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Commission on
International
Trade Law**

YEARBOOK

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The footnote numbering follows that used in the original documents on which this *Yearbook* is based. Any footnotes added subsequently are indicated by lower-case letters.

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INTRODUCTION

This is the twenty-fourth volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).¹

The present volume consists of three parts. Part one contains the Commission's report on the work of its twenty-sixth session, which was held at Vienna from 5 to 23 July 1993, and the action thereon by the United Nations Conference on Trade and Development (UNCTAD) and by the General Assembly.

In part two most of the documents considered at the twenty-sixth session of the Commission are reproduced. These documents include reports of the Commission's Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were before the Working Groups.

Part three contains the UNCITRAL Model Law on Procurement of Goods and Construction, the Guide to Enactment of the Model Law, a bibliography of recent writings related to the Commission's work, a list of documents before the twenty-sixth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

UNCITRAL secretariat
Vienna International Centre
P.O. Box 500, A-1400 Vienna, Austria
Telephone: 43-1-21131-4060 Telex: 135612 Telefax: 43-1-237485

¹To date the following volumes of the *Yearbook of the United Nations Commission on International Trade Law* (abbreviated herein as *Yearbook* [year]) have been published:

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication, Sales No.</i>
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6
XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7

THE TWENTY-SIXTH SESSION (1993)

A. Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session (Vienna, 5-23 July 1993) [Original: English]^a

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^aOfficial Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17) (7 September 1993) (hereafter referred to as "Report").

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-sixth session, held at Vienna from 5 to 23 July 1993.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-sixth session on 5 July 1993.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII) the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 19 October 1988 and on 4 November 1991, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:¹

¹Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its forty-third session on 19 October 1988 (decision 43/307) and 19 were elected at its forty-sixth session on 4 November 1991 (decision 46/309). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995, while the term of those members elected at its forty-sixth session will expire on the last day prior to the opening of the thirty-first session of the Commission, in 1998.

Argentina (1998), Austria (1998), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1998), China (1995), Costa Rica (1995), Denmark (1995), Ecuador (1998), Egypt (1995), France (1995), Germany (1995), Hungary (1998), India (1998), Iran (Islamic Republic of) (1998), Italy (1998), Japan (1995), Kenya (1998), Mexico (1995), Morocco (1995), Nigeria (1995), Poland (1998), Russian Federation (1995), Saudi Arabia (1998), Singapore (1995), Slovakia (1998), Spain (1998), Sudan (1998), Thailand (1998), Togo (1995), Uganda (1998), United Kingdom of Great Britain and Northern Ireland (1995), United Republic of Tanzania (1998), United States of America (1998) and Uruguay (1998).

5. With the exception of Costa Rica, Kenya, Togo, Uganda and the United Republic of Tanzania, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Albania, Armenia, Australia, Bangladesh, Belarus, Belgium, Bolivia, Brazil, Colombia, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Democratic People's Republic of Korea, Ethiopia, Finland, Gabon, Guatemala, Holy See, Indonesia, Jordan, Kuwait, Libyan Arab Jamahiriya, Malaysia, Nicaragua, Paraguay, Peru, Republic of Korea, Romania, Slovenia, South Africa, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Turkey, Ukraine and Venezuela.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations organs*: International Monetary Fund (IMF); World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Committee (AALCC); Banque africaine de développement (BAfD); International Institute for the Unification of Private Law (UNIDROIT);

(c) *Other international organizations*: Cairo Regional Centre for International Commercial Arbitration; Grupo Latinoamericano de Abogados para el Derecho de Comercio Internacional (GRULACI); Inter-American Development Bank; Organization of African Unity; World Assembly of Small and Medium Enterprises (WASME).

C. Election of officers²

8. The Commission elected the following officers:

<i>Chairman:</i>	Mr. Sani L. Mohammed (Nigeria)
<i>Vice-Chairpersons:</i>	Mrs. Ana Isabel Piaggi-Vanossi (Argentina)
	Mr. Rossen Hristov Guenchev (Bulgaria)
	Mr. David Moran Bovio (Spain)
<i>Rapporteur:</i>	Mr. Visoot Tuvayanond (Thailand)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 493rd meeting, on 5 July 1993, was as follows:

1. Opening of the session.
2. Election of the officers.
3. Adoption of the agenda.
4. New international economic order: procurement.
5. Electronic data interchange.
6. International contract practices: draft Convention on International Guaranty Letters.
7. Case law on UNCITRAL texts (CLOUT).
8. Future programme of work.
9. Coordination of work.
10. Status and promotion of UNCITRAL legal texts.
11. Training and assistance.
12. General Assembly resolutions on the work of the Commission.
13. Other business.
14. Date and place of future meetings.
15. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 519th meeting, on 23 July 1993, the Commission adopted the present report by consensus.

²The election of the Chairman took place at the 493rd meeting, on 5 July 1993, the election of the Vice-Chairpersons at the 500th meeting, on 8 July 1993, and the election of the Rapporteur took place at the 496th meeting on 6 July 1993. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairpersons, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/72/16)*, para. 14 (*Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970* (United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 14).

II. DRAFT MODEL LAW ON PROCUREMENT**A. Introduction**

11. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order.³ The Working Group carried out its work at its tenth to fifteenth sessions (the reports on the work of the Working Group at those sessions are contained in documents A/CN.9/315, A/CN.9/331, A/CN.9/343, A/CN.9/356, A/CN.9/359 and A/CN.9/371). The Working Group completed its work by adopting the draft text of a Model Law on Procurement at the close of its fifteenth session. The Working Group also agreed that a draft commentary giving guidance to legislatures enacting the Model Law should be prepared by the Secretariat, without precluding the possibility of preparation at a later stage of commentaries with other functions (A/CN.9/359, para. 249).

12. The text of the draft Model Law as adopted by the Working Group at its fifteenth session was sent to all Governments and to interested international organizations for comment. The comments received were reproduced in A/CN.9/376 and Add.1 and 2. The Secretariat prepared a draft Guide to Enactment of the Model Law on Procurement (A/CN.9/375), an earlier draft of which had been reviewed by a small and informal ad hoc working party of the Working Group (Vienna, 30 November-4 December 1992).

13. Before entering into a substantive discussion of the articles of the draft Model Law, the Commission considered its method of work, in particular whether both the draft Model Law and the draft Guide to Enactment should be adopted by the Commission or whether only the draft Model Law would be adopted by the Commission, while the draft Guide to Enactment would be published as a Secretariat document. The Commission decided that the draft Guide to Enactment should be discussed and adopted by the plenary of the Commission as it considered that the adoption of the Guide to Enactment by the Commission would make it more authoritative when considered by legislatures. The Commission also decided to proceed with the consideration of the draft Model Law as contained in the annex to document A/CN.9/371 and to defer the consideration of the draft Guide to Enactment until it had completed its consideration of the draft Model Law.

14. The Commission, at the initial stage of its deliberations, agreed that the title of the draft Model Law should be changed to "UNCITRAL Model Law on Procurement" so that the title would be consistent with the titles of other model laws prepared by the Commission. Subsequently, the Commission agreed to further modify the title to read "UNCITRAL Model Law on Procurement of Goods and Construction". The Commission also agreed that, upon completion of its consideration of the Model Law and the Guide to Enactment, it would consider such questions as whether the Model Law and the Guide to Enactment should

³*Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 243.

be published in a joint document or separately and whether, in a separate publication of the Model Law, to include a footnote reference to the Guide.

15. The Commission expressed its appreciation to the Working Group on the New International Economic Order and its Chairmen, Robert Rufus Hunja (Kenya) and Leonel Perezniato Castro (Mexico), for having prepared a draft of the Model Law that was generally favourably received and regarded as an excellent basis for the discussion in the Commission. The Commission also expressed its appreciation to the Secretariat.

B. Discussion of articles

Preamble

16. The Commission adopted the preamble unchanged.

Chapter I. General provisions

Article 1. Scope of application

17. A proposal was made to delete article 1(2)(a). In support of the proposal, it was stated that States were now applying increasingly transparent procedures for procurement involving national security or national defence and that it was not desirable for the Model Law to appear to recommend the preclusion of such procurement in all instances. It was suggested that any States that wished to preclude such procurement would still be able to do so under paragraph (2)(b) and (c).

