



General Assembly

Distr.: General
22 July 2011

Original: English

United Nations Commission on International Trade Law Forty-fourth session

Summary record of the 933rd meeting

Held at the Vienna International Centre, Vienna, on Friday, 1 July 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** said he took it that the Commission wished to adopt the UNCITRAL Model Law on Public Procurement as read out during earlier meetings in the current session.

2. *It was so decided.*

Preparation of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement

3. **The acting Chairperson** invited comments on how to proceed with the adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

4. **Ms. Nicholas** (Secretariat) said that before the Commission's next session the Secretariat could continue to hold informal consultations with experts for the purpose of finalizing the draft text in documents A/CN.9/731 and Add.1 to 9. Also, Working Group I could review the draft text during one or two sessions, later in 2011 and/or early in 2012. In addition, Working Group I could go into more detail regarding issues that might arise in particular regions.

5. In view of questions about matters such as defence procurement, and given the commentaries regarding the objectives of the Model Law in academic journal articles, the Commission might want to take the lead in ensuring that the commentary in the Guide was consistent with those objectives.

6. The Commission might wish to consider publication of the Guide in electronic form so that it could be a living document, updated to reflect input from experts on the implementation of the Model Law and changing business practices.

7. **Mr. Yukins** (United States of America), supported by **Mr. D'Allaire** (Canada), **Mr. Fruhmenn** (Austria), **Mr. González** (Argentina) and **Mr. Maradiaga Maradiaga** (Honduras), said that his delegation would not welcome two Working Group I sessions for finalizing the draft Guide; much of the work could be done at meetings of experts. His delegation was open to a Working Group I session early in 2012 or immediately before the 45th session of the Commission.

8. **Mr. D'Allaire** (Canada) said that it was important to preserve the expertise accumulated during the seven years of work on the Model Law and requested the Secretariat to submit to the Commission, for its consideration, proposals for its future work, with an indication of priorities. In the area of public procurement, he would like to see further work done on the issue of public-private partnerships.

9. Regarding finalization of the draft Guide, budgetary considerations would probably dictate the number of Working Group I sessions. Perhaps the Secretariat could prepare a finalized draft of the Guide in consultation with experts for submission to members of the Commission well in advance of its 45th session.

10. **Mr. Fruhmenn** (Austria) said that it was very important to finalize the Guide; experts could assist the Secretariat in that task.

11. His delegation would like the Guide to be a living document, with proposed updates reported to the Commission for approval.

12. **The acting Chairperson** noted that the dates proposed for a possible Working Group I session in 2012 were 27 February-2 March, in Vienna, or 9-13 April, in New York.

13. **Mr. Fruhmenn** (Austria) noted that 9 April 2012 would be Easter Monday.

14. **Mr. Sorieul** (Secretary of the Commission) said that Easter Monday would not be a holiday in New York.

15. **Mr. Grand d'Esnon** (France) said that in his view at least two Working Group I sessions would be required for finalization of the draft Guide. Expert meetings would be useful but would not speed up the process.

16. Regarding future work, he believed that the subject of public-private partnerships could usefully be revisited.

17. **Mr. González** (Argentina) said, with regard to the Commission's future work that the Commission needed an overview of its budgeting situation in order to decide how many working groups would hold how many sessions.

18. His delegation believed that the Guide to Enactment, which should be a living document, could be finalized through consultations with experts.

