the word “unlawful” be replaced by a formulation on the lines of “deemed to be unlawful”, so that — for example — “an unlawful act” would become “an act deemed to be unlawful”.

49. He was concerned about the proposed deletion of article 69. He would like Chapter VIII to provide for judicial review, and he agreed with the representative of the United States of America that article 63 should be amended in such a way that judicial review would be provided for in Chapter VIII.

50. **The acting Chairperson** said that, if article 69 was going to be deleted, article 63 would have to be redrafted.

51. **Mr. Phua** (Singapore), referring to article 66 (8), which spoke of the procuring entity providing the independent body “with all documents relating to the procurement proceedings in its possession”, suggested that the procuring entity be required to submit simply a list of all documents in its possession.

52. **The acting Chairperson** said that the important thing was that the procuring entity should provide the independent body with effective access to all documents in its possession.

53. **Ms. González Lozano** (Mexico) said that there appeared to be some inconsistency in Chapter VIII as regards notification requirements. The parties who had to be notified were different in different parts of that chapter — for example, all participants in the procurement proceedings in the case of article 65 (3)(b) and all other participants in the challenge proceedings and all other participants in the procurement proceedings in the case of article 65 (6).

54. Perhaps one could simply provide for the notification of all parties with a legitimate interest in the matter.

55. **Ms. Nicholas** (Secretariat) said that the Secretariat had drafted the notification requirements contained in articles 64 and 65 in accordance with instructions received from Working Group I, which had recognized that the notification requirements should be different at different stages of challenge and appeal proceedings.

56. As regards the very first stage, Working Group I had been keen to ensure that the general public was notified — hence the requirement, in the chapeau of article 65 (3), that the procuring entity publish a notice of any application for reconsideration of one of its actions or decisions.

The meeting rose at 11.35 a.m.