18. Concerns were expressed, however, that procurement for national security purposes remained of a sensitive nature for many States and that, in order to preserve the acceptability of the Model Law and to foster its widest possible application, it was important to mention expressly the right of States to exclude such procurement from the application of the Model Law, even though the effect of the deletion of paragraph (2)(a) might be largely cosmetic. The prevailing view was, therefore, that paragraph (2)(a) should be retained. At the same time it was emphasized that, since the goal was to have as much procurement as possible regulated by the Model Law, the Guide to Enactment of the Model Law could point out to enacting States that the exclusion of procurement involving national security was optional and that this and any other exclusions under article 1(2) should be applied as narrowly as possible. A suggestion to amend paragraph (3) to enable the procurement regulations to state the extent to which the procurement referred to in paragraph (2) would be subject to the Model Law did not receive sufficient support.

19. After deliberation, the Commission adopted article 1 unchanged.

Article 2. Definitions

"Procurement" (subparagraph (a)) and "procuring entity" (subparagraph (b))

20. The Commission adopted the definitions of "procurement" and "procuring entity" unchanged.

"goods" (subparagraph (c))

21. The Commission considered a proposal to include in the definition of "goods" an option for specific inclusion by States of some things and the specific exclusion of others. The intent of this proposal was to provide increased clarity and transparency and to lessen the possibility of disputes with respect to the status of certain items, such as printing, that might be regarded in some jurisdictions as goods and in other jurisdictions as a service. It was suggested to this end that the following optional language might be added within square brackets at the end of the existing text of the definition: "[and, without limiting the generality of the foregoing, includes . . . , but does not include . . .]".

22. While there was general sympathy for achieving the goal of added clarity with respect to borderline cases such as printing, the proposal evoked the concern that mentioning the possibility of exclusion in the definition of "goods" might have the unintended effect of encouraging exclusions of the application of the Model Law; it was said that exclusion of the Model Law was already amply provided for in article 1 and should not be further provided for by way of definition. In response to this concern, it was emphasized that the intent of the proposal was to provide clarity with respect to what was and what was not to be considered "goods", and not to limit the scope of application of the Model Law.

23. Taking into account the above exchange of views, the Commission considered several additional proposals in an attempt to achieve such added clarity. One proposal was to add to article 1(2) editorial language indicating that enacting States could at that point in the Model Law include those things that were goods and those that were not deemed to be goods. Support for that proposal failed to solidify, in particular since such an approach was felt to be excessively at variance with the present structure of the Model Law, in which article 1(2) dealt solely with exclusions and the definition of goods covered was found in article 2(c). It was also generally felt that such a modification would be superfluous since article 1(2) already provided a sufficient modality for the exclusion of specific types of procurement. Another proposal, aimed at addressing the concern about unduly fostering exclusion of the Model Law, was simply to include in the definition of goods express mention of printing and other borderline cases such as computer software. This would permit an enacting State to forego incorporation of those items if they were traditionally considered to be services and would leave the matter of exclusions to be addressed in article 1. Yet another proposal was to make the definition of "goods" generally clearer by replacing the word "includes" by the words "includes such items as" so as to make it clear that the definition was not exhaustive. This proposal was not regarded as delivering much additional clarity since it was generally felt that the word "included" would already be understood in a non-exhaustive sense.

24. As an outcome of the discussion of the advantages and disadvantages of the various proposals, the Commission was able to reach a consensus in favour of adding editorial language along the following lines at the end of the definition of "goods", language which would refrain

from making any reference to exclusions, while permitting enacting States to treat as goods certain types of goods whose status might otherwise be unclear: "[enacting States may include additional categories of goods]". Subject to that modification, the Commission adopted the definition of "goods".

"construction" (subparagraph (d))

25. The Commission adopted the definition of "construction" unchanged.

"supplier or contractor" (subparagraph (e))

26. It was proposed that reference could be made throughout the Model Law simply to "supplier". In favour of this approach it was pointed out that the Model Law did not appear to differentiate at any particular point between suppliers and contractors. However, it was pointed out that in some situations the party would be thought of as a "supplier" in business usage, but as a "contractor" in other situations. It was therefore felt that use merely of the term "supplier" would be too narrow. It was further stated that the matter had been discussed by the Working Group and that it had not turned out to be possible to come up with a more suitable expression than "supplier or contractor". The Commission, noting that a term such as "tenderer" would not be appropriate since the Model Law provided for a variety of methods of procurement in addition to tendering proceedings, decided to retain the existing expression.

"procurement contract" (subparagraph (f))

27. The Commission adopted the definition of "procurement contract" unchanged.

"tender security" (subparagraph (g))

28. The Commission accepted and referred to the drafting group a proposal to expand the definition to refer to the two functions of tender securities mentioned in article 27(1)(f)(i) and (iii) but not presently referred to in the definition of "tender security", which mentioned only the function of securing the obligation of the successful supplier or contractor to enter into a procurement contract.

"currency" (subparagraph (h))

29. The Commission adopted the definition of "currency".

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

30. The Commission adopted article 3 unchanged.

Article 4. Procurement regulations

31. A suggestion was made to include in article 4 a new paragraph along the following lines to clarify that the Model Law did not preclude the use of electronic data interchange (EDI) in communications governed by the Law:

"(2) In addition to the procurement regulations referred to in paragraph (1), (the organ or authority specified in

paragraph (1), or another specified organ or authority) is authorized to promulgate procurement regulations allowing for the use of electronic data interchange with respect to procurement by procuring entities. Such regulations may deal with any matter dealt with in articles 9, 10, 32 or any other article of this law, and specifically may vary the requirements in article 25(5) of a writing and a sealed envelope for the submission of a tender, provided that the confidentiality provided by such writing and such sealed envelope shall be preserved and that the record and other requirements of article 9 are satisfied."

32. The Commission decided to consider the proposal in the context of articles 9, 10 and 25 (see paragraph 63).

Article 5. Public accessibility of legal texts

33. The Commission adopted article 5 unchanged.

Article 6. Qualifications of suppliers and contractors

Paragraph (1)

34. The Commission adopted paragraph (1) unchanged; however, it later decided to restructure paragraphs (1) and (2) of article 6 (see paragraph 201).

Paragraph (2)(a), (b) and (c)

35. The Commission adopted paragraph (2)(a), (b) and (c) unchanged; however, it later decided to restructure paragraphs (1) and (2) of article 6 (see paragraph 201).

Paragraph (2)(d)

36. A suggestion, which received some support, was to replace the words "in this State" by the words "in any State"; the purpose of the proposal was to enable the procuring entity to obtain and evaluate information about possible failures by suppliers to pay taxes or social security obligations not only in the State of the procuring entity but also in foreign States. Such failures in foreign States might be of concern to a State seeking to limit the risk of entering into contractual relations with an irreputable supplier or contractor. The suggested modification was opposed on the ground that it might open a possibility of disqualifying suppliers that were legitimately disputing their obligation to pay a tax, and that such a ground for disqualification might therefore be abusively applied. It was stated in reply that the modified provision should make it clear that the subparagraph was oriented not to persons legitimately disputing their tax or social security obligations but to persons evading those obligations; such a clarification might be made by inserting the word "lawful" in front of the word "obligations". After discussion, and noting that the word "lawful" would not eliminate the danger of improper disqualifications of suppliers, the Commission did not adopt the suggestion. The subparagraph was adopted unchanged.

Paragraph (2)(e)

37. It was proposed to add, after the words "within a period of . . . years", the words "or while a sentence is being served for the offence, whichever is the greater". The purpose of the proposed addition was to avoid the anomalous

lous situation of qualifying a firm while its current principal was, based on a conviction before that period, still incarcerated for an offence of the type referred to in the subparagraph. In opposition to the addition, it was thought that the modified text might be interpreted in such a way that a firm would be disqualified for the entire period during which one of the firm's former principals was incarcerated; furthermore, it was said that, while the modified paragraph might in fact be construed as applicable only when current principals were incarcerated, the anomalous situation sought to be avoided by the addition was at any rate unlikely to arise since in practice a conviction for a criminal offence would normally lead to the resignation or removal of the principal concerned. The supporters of the proposal agreed that the modified text should apply, as the current text did, only when current principals were sentenced and, in order to remove any doubt, suggested inclusion of words making that abundantly clear.