19. **Mr. Maradiaga Maradiaga** (Honduras) said that the revised Model Law would be particularly important for Central American countries, where enormous efforts were being made to combat corruption.
20. As regards finalization of the Guide to Enactment, the Secretariat should draw on experts' contributions.
21. **Mr. Wallace** (United States of America) said that it would be too soon to hold a Working Group I session on the Guide in 2011. He proposed the convening of a "working party", which would be more flexible — and require less in the way of language services — than a working group. The "working party" could meet early in 2012, and possibly just before the 45th session of the Commission.
22. **Mr. Yukins** (United States of America) invited Commission members to participate in a blog on the UNCITRAL Model Law on Public Procurement.
23. **Mr. Díaz y Pérez Duarte** (Mexico) said that top priority should be assigned to finalization of the draft Guide to Enactment.
24. The Guide should be a periodically updated living document. The same applied to other Commission texts, such as the UNCITRAL Legislative Guide on Insolvency Law.
25. **Ms. Nicholas** (Secretariat) said that, even if the Guide was in electronic form, the Commission could control the updating process.
26. **Ms. Keyte** (United Kingdom) said that the servicing of a Working Group I session on the Guide would draw heavily on the Commission's very limited resources. Consideration should be given to — for example — the idea of convening a "working party" before or during the Commission's 2012 session. In her view, meetings in 2011 would not be advisable.
27. **Mr. Grand d'Esnon** (France) said that there appeared to be a growing consensus against meetings on the Guide in 2011; his delegation would go along with such a consensus. However, if meetings were not held until early in 2012, the Commission would not be able to finalize the draft Guide during that year.
28. **The acting Chairperson** said that he was not clear as to what the difference was between a working group and a "working party".
29. **Mr. d'Allaire** (Canada) said that there were significant differences between a working group and a group of experts or "working party". For example, a working group was provided with extensive conference services and the members represented their countries. Experts conducted their discussions in whichever language was most convenient and they acted in a personal capacity.
30. **Mr. Sorieul** (Secretary of the Commission), concurring with the representative of Canada, said that a working group meeting was an intergovernmental meeting, whereas at meetings of experts only very limited conference services were provided, such services being dependent on the current resource situation.
31. **The acting Chairperson** said that he was nevertheless in favour of a Working Group I session, as there were important issues to be resolved in connection with the Guide to Enactment.
32. He suggested that the Secretariat be requested to prepare a paper on the Commission's future activities.
33. **Mr. Fruhmenn** (Austria) said that he was concerned about the possibility that there would be no Working Group I session in the early months of 2012. If only meetings of experts were held, any new texts to be considered would presumably not be available in all the official languages of the United Nations.
34. **Mr. Sorieul** (Secretary of the Commission) confirmed that only working groups of the Commission could be provided with full translation and interpretation services.
35. **Mr. González** (Argentina) said that the Guide was only a supporting text without legal force, and long-distance air travel by national representatives in order to work on a draft text could not be justified, especially in the case of developing countries.
36. **The acting Chairperson** said that the Model Law itself did not have legal force; States could draw on it in any way they wished. The draft Guide to Enactment contained very important material relating to elements of policy on which the Commission had not been able to decide.
37. **Mr. Wallace** (United States of America) said that, if meetings on the draft Guide were held in the early months of 2012, the text should be as final as possible, and in all six official languages of the United Nations.

38. As to future activities, perhaps the Secretariat could prepare a paper on private finance initiatives in support of public-private partnerships.

The meeting was suspended at 11.10 a.m. and resumed at 11.55 a.m.

39. **The acting Chairperson** said that, during informal consultations, some delegations had proposed the holding of a Working Group I session on the draft revised Guide to Enactment late in 2011. However, there was no possibility of changing the dates of the Working Group I session scheduled for the week beginning 17 October 2011, which was somewhat early in that the Secretariat would need to have completed its preparations by 10 August 2011. It would be preferable for the Secretariat to have more time to finalize the text of the draft revised Guide and prepare notes on the issues that the Commission might wish to work on in the future. Consequently, the idea of holding one Working Group I session early in 2012, that session having been scheduled provisionally for 27 February-2 March 2012, was more realistic.

40. **Mr. González** (Argentina) said that his delegation required additional time to consider the issue. Perhaps a decision could be taken during the following week, in the light of the Commission's overall financial situation, the situation with regard to the financing and location of meetings and the possible establishment of new working groups.

41. **Mr. Li** (China) said that the work on the Model Law could not be regarded as finished without the approval of a Guide to Enactment. In his view, therefore, a Working Group I session should be held later in 2011 as scheduled. However, finalization of the Guide was likely to require a number of sessions, and budget constraints might prevent developing countries from sending delegations to all of the sessions. Informal consultations might be the answer.

42. **Mr. León Vargas** (Mexico) suggested that the 17-21 October 2011 slot be exchanged with the 14-18 November 2011 slot of Working Group III. That would give the Secretariat more time for preparations, and it would not create financial problems.

43. That having been said, his delegation was not entirely convinced that a Working Group I session was necessary.

44. **Mr. Sorieul** (Secretary of the Commission) said that in his view the only option was an exchange of slots. The latest slot available was 12-16 December 2011, when Working Group VI was scheduled to meet; however, Working Group VI was on the point of concluding its work and should not be forced to meet earlier than in December 2011.

45. An exchange of slots with Working Group III, while creating other problems, would give the Secretariat four additional weeks to prepare for the session of Working Group I.

46. **The acting Chairperson** took it that the Commission wished a Working Group I session to be held either late in 2011 or early in 2012, depending on the scheduling of other meetings.

47. **Mr. González** (Argentina) said that, as pointed out by the representative of Mexico, the holding of a Working Group I session in November 2011 would not create financial problems; the holding of a Working Group I session early in 2012 would.