38. An observation was made that the purpose of the subparagraph was generally to give the possibility to the procuring entity to establish that the supplier was of "good character", and it was suggested that the use of words along the lines of "good character" in the subparagraph might provide the desired flexibility to the procuring entity in evaluating the circumstances of the case, including the possibility that a current principal would be incarcerated for longer than the number of years specified in the subparagraph. The suggestion was opposed on the ground that it would make the provision too vague.

39. After discussion, the Commission decided to adopt the subparagraph unchanged.

Paragraphs (3), (4) and (5)

40. The Commission adopted paragraphs (3), (4) and (5) unchanged.

Paragraphs (6) and (7)

41. The Commission considered a number of proposals relating to the nature of defects in qualification information that would provide grounds for disqualification and the extent to which any such defects should be permitted to be rectified. It was proposed that paragraph (6) should contain a provision restricting the procuring entity from disqualifying suppliers or contractors owing to minor errors or omissions and that this should be extended even to instances where prequalification proceedings had taken place. To that end it was argued that the procuring entity should allow suppliers or contractors to correct such minor errors or omissions and that this would limit abusive disqualification on inconsequential grounds. Another proposal that was generally aimed at restricting the right of the procuring entity to disqualify suppliers or contractors for minor errors or omissions was to state in the Model Law that the procuring entity could only disqualify for "substantial" inaccuracies. It was further proposed that, since paragraph (7) apparently referred to instances where no information had been provided, paragraph (6) should also refer to the situations where the supplier or contractor submitted incomplete information in addition to the current reference to false and inaccurate information. This latter proposal was accepted.

42. The Commission was of the view that the proper test with which to limit the right of the procuring entity to disqualify suppliers or contractors would be whether the inaccuracy or incompleteness of the information was "material" or not. It was felt that the word "substantial" might be imperfect and may lead to disputes. A concern was, however, expressed that this test of whether the inaccuracy was material or not for purposes of disqualification should not apply to false information as false information was understood to be information that was deliberately false and should therefore not be qualified in any respect as this would give an aura of acceptance to false information. A proposal to clarify this by adding the word "intentionally" before the word "false" did not gain support as it was felt that this would entail investigating the motives of the supplier or contractor.

43. The Commission then took up the issue of whether the supplier or contractor should have the right to rectify false, inaccurate or incomplete information. There was general agreement that there should be no right to correct false information as this would be open to abuse and provide opportunity for fraud. As regards material inaccuracies or incomplete information, one view was that the supplier or contractor should not have the right to correct material inaccuracy or incompleteness of information but should be entitled to make corrections or make complete information that was not material. Another view was that the additional reference in paragraph (6), to disqualification of a supplier or contractor for material inaccuracy or incompleteness of information, should be made subject to paragraph (7) of article 6 so as to enable the supplier or contractor to correct defects by providing accurate and complete information; paragraph (7) would enable him to provide proof of information that was required under paragraph (2).

44. Yet another view was that, as currently stated, paragraph (7) dealt with situations where the supplier or contractor provided proof of qualification before the deadline for submission and was not intended to deal with the issue of allowing corrections. Another view was that paragraph (7) should also apply where prequalification proceedings had taken place. A view was also expressed that the substance of paragraph (7) should be relocated to paragraph (2) as it only concerned provision of information that was required under paragraph (2). Yet another suggestion was that paragraph (7) could be deleted as it served no purpose after the amendments made to paragraph (6), which now dealt with instances of incomplete information.

45. After deliberation, the Commission decided that paragraph (7) should be retained, in its present place, and that it should be expanded to allow the supplier or contractor to make corrections of material inaccuracy or incompleteness of information. It was felt that this would fit in with paragraph (6) in which it was already implicit that the procuring entity could not disqualify a contractor or supplier for immaterial inaccuracies or incompleteness of information.

46. A proposal was made to the effect that paragraph (7) should also provide the supplier or contractor with the right to provide evidence to rebut a claim by the procuring entity that the information it had provided was false. In response

to this proposal it was pointed out that the supplier or contractor who felt erroneously disqualified could avail itself of the recourse proceedings under chapter V of the Model Law and that chapter V would therefore be the proper place to deal with the issue.

47. It was pointed out that the words "proposals or offers" should be reinstated after the word "tenders" in the penultimate line of paragraph (7).

48. In considering the report of the drafting group, the Commission engaged in further deliberations affecting paragraphs (6) and (7) of article 6 (see paragraphs 213 and 214).

Article 7. Prequalification proceedings

Paragraphs (1) and (2)

49. The Commission adopted paragraphs (1) and (2) unchanged.

Paragraph (3)

50. It was agreed that the information referred to in article 19(1)(j), i.e., the place and deadline for the submission of tenders, should be added to the exceptions referred to in paragraph (3), as the procuring entity may not always be in a position to know that information at the time of prequalification. The Commission also noted its agreement with the Secretariat proposal that article 19(1)(j) should be amended to the effect that the place and deadline for submission should be included in the invitation to tender and the invitation to prequalify, only if known to the procuring entity at that stage. It was further noted that, if the amendment to article 19 were adopted, the concern raised with respect to the present provision would be sufficiently addressed since it mirrored the information referred to in article 19. The Commission also requested the drafting group to consider whether it would be possible to avoid repeating similar listings of the exclusions both in article 7(3) and in article 19(2).

Paragraph (4)

51. It was suggested that in some countries it was not common practice to require procuring entities to transmit during the prequalification proceedings to all suppliers and contractors the clarifications of the prequalification documents as this would be excessively burdensome, unnecessary and costly. Such a procedure would be permitted but not mandated by the Model Law as it currently was in paragraph (4). A differing view was that, in order to ensure fairness in the competition among suppliers and contractors, it would not be sufficient to provide for the circulation of clarifications of solicitation documents, without also requiring an analogous procedure at the important threshold stage of prequalification. In order to achieve a balance between these two concerns, it was suggested that the procedure be required only for "reasonable requests" or "necessary clarifications", or only for clarifications deemed "relevant" to all suppliers and contractors. Though the concern was raised that such terms raised the possibility of disputes as to interpretation, the Commission referred to

the drafting group the suggestion that the duty to circulate clarifications be limited to "reasonable" requests.

Paragraph (5)

52. The suggestion was made that the second sentence of this paragraph should be redrafted to read: "In reaching that decision the procuring entity shall use only the criteria set forth in the prequalification documents." The Commission adopted the paragraph and referred the suggestion to the drafting group.

Paragraphs (6) and (7)

53. The Commission adopted paragraphs (6) and (7) unchanged.

Paragraph (8)

54. A number of questions were raised that indicated the possible need to use more precise language in paragraph (8), as well as to align it with article 6(6). Those questions included: whether the reference to prequalification in the second sentence should be deleted as disqualification of the supplier for submission of false or inaccurate information during prequalification was covered in article 6(6); whether, at the end of the second sentence, reference should be made to the submission of incomplete information; whether the words "failed to reconfirm" should be made more clear. The Commission referred those questions to the drafting group.

Article 8. Participation by suppliers and contractors

55. A question was raised as to why a State would enter into agreements such as the General Agreement on Tariffs and Trade (GATT) or regional free-trade agreements while at the same time giving generally free and open access to procurement to all foreign nationals. It was proposed that article 8 should rather be based on the notion of reciprocity, by providing for free participation by suppliers and contractors from States that had adopted legislation based on the Model Law and especially its article 8. While a reciprocity provision could already be applied under the existing text by way of the procurement regulations, inclusion of the reciprocity rule in the Model Law itself was said to be preferable from the standpoint of transparency.

56. A degree of misgivings was also expressed with the present approach in article 8 in that it appeared to be ambiguous. On the one hand, it established the rule of non-discrimination against foreign suppliers and contractors, while, on the other hand, the same provision provided wide latitude to enacting States to exclude that rule. It was suggested that, if such an ambiguous formulation was all that could be achieved, it might be preferable instead for the Model Law simply to remain silent on the question of non-discrimination against foreign suppliers and contractors. A view was expressed that such an approach would take better account of the needs of developing countries to maintain measures preferential to their local suppliers and contractors. Other suggestions were that the ambiguity might be resolved by limiting the possibility of exclusions to those based on the notion of reciprocity or on the basis of the low value of a procurement, in the direction of the provision in article 17(b).

57. In response to the above concerns and proposals, it was recalled that the Working Group had considered the question of non-discrimination at length at several sessions. The Working Group had found that the existing approach was the best possible compromise that could be achieved, in particular from the standpoint of striking a proper balance between the progressive fostering of non-discrimination and the need to recognize that enacting States would, at least for the foreseeable future, continue, to one degree or another, to apply measures designed to favour national suppliers and contractors.

58. The Commission looked favourably on a suggestion that, in order to address the concerns that had been raised about the possible ambiguity of the provision, the Guide to Enactment should make it clear that the Commission endorsed the desirability of the widest possible application of the rule of non-discrimination, while also making it sufficiently clear that the Model Law expressly provided for exclusion of that rule to the degree considered necessary by enacting States in light of their economic conditions, and their international and national legal obligations affecting procurement.

Article 9. Form of communications

Paragraph (1)

59. It was observed that, while procurement practices have traditionally relied on paper-based communications and the Model Law largely reflected those practices, it should give more latitude to and enable the use of electronic data interchange (EDI) in procurement communications. It was emphasized that the use of EDI was beginning to take hold in procurement and was the wave of the future. It was suggested that the existing text could be viewed as hindering the development of EDI applications in procurement, in particular because of the provision in article 25(5) requiring submission of tender in writing and in a sealed envelope. Because of that provision, article 9(1), which should be read as a provision enabling the use of EDI, was thrown into doubt.

60. At the same time, a note of caution was struck to the effect that the introduction of EDI into procurement was not a simple matter; it raised questions of security and confidentiality, as well as legal questions, for example, in the area of evidence, as a result of the application of new communications technology to traditional paper-based procedures. It was suggested that perhaps the Secretariat should prepare a note on the use of EDI in procurement, legal issues arising therefrom, and possible ways of addressing those issues.

61. The Commission was generally of the view that the text of the Model Law should be modified so as to make it abundantly clear that procuring entities were enabled to introduce EDI techniques into the procedures provided for in the Model Law. There was general agreement that any solution to be included in the Model Law as to the use of EDI should bear in mind the interests both of parties wishing to use EDI as well as of parties that were not yet ready to use EDI. In response to the concerns expressed over EDI, it was pointed out that the language of article 9(1)

should not require any particular form, only a record preserving the content of the communication, and that similar formulations appeared in other UNCITRAL texts and were generally understood to enable the use of EDI. It was also noted that technological solutions were rapidly being developed to ensure that EDI technologies employed would provide the same juridical function as that offered by the traditional paper-based procedures. For example, it was reported to be already possible to "time seal" computers so that an EDI functional equivalent could be available for the writing and sealed envelope requirements presently imposed in article 25(5) for the submission of tenders.

62. The Commission further noted that, as had already been seen in the deliberation of the Commission's Working Group on Electronic Data Interchange, the questions raised by the use of EDI in procurement were generally not unique to procurement. Those questions were analogous to those raised in other spheres of economic and contracting activity, and would usually be subject to general solutions, often found in existing national laws. It was also questioned whether, in this light, any additional Secretariat study was merited since, beyond generally applicable legal solutions which were already being addressed by the Working Group, there lay technological questions that were beyond the competence of the Secretariat.

63. The Commission then considered proposals aimed at improving the text from the standpoint of enabling the use of EDI. One suggested approach was to add to article 4 a new paragraph expressly authorizing adoption of regulations allowing the use of EDI in the procurement process (for the text of the proposed paragraph, see paragraph 31). It was noted that the purpose of the proposed text was primarily to draw the attention of States to the question of the use of EDI in procurement without providing detailed guidance as to the content of the solutions to be incorporated in the regulations. Such an approach was said to be appropriate in view of the fact that internationally harmonized solutions to legal issues in EDI had not yet emerged and that those issues were still currently under consideration by the Working Group on Electronic Data Interchange. A criticism of the proposal was that the broad latitude it left to States in determining the conditions for the use of EDI, and the lack of internationally agreed models, might lead to solutions that did not adequately heed the policies underlying the Model Law. It was further suggested that the new paragraph in article 4 might be seen as raising obstacles to the use of EDI, by suggesting that elaborate regulations might be necessary when in fact many of the apparent difficulties could easily be overcome.

64. Another approach, which won the approval of the Commission, was to provide in the Model Law itself, by an appropriate modification of articles 25(5) and 9, for the availability of EDI. It was suggested that this might be done by making the changes presented below (paragraphs 8-10) and by using at the beginning of article 9(1) the words "Subject to other provisions of this law and any requirement of form specified by the procuring entity . . .". It was stressed that any modification should be based on the premise that many suppliers would continue to use paper-based communications in procurement and that the use of EDI should not be imposed on them and should not adversely affect their ability to compete with suppliers that

used EDI. It was also stressed that the procuring entity should not be compelled by the Model Law to use EDI. The Commission, in requesting the drafting group to prepare an appropriate reformulation of article 9, expressed its understanding that the reference to a record was understood to be a reference to a durable record.

65. Subject to the above modifications, the Commission adopted paragraph (1).

Form of submission of tenders (article 25(5))

66. Having agreed on the approach to be taken in paragraph (1) with a view to enabling the use of EDI, the Commission considered the related question of form requirements for submission of tenders, a question addressed in article 25(5). It was generally agreed that that question warranted a special provision in the Model Law because the submission of tenders had to be subject to special security measures, in particular measures ensuring that, before the simultaneous opening of tenders, neither the procuring entity nor the other suppliers or contractors would be able to discover the content of the tender. The Commission considered a proposal to reformulate article 25(5) to the effect that a tender could be submitted either in writing and in a sealed envelope, or by any other means that provided a secure, confidential method of communication. The Commission agreed with the proposal on the understanding that neither the procuring entity nor suppliers or contractors would be compelled to use EDI.

67. Further suggestions were aimed at refining the text. One suggestion was to provide that the acceptability of submission of tenders in an EDI form should be stipulated by the procuring entity. The purpose of the suggestion was to clarify that the procuring entity could not be compelled to accept tenders in an EDI form. Another suggestion was to specify that, in addition to security and confidentiality, the EDI method used had to provide satisfactory assurance as to the authenticity of the tender. It was observed that, in devising a provision on authenticity of tenders, it should be borne in mind that the means and reliability of authentication depended on the method for transmitting the message. For example, the telefax technique provided a low level of assurance as to the authenticity of the message. Thus, it was suggested not to leave in doubt whether telefax was considered to be an EDI communication covered by article 25(5). A further suggested formulation was that tenders in EDI must meet a degree of security, confidentiality and authenticity that was comparable to the degree of security, confidentiality and authenticity offered by a written tender in a single sealed envelope. Yet another suggestion was to clarify that the EDI transmission method used had to provide a durable record of the transmitted tender.

68. The Commission, noting that the provision should be neutral as regards particular forms of technology, accepted these suggestions in principle and referred them to the drafting group.

Paragraph (2)

69. The Commission decided not to accept a proposal to remove the communication provided for under article 32(1) from the scope of paragraph (2). The Commission also

noted that the reference to article 11(3) was mistaken and should be replaced by a reference to article 18(3). Subject to the above correction, the Commission adopted paragraph (2).

Paragraph (3)

70. The Commission adopted paragraph (3) unchanged.

Article 10. Rules concerning documentary evidence provided by suppliers and contractors

71. A question was raised as to which sources of law were meant to be referred to by the expression "the laws of this State", in particular whether it was clear that it meant to refer not only to statutes, but also to implementing regulations as well as to the treaty obligations of the enacting State. In this regard it was noted that, in addition to the national laws concerning legalization, obligations arising from treaties applied to the legalization of documents and that this needed to be adequately reflected in article 10. It was further noted that there might be differences from State to State as to which of those various sources of law would be considered covered by the expression "laws of this State", especially since in some States treaties were considered automatically part of the national law, while in other States the enactment of implementing legislation was required in order to give effect to treaty obligations. The view was expressed that for the purposes of clarity it would be preferable to include a more specific reference, including mention of laws, treaty obligations, regulations, and perhaps even requirements imposed as a result of practice. The prevailing view, however, was that, for the purposes of a model law, the existing reference simply to "laws" was sufficient. At the same time, it was agreed that it might be usefully explained in the Guide to Enactment that in some States a general reference to laws would suffice, while in other States a more detailed reference to various sources of law would be warranted. Only limited support, however, was expressed for referring in the Model Law or in the Guide to legalization requirements imposed as a result of practice since this was felt to run counter to the objective of transparency.