Future work

48. **Ms. Nicholas** (Secretariat) said that there were two aspects to the Commission's future work in the area of public procurement.

49. The first was promotion and implementation of the revised Model Law, which the Commission might wish to consider in the light of operative paragraphs 2 to 6 of the draft decision on the adoption of the UNCITRAL Model Law on Public Procurement (A/CN.9/XLIV/CRP.2). Promotion of the revised Model Law raised logistical and budgetary issues, since UNCITRAL texts were promoted mainly through conferences, publications and technical assistance projects.

50. The Secretariat was working with the European Bank for Reconstruction and Development (EBRD) and the Organization for Security and Cooperation in Europe (OSCE) on promotion of the revised Model Law in countries of the Commonwealth of Independent States (CIS) and in Mongolia. The Commission might wish to consider, or request Working Group I to consider, what else the Secretariat should do and what information in the revised Guide would need to be updated from time to time.

51. During the following week, the Commission might also wish to consider how the Secretariat should

continue to promote the increasing number of UNCITRAL texts with the decreasing resources available to it. In that regard, it might be helpful for States to consider how they could support the promotion and implementation of the revised Model Law.

52. Since there was no requirement for a State to inform the Secretariat that it had adopted UNCITRAL texts, the Secretariat might well prove to be ill-informed about the extent of the revised Model Law's use. That would be unfortunate, since the Secretariat would benefit from knowing — for example — how provisions of the revised Model Law were being interpreted by administrative review bodies and courts in different States. Such knowledge would be useful to the Commission if it decided to consider how best to bring about uniform interpretation of the revised Model Law.

53. The other aspect to the Commission's future work in the area of public procurement was connected with the fact that there were many standards at the international and the regional level that could be applied in that area, and an enacting State might have to review numerous texts when deciding how to improve its public procurement legislation. The Secretariat could be mandated to cooperate with other bodies involved in public procurement law reform in determining how harmonization of those standards might be achieved, including through use of the revised Model Law, and to report back to the Commission in due course.

54. Lastly, she expressed the hope that Commission members that were major donors would commit themselves to using the revised Model Law when engaging in procurement activities involving other States.

Election of officers (*resumed*)

55. **The acting Chairperson** said that the delegation of Honduras had nominated Mr. Sánchez Mejorada y Velasco (Mexico) as Vice-Chairperson of the Commission and that it had been suggested that, in view of his substantial knowledge of the issues involved, Mr. Sánchez Mejorada y Velasco chair the Commission during its consideration of agenda item 5 — Finalization and adoption of judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency.

56. *Mr. Sánchez Mejorada y Velasco (Mexico) was elected Vice-Chairperson by acclamation.*

Draft decision on the adoption of the UNCITRAL Model Law on Public Procurement (A/CN.9/XLIV/CRP.2) (*resumed*)

57. **Mr. Yukins** (United States of America), drawing attention to the reference to “novel issues and practices” in the fifth preambular paragraph, pointed out that the word “novel” in English meant not only “new” but also “unusual” or “out of the ordinary” and might therefore be misunderstood. He suggested that the word “novel” be deleted or replaced with the word “new”.

58. **Mr. González** (Argentina), referring to the Spanish text, proposed that in operative paragraph 3 “apliquen” be replaced by “consideren aplicar” and “estudien” be replaced by “consideren estudiar”.

59. **The acting Chairperson**, commenting on the second proposed change, said that, if the proposal was accepted the words “give favourable consideration to” in the English text could probably remain unchanged.

60. **Ms. González Lozano** (Mexico), referring to the proposals for change made by the representative of Argentina, said that a recommendation that States only “consider using” the Model Law would constitute a substantial watering-down of the draft resolution. In any case, what operative paragraph 3 contained was merely a recommendation — not a requirement. In her view, operative paragraph 3 should be left as drafted.

61. **The acting Chairperson**, pointing out that “use” in the English text had been rendered as “apliquen” (“apply”) in the Spanish text, wondered whether “apliquen” could be taken to imply “application” in the sense of “enactment”.

62. **Mr. González** (Argentina) said that the drafting group had initially thought of using “Invites” or “Encourages” rather than “Recommends” in operative paragraph 3. In his view, the use of “Recommends” warranted a change from “apliquen” to “consideren aplicar” and from “estudien” to “consideren estudiar”.

63. **The acting Chairperson** suggested that the use of the word “apliquen” (“apply”) in the Spanish text be reviewed by the Secretariat in consultation with interested delegations.

The meeting rose at 12.30 p.m.