72. The Commission noted that the situation of unequal treatment of different foreign suppliers and contractors might arise in instances where the State was a party to a treaty regulating the legalization of documents with the countries of origin of some but not of all foreign suppliers or contractors and was therefore obliged to apply less strenuous procedures only to some suppliers or contractors. It was agreed that the regulation of such a case was beyond the purview of the Model Law, though it would be useful to bring the possible situation to the attention of enacting States in the Guide to Enactment.

73. After deliberation, the Commission adopted article 10 unchanged.

Article 11. Record of procurement proceedings

Paragraph (1)

74. A number of refinements were agreed upon with respect to the formulation of paragraph (1). The Commission

agreed that the wording should reflect the possibility, as evident in some States, that the record of the procurement proceedings would be prepared not by the procuring entity but by another government agency, though the procuring entity would maintain a copy of the record so as to make it available to suppliers or contractors. For that reason, the Commission decided to replace "prepare" by the word "keep" or "maintain".

75. The Commission also decided to insert words along the lines of "at least" before the words "the following information", so as to make it clear that the information referred to in paragraph (1) would be regarded as the minimum content of the record. In this regard, it was noted that the use of such additional language in the Model Law should not encourage the imposition of additional requirements not in the spirit of the Model Law. The Commission further agreed to replace the reference in subparagraph (k) to the "grounds" upon which the procuring entity could exclude contractors or suppliers on the basis of nationality by a reference to the "grounds and circumstances" in order to align the text with similar expressions used elsewhere in the Model Law. Lastly, the Commission agreed to insert a new subparagraph ("l"), adding to the required content of the record a summary of requests for clarifications submitted by contractors or suppliers with respect to prequalification and solicitation documents and the corresponding clarifications given by the procuring entity. It was noted that this amendment would require a consequential amendment of paragraph (3).

Paragraphs (2) and (3)

76. The Commission decided to replace the words "made available for inspection by" in paragraphs (2) and (3) by the words "made available to". It was felt that the revised formulation would better convey the intended flexibility as regards the particular mode in which the record might be made available. The Commission also agreed that paragraph (3) should explicitly state that the record would be made available to contractors or suppliers only upon request.

77. The Commission adopted a proposal to reformulate the second sentence of paragraph (3) so that it would refer only to early disclosure upon the order of a competent court of the portion of the record referred to in subparagraphs (c) to (e), and not the portion of the record referred to in subparagraphs (f) and (g). This change was necessitated by the fact that the circumstances referred to in subparagraphs (f) and (g) could not arise prior to acceptance of the tender, proposal or offer and a court therefore could not order disclosure of that information at an earlier point.

78. The Commission agreed that, in order to distinguish information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and their prices, referred to in paragraph (3)(b), from the summary of such information, referred to in paragraph (1)(e), wording along the following lines should be added to paragraph (3)(b): "... and tender, proposal, offer or quotation prices, beyond the summary referred to in paragraph (1)(e)".

79. Subject to the above modification, the Commission adopted paragraphs (2) and (3).

Paragraph (4)

80. The view was expressed that paragraph (4) should be deleted on the ground that the procuring entity should be subject to unfettered liability for failure to maintain a record, since this obligation was one of the pillars of transparency in the system established in the Model Law. In response, it was explained that the rationale behind paragraph (4) was to strike a balance between the need to enforce the record requirement and the need not to impose excessive burdens on the procuring entity, in particular in the event of what might be innocent errors or omissions. The Commission affirmed the decision of the Working Group that the present text struck a proper balance between those considerations and that a reference to exclusion of liability in damages was necessary to make it clear that injunctive and similar forms of relief were not excluded. It was agreed, however, that the word "monetary" before "damages" was superfluous and should be deleted. The Commission also accepted a proposal that paragraph (4) should be reformulated to read: "... damages due to failure to maintain a record . . .".

Article 12. Inducements from suppliers and contractors

81. The Commission agreed on a number of modifications designed to make clearer the intended scope and effect of article 12. First, it was decided to insert the words "directly or indirectly" before the words in the first sentence, "offers, gives or agrees to give", so as to make it abundantly clear that the provision covered also inducements offered through an agent. This clarification was said to be particularly useful because the provision covered illicit actions, which had to be described in a manner that left as little as possible to interpretation; at the same time, it was stressed that the absence of words such as "directly or indirectly" in other provisions should not be interpreted as meaning that actions through an agent were meant not to be covered in such other provisions.

82. Secondly, it was decided to replace the words "gratuity, whether or not in the form of money" by the words "gratuity in any form".

83. Thirdly, the Commission decided to add after the words "officer or employee of the procuring entity" the words "or other governmental authority" in order to cover also an inducement to a person who, while not being an officer or an employee of the procuring entity, was in a high government position and thereby able to influence the procurement process. It was also decided to add "or other governmental authority" after the words "act or decision of, or procedure followed by, the procuring entity". Lastly, it was agreed to replace the words "the rejection" at the beginning of the second sentence by the words "such rejection".

84. In response to a suggestion that specific mention needed to be made of acts of omission, the Commission took the view that the existing wording, "an act or decision of, or procedure followed by, the procuring entity", was

sufficient to cover acts of commission and acts of omission.

85. Subject to the foregoing modifications and clarifications, article 12 was adopted. A suggestion to refer in the text to proof of the allegation of inducement was referred to the discussion of the review procedures, and to the Guide, to the extent any additional clarification might be required.

Chapter II. Methods of procurement and their conditions for use

Article 13. Methods of procurement

86. The Commission affirmed the principle enunciated in paragraph (1) that tendering should be the normally used method of procurement. It also was generally agreed that the balance of discretion offered to and constraints placed on the procuring entity with respect to the choice of a method of procurement other than tendering was appropriate. After deliberation, the Commission adopted the article unchanged.

Article 14. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

Paragraph (1)

87. In order to refine the wording of the *chapeau* of subparagraph (a), it was agreed to replace the words "the procuring entity is unable to formulate" by words along the lines of "it is not feasible for the procuring entity to formulate". This change was intended to reflect that, while objective circumstances were important, some exercise of discretion by the procuring entity was involved in the decision whether the conditions existed for justifying the use of one of the three methods of procurement referred to in article 14. It was noted that the exercise of this discretion was subject to the approval and record requirements of the Model Law.

88. The Commission decided in favour of retaining the present wording of subparagraph (a)(ii), rather than to accept wording along the lines of "because of the nature of the goods or construction, specifications cannot be established with sufficient precision to permit the award of the contract by selecting the successful tender according to the procedures set forth in chapter III". It was felt that the existing language had an appropriate focus on the technological circumstances intended to be referred to.

89. The Commission affirmed the inclusion in subparagraph (c) of a specific authorization for the use of the methods of procurement referred to in article 14 in cases in which the Model Law was applied to procurement involving national defence or national security pursuant to article 1(3). It was noted that subparagraph (c) was not thereby repetitive of article 1(3). It merely served to make it clear that, when the Model Law ever applied to defence procurement, the procuring entity was permitted to use one of the methods of procurement other than tendering. The

Commission decided on the same grounds to retain article (f) concerning the use of single-source procurement in such cases.

90. The Commission considered a proposal to insert in subparagraph (d) the following wording: "when, in the judgement of the procuring entity, engaging in new tendering proceedings . . .". A concern was expressed that the new wording would inject an undesirable degree of subjectivity. However, it was widely felt that the change usefully made it clear that the question of whether to retry a failed tendering proceeding was a matter left to the discretion of the procuring entity, and thereby would avoid needless disputes. It was also pointed out that the subparagraph dealt with a discretionary matter that was ultimately subject to approval and beyond the purview of the right to review envisaged in article 38.

91. Subject to the above modifications, the Commission adopted paragraph (1).

Paragraph (2)

92. The Commission affirmed the two-track approach contained in paragraph (2), permitting use of competitive negotiation in two types of cases of urgency: the case of urgent circumstances that were not foreseeable or a result of dilatory conduct on the part of the procuring entity and the case of urgency caused by a catastrophic event. In response to a question as to the need to distinguish between the two cases, the Commission noted that the case concerned in subparagraph (a) was subject to the exception of foreseeability and dilatory conduct so as to limit the extent to which the grounds of urgency would be used to avoid abusive circumstances of tendering proceedings. It was affirmed that such limitations should not apply when the urgent circumstances involved humanitarian needs, a position reflected in subparagraph (b).

93. It was then pointed out that the resort to competitive negotiation on the urgency grounds referred to in paragraph (2) was not subject to the approval requirement contained in the *chapeau* of paragraph (1). The Commission noted that this was the result of an apparent oversight and affirmed that the approval requirement should indeed apply to the choice of competitive negotiation on the grounds of urgency, in particular as the approval requirement was applied to the choice of single-source procurement on similar urgency grounds.

94. As regards the precise formulation of the urgency grounds in paragraph (2)(a) and (b) and, for that matter, also in article 16(b) and (c), it was agreed to replace the expression "impossible or imprudent" by the word "impractical". It was agreed to replace, in subparagraph (b) of the present paragraph (2), the words "amount of time" by the word "time". A suggestion that the term "direct competitive negotiation" be used, as opposed to "competitive negotiation", was considered unnecessary since article 14 dealt only with the choice of a procurement method other than tendering, and not the procedures used in those methods, an area dealt with in chapter IV.

95. Subject to the above modifications, the Commission adopted paragraph (2).

Article 15. Conditions for use of request for quotations

Paragraph (1)

96. In response to a proposal to define "quotations", it was noted that the Working Group had decided not to include in article 2 definitions of the methods of procurement other than tendering. However, this would not preclude including in article 36 a more detailed explanation of what was involved in a "quotation".

Paragraph (2)

97. The suggestion was made to make the provision in paragraph (2) a general rule applicable to other non-tendering methods of procurement so as to prohibit the artificial division of procurement of packages of goods and works by procuring entities simply for the purpose of avoiding tendering. In this regard, it was noted that applying the rule contained in paragraph (2) to all methods of procurement other than tendering was not appropriate because request for quotations was, in the context of the Model Law, the only method of procurement the use of which was linked to the value of the procurement contract. The Commission agreed thereto and noted that the attention of enacting States should be drawn in the Guide to Enactment to the principle that procuring entities should abstain from artificially dividing procurement packages in order to avoid tendering.

Article 16. Conditions for use of single-source procurement

Subparagraph (a)

98. The Commission adopted subparagraph (a) unchanged.

Subparagraphs (b) and (c)

99. No changes of substance were made to subparagraphs (b) and (c). However, in line with the modification made earlier in article 14 (2)(a) and (b), the words "impossible or imprudent" found in subparagraphs (b) and (c) were replaced by the word "impractical". In subparagraph (c), the words "amount of time" were replaced by the word "time".

Subparagraph (d)

100. A suggestion was made to refer to the notion of "cost effectiveness" rather than to the "reasonableness" of the price of the follow-on purchase. Such a change was felt to be unnecessary, however, since the text of subparagraph (d) already referred to factors that represented key elements of cost effectiveness. The Commission adopted subparagraph (d) unchanged.

Subparagraphs (e) and (f)

101. The Commission adopted subparagraphs (e) and (f), subject to the correction in the latter subparagraph of the reference to article 1(2) to read "article 1(3)".

Subparagraph (g)

102. The Commission noted that subparagraph (g) contained a reference to an approval requirement and that, unlike other references to an approval requirement, includ-

ing the reference in the *chapeau* of paragraph (1) concerning recourse to single-source procurement, the reference to approval in subparagraph (g) was not presented as an option to enacting States. It was agreed that, in principle, this should remain so since the Model Law should recognize that the decision to use single-source procurement in the economic emergency type of circumstance referred to would ordinarily be taken at the highest levels of government, or at least it was a decision that should be taken at such a high level.

103. Several suggestions were considered aimed at making the substance and exceptional nature of subparagraph (g) stand out better. One such suggestion that was accepted was to relocate the provision to a new paragraph (2), as this would highlight the exceptional nature of the procedure envisaged. Another suggestion was that, in order to deal with the impression of "double approval" created by the presence of an approval requirement both in the *chapeau* of paragraph (1) and in subparagraph (g), the Guide to Enactment should explain that those enacting States that incorporated the approval requirement in paragraph (1) might not necessarily have to incorporate the approval requirement in subparagraph (g). It was further agreed that the word "approval" should be replaced by the words "approval by . . . (the enacting State designates an organ to issue the approval) . . .". Questions were raised as to whether the references in the existing text to procedures to be followed prior to the use of single-source procurement on the basis of subparagraph (g) might be too vague. It was widely felt, however, that additional precision concerning the modality of implementation of the procedures was not necessary in a framework Model Law. Yet another suggestion was to use the term "governmental authorization" in place of "approval".

104. Subject to the above modifications, the Commission adopted subparagraph (g).

Chapter III. Tendering proceedings

Section I. Solicitation of tenders and of applications to prequalify

Article 17. Domestic tendering

105. It was suggested that the reference in subparagraph (b) to "low amount or value" was not sufficiently clear and might be improved by referring instead to the "small quantity or low monetary value". The Commission referred that suggestion to the drafting group.

106. The Commission noted that the reference in the latter portion of the article to article 11(2) was mistaken and should be replaced by a reference to article 18(2).

107. Subject to the above drafting suggestion and modification, the Commission adopted article 17.

Article 18. Procedures for soliciting tenders or applications to prequalify

Paragraph (1)

108. The Commission adopted paragraph (1) unchanged.

Paragraph (2)

109. A view was expressed that the requirement of international publication in a language used in international trade, set out in paragraph (2), was too onerous on the procuring entity to be imposed as a general rule, particularly in the case of low-value procurements. It was argued that any foreign suppliers or contractors interested in participating in procurement in a certain country already had the means of discovering the procurement needs of that country, including through the use of diplomatic or consular trade representatives. It was stated that publication in a major national journal should therefore suffice.

110. A countervailing view was that publicity was one of the most important aspects in procurement because it promoted competition resulting in better quality and lower prices for the procuring entity. Furthermore, the only way in which the Model Law could promote international trade, as referred to in subparagraph (b) of the preamble, was through international procurement, in which international publicity was the key element. It was stated that many companies, particularly small ones, would be disadvantaged without the international publicity requirement in paragraph (2). It was further stated that the costs involved in advertising would not be a deterrent as they were recoverable or could be minimized if a journal such as *Development Business*, a publication of the United Nations Department of Public Information, were used to publish invitations to tender and invitations to prequalify. It was also pointed out that article 17(b) already excluded low-value domestic procurements from the application of article 18(2).

111. After deliberation, the Commission agreed to leave paragraph (2) unchanged. It was noted that the text before the Commission was a Model Law, and that therefore any State that found it difficult to enact paragraph (2) could choose not to do so. It was also agreed that the Guide to Enactment could usefully stress the possibility of fulfilling the publication requirement through the use of *Development Business*.

Paragraph (3)

112. A proposal was made to relocate paragraph (3) to chapter II. In support of the proposal it was stated that restricted tendering, particularly in certain regions, represented the most common exception to open tendering. It was suggested that the present formulation and location of paragraph (3) failed to provide adequate treatment to this important exception to open tendering, which, because it lacked one of the most important ingredients of tendering, namely publicity, was particularly open to abuse.

113. Opposition was expressed to the proposal on the basis that restricted tendering was not a method of procurement distinct from tendering, the only difference being that it lacked open solicitation. It was suggested that a middle-ground solution could be to make paragraph (3) a separate article within chapter III. After deliberation, the Commission decided to relocate the paragraph to chapter II.

114. As to the formulation of paragraph (3) regarding the conditions for use of restricted tendering, the view was widely expressed that the present formulation of the

grounds as "economy and efficiency" was too vague and subject to abuse. It was suggested that these words should be replaced by the words "in particular and exceptional circumstances". Another proposal was that the two phrases could be combined and that the decision to use restricted tendering should be made subject to approval; yet, the solution that attracted the strongest support was the listing in the provision of the conditions for use of restricted tendering. It was thus agreed that the grounds for the use of restricted tendering should be spelled out and that the procedures for use of restricted tendering should remain those for tendering proceedings, except for the requirement of open solicitation.

115. The Commission then considered the specific manner in which its decision would be formulated in the text of the Model Law. As to the conditions for use of restricted tendering, one proposed formulation listed conditions including: the limited number of suppliers or contractors from whom the goods are available; urgency; failure of a public tendering proceeding; procurement of small quantities; and a reference to "any other exceptional cases".

116. It was generally agreed that the first case, that of a limited number of suppliers or contractors being able to supply the goods or construction, should be included. As to the other cases, however, it was widely felt that such an extensive enumeration would lead to the use of restricted tendering in inappropriate circumstances. Furthermore, the suggested enumeration was not felt to provide an appreciable degree of added precision beyond that in the existing text in article 18(3), which referred to grounds of economy and efficiency. Questions were raised as to why it should be assumed that, in the case of a failed tendering proceeding, use of restricted tendering would be any more successful in finding a qualified supplier or contractor. Similarly, doubts were cast on the significance of the amount of time that would actually be saved in cases of urgency by the use of restricted tendering, in particular since the Model Law provided other, more expeditious methods of procurement for cases of urgency. There was agreement that restricted tendering should be available in cases of low-value procurement, but subject to considerations of economy and efficiency and formulated along the lines of the explanation contained in the draft Guide: "where the time and cost of the examination and evaluation of a large number of tenders would be disproportionate to the value of the goods or construction to be procured".

117. As regards the procedures to be followed in restricted tendering, which would be described in chapter IV, it was agreed that no reference was needed to the supplier invited being reputable, since article 6 had been modified to make it clear that a qualification requirement applied to all methods of procurement. Concerning the selection of the suppliers, a twofold approach was agreed on designed to curb distorted application of restricted tendering. One leg of this approach was to require that, for resort to restricted tendering in cases of limited numbers of suppliers or contractors, all the suppliers or contractors that could supply the goods or construction should be invited. In the case of low-value contracts, the provision would require the participation of suppliers or contractors in numbers sufficient to ensure an adequate level of competition."

118. Subject to the above relocation and modifications, the Commission adopted paragraph (3).

Article 19. Contents of invitation to tender and invitation to prequalify

Paragraph (1)

119. It was agreed that paragraph (1)(b) and (c) should be expanded to provide that the place of delivery of the goods should be indicated in the invitation to tender. Subject to that modification, the Commission adopted paragraph (1). It was noted that the reference in subparagraph (d) to article 8(1)(a) was mistaken and should be replaced by a reference to article 6(2).

Paragraph (2)

120. It was noted that article 7(3) required the prequalification documents to disclose the place and deadline for submission of tenders, while this information was not required in the draft Model Law for the invitation to prequalify in view of the possibility that such information might not be available to the procuring entity at the time it would draw up the invitation to tender. Upon deliberations concerning article 7(3), the Commission had already agreed that the preferable approach would be to require mention of the place and deadline for submission of tenders in the invitation to prequalify as well as in the prequalification documents, if the information was known to the procuring entity at the time (see paragraph 50).

121. A proposal to restructure the *chapeau* of paragraph (2) so as to make it clearer was referred to the drafting group. Subject to the above modification and clarification, the Commission adopted paragraph (2).

Article 20. Provision of solicitation documents

122. The Commission agreed to a proposal to expand the rule in article 20 to also cover charges for prequalification documents. It was noted that a modification to the title of the article to reflect this expansion would be necessary, along the following lines: "Provision of solicitation documents; price of prequalification documents and solicitation documents".

123. A question was raised whether the cost of the documents referred to in article 20 consisted of the cost of producing and distributing the documents, or merely the cost of printing, in which case it might be better to clearly state so. It was pointed out that the Guide to Enactment made it clear that the cost referred to in article 20 was the cost of printing and providing the documents.

Article 21. Contents of solicitation documents

Chapeau

124. The Commission noted that different variations of expressions such as the term "at a minimum", used in the first sentence of article 21 in order to make clear that the procuring entity could include in the solicitation documents additional information, appeared at various points in the

draft Model Law. The Commission requested the drafting group to ensure their consistency.

Subparagraphs (a) to (e)

125. The Commission adopted subparagraphs (a) to (e) unchanged.

Subparagraph (f)

126. The Commission decided not to accept a proposal that subparagraph (f) should refer merely to the principal terms and conditions of the procurement contract, although there was some sentiment that the proposed reformulation would be more practical.

Subparagraph (g)

127. The Commission adopted subparagraph (g) with the following addition at the end: "and a description of the manner in which alternative tenders are to be evaluated and compared". The Commission intended to make it clear that, in the case in which the procuring entity solicits alternative tenders, the solicitation documents should decide the manner in which the alternative tenders would be considered, in particular whether a supplier or contractor submitting an alternative tender would have to submit a tender in conformity with the specifications in order for the alternative tender to be considered.

Subparagraphs (h) to (r)

128. The Commission adopted subparagraphs (h) to (r) unchanged, subject to the inclusion of a new subparagraph ("1 bis") concerning the need to mention in the solicitation documents the exceptional case of forfeiture of the tender security for withdrawal or modification of the tender prior to the deadline for submission of tenders, and subject to the replacement in subparagraph (n) of the words "the procuring entity intends to convene" by the words "the procuring entity intends, at this stage, to convene".

Subparagraph (s)

129. The Commission noted that no other portion of article 21 was subject to a liability exclusion of the type contained in subparagraph (s) and that this would remain so if, as suggested therefore, the provision were relocated after subparagraph (x) or (y). The Commission adopted subparagraph (s) unchanged.

Subparagraphs (t) to (y)

130. The Commission adopted subparagraphs (t) to (y) unchanged.

Article 22. Rules concerning description of goods of construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents

131. The Commission accepted a proposal to move article 22 to chapter I. The aim of the relocation was to apply to all methods of procurement the principle of objectivity in the description of the goods or construction so as to foster

competition, to limit abusive resort to single-source procurement, and to facilitate the choice of the most competitive method of procurement possible. The Commission referred to the drafting group a concern that the relocated provision should take into account that things like solicitation documents and specifications were used to varying degrees in the methods of procurement other than tendering. It was suggested that the problem might be cured by making references to the solicitation documents and to specifications subject to a proviso along the lines of "to the extent and where appropriate". The Commission accepted a proposal to replace the words in paragraph 3(b) "Standardized trade term shall be used" by the words "Due regard shall be had for the use of standardized trade terms". Subject to the above relocation and clarifications, the Commission adopted article 22.

Article 23. Clarifications and modifications of solicitation documents

132. The view was expressed that the procuring entity should be given a chance to correct errors in contract documents as well as in technical aspects of the solicitation documents. It was pointed out that, pursuant to article 21(f), the contract terms and conditions were to be included in the solicitation documents, to the extent they were already known to the procuring entity, and were therefore to that extent subject to the clarification and modification procedure foreseen in article 23. It was also suggested that recourse could be had to review in the event that the procuring entity was in breach of a duty relating to a description of the contract in the solicitation documents.

133. The Commission adopted article 23 unchanged.

Section II. Submission of tenders

Article 24. Language of tenders

134. The Commission adopted article 24 unchanged.

Article 25. Submission of tenders

Paragraph (1)

135. The Commission decided to add to the provision the obligation of the procuring entity to fix the place where tenders were to be submitted. Subject to that addition, the paragraph was adopted.

Paragraph (2)

136. The question was raised whether it would be useful to include in the paragraph guidance as to the length of the extension of the deadline. The Commission considered that such guidance was not called for in view of the fact that the Model Law left the length of the period for the submission of tenders to be decided by the procuring entity to reflect the particular circumstances at play and in accordance with any procurement regulations on the matter. In response to a question, it was clarified that "a meeting of suppliers and contractors", referred to in the paragraph, was a meeting convened by the procuring entity under article 23(3).

137. The Commission adopted paragraph (2) unchanged, subject to a request to the drafting group to review the use of the expression "supplier and contractor" in paragraph (2).

Paragraph (3)

138. A concern was expressed that the existing formulation allowed an excessive degree of discretion to the procuring entity, in particular since it referred to "any" circumstance beyond the control of a supplier or contractor. The Commission decided, however, to retain the existing discretionary approach. In this connection, it was noted that the absence of a qualification of the word "may" might in some national laws lead to the interpretation that a decision not to extend the deadline was open to judicial review, while under the national laws of other countries the current wording would not give rise to such an interpretation. In order to avoid any misinterpretation of the intended effect of the provision, it was decided to add to the words "the procuring entity may" an expression such as "in its absolute discretion". The Commission adopted the paragraph, subject to that clarification, and agreed that the question raised should be mentioned in the Guide.

Paragraph (4)

139. The Commission adopted paragraph (4) unchanged.

Paragraph (5)

140. It was noted that, in connection with its consideration of article 9, the Commission had agreed to modify article 25(5) so as to enable the use of EDI for the submission of tenders (paragraphs 66-68).

141. The Commission, noting that the provision enabling submission of tenders by EDI would require such tenders to be authenticated, agreed that paragraph (5) should encompass a signature requirement.

142. A suggestion was made for the paragraph to require a signature by a director or officer of the company submitting the tender. The suggestion was not adopted on the ground that such specific requirement may touch upon, and interfere in an undesirable way with, rules of company law and other rules dealing with the question of validity and binding nature of the tender.

143. Subject to the agreed upon modification, the Commission adopted paragraph (5).

Paragraph (6)

144. The Commission adopted paragraph (6) unchanged.

Article 26. Period of effectiveness of tenders; modification and withdrawal of tenders

Paragraph (1)

145. The view was expressed that the words "in effect" contained in the first sentence of paragraph (1) were ambiguous, and should be replaced by clearer language along the lines of "open for acceptance". Some sympathy was expressed for the proposal to achieve greater precision in

the text, but it was noted that a tender would be generally regarded as an offer and that stating that a tender was "in effect" would have a generally understood legal meaning. Hesitation over the proposed modification was expressed also on the ground that it would necessitate reformulation of the various references throughout the draft Model Law to the "effectiveness" of tenders to refer instead to tenders being "open for acceptance", an effort that might complicate the text. Bearing in mind those possible difficulties with the proposed modification, the Commission referred the matter to the drafting group.

146. The Commission agreed to the deletion of the second sentence of paragraph (1). It was generally felt that the sentence was no longer appropriate, in particular in view of the Commission's decision with respect to paragraph (3) of the present article, namely, that the draft Model Law should enable the procuring entity to stipulate in the solicitation documents that withdrawal or modification of the tender after submission of tenders would be subject to forfeiture of the tender security. Subject to deletion of the second sentence, the Commission adopted paragraph (1).

Paragraph (2)

147. The Commission adopted paragraph (2) subject to the deletion of the words "if it is not possible to do so", contained in paragraph (2)(b). This deletion was agreed upon since the provision was not intended to preclude a supplier or contractor wishing to extend the validity period of its tender security from obtaining a new tender security, even though a mere extension of the original tender security might have been possible.

Paragraph (3)

148. A concern was expressed that in some States the rule in paragraph (3) that only modification or withdrawal of a tender after the deadline for the submission of tender would be subject to forfeiture of the tender security would be contrary to existing law and practice of imposing such a forfeiture penalty even on tender modifications and withdrawals made prior to the deadline for submission of tenders. It was reported that that approach was based on the notion that the mere submission of a tender represented the formation of a "contract" or of a "preliminary contract".

149. One suggestion to meet that concern was to simply delete paragraph (3). That suggestion, however, failed to attract much support, in particular since the Commission took the view that the Model Law should recognize that, as a general rule, permitting modifications and withdrawals of tenders prior to the deadline for submission of tenders was acceptable. It was pointed out that restricting such modifications or withdrawals would discourage participation by suppliers and contractors in tendering proceedings and would be counter to widely accepted practice under most national procurement laws. At the same time the Commission agreed that the Model Law should permit procuring entities to depart from the general rule and to impose a penalty of forfeiture of the tender security for modifications and withdrawals prior to the deadline for the submission of tenders, but only if so stipulated in the solicitation documents. To this end, it was agreed to add at the begin-

ning of paragraph (3) the words "Unless otherwise stipulated in the solicitation documents". Subject to that change, the Commission adopted paragraph (3). It also generally requested the drafting group to review and align other relevant provisions in the Model Law, in particular articles 21 and 27(1)(f)(i), in view of the modification that had been made to paragraph (3) of the present article.

Article 27. Tender securities

150. The Commission noted that its decision to permit variation in the solicitation documents of the general rule in article 26(3) concerning modification and withdrawal of tenders required the consequential modification of paragraphs (1)(f)(i) and (2)(d) of the present article. The matter was left to the drafting group.

151. It was noted that additional clarity might be achieved by replacing the references in article 27 to an "institution or entity" issuing or confirming a tender security by the expression "institution or person" so as to indicate that the guarantor or confirmer may also be a physical person and to avoid using the term "entity" for both the guarantor and the party procuring goods. It was further noted that additional simplicity, as well as consistency with terminology currently employed in the draft Convention on Guarantees and Standby Letters of Credit being formulated by the Commission, might be achieved by referring, depending upon the context, to "issuer" or "confirmer". The Commission requested the drafting group to consider the implementation of these suggestions. A proposal to refer to "financial" institutions was not accepted since that expression was felt to be too narrow.

152. A suggestion was made to refer expressly in the Model Law to the possibility of providing a security such as a mortgage, pledge or floating charge. The suggestion was not adopted since it was felt that, while such types of securities were not excluded by article 2(g), it would not be desirable to refer expressly to them. Mention was made of practical difficulties in enforcing such securities that rendered them inadvisable in tendering proceedings.

153. Subject to the agreed modifications and drafting suggestions, the Commission adopted paragraph (1).

Paragraph (2)

154. It was suggested to replace, in the introductory phrase of paragraph (2), the expression "without delay" by the expression "promptly" or "without undue delay". The Commission agreed with the suggestion and gave preference to the expression "promptly", as that expression was felt to indicate more clearly the urgency of the obligation to return the tender security document.

155. It was suggested to refer in paragraph (2)(a) to the expiry of the validity period of the tender security instead of to the expiry of the tender security.

156. A suggestion was made to make it clear in subparagraph (b) that any requirement of a performance security in connection with the procurement contract should be disclosed in the solicitation documents.

157. The Commission noted that it would be necessary to align subparagraph (d) with the modification that had been agreed to with respect to article 26(3). It was agreed that the words in subparagraph (d) "in connection with which the tender security was supplied" were superfluous and could be deleted. A suggestion was also made that a reference to "modification" could be added to the reference to "withdrawal", in line with article 23(3).

158. Subject to the agreed modification of the introductory phrase in paragraph (2), to the alignment with article 26(3) and to consideration by the drafting group of the amendments referred to above, the Commission adopted paragraph (2).

Section III. Evaluation and comparison of tenders

Article 28. Opening of tenders

Paragraph (1)

159. A concern was raised that the requirement in article 28(1) that the time for the opening of tenders should be simultaneous with the deadline for the submission of tenders was too onerous and that it would be fair to allow some lapse of time between these two events. In response to this concern, it was noted that allowing for a lapse of time in this instance would increase opportunities for corruption and, at the least, create the appearance of impropriety. After deliberation, the Commission adopted paragraph (1) unchanged.

Paragraph (2)

160. The Commission adopted paragraph (2) unchanged.

Paragraph (3)

161. A question was posed as to why it was necessary to announce only the price of the tender during the opening of the tenders, since this might place undue emphasis on the price as the main factor for evaluating the successful tender which was not always the case. The prevailing view was however that what was typically most important at this stage in a tendering proceeding was to establish a record of the prices of the tenders by reading them out at the opening so as to foster transparency and to avoid disputes.

162. The Commission noted that there was an inconsistency between article 28(3), which required disclosure of the prices of the tenders at the opening of the tenders, and the provisions of article 11(3), which stated that the prices of the tenders should only be disclosed after a tender had been accepted. It was agreed that an amendment to article 11 would be necessary to remove this inconsistency.

163. Subject to the above decision, the Commission adopted paragraph (3) unchanged.

Article 29. Examination, evaluation and comparison of tenders

Paragraph (1)

164. It was proposed to replace in paragraph (1)(b) the expression "shall correct purely arithmetical errors" by the

expression "may correct purely arithmetical errors" or "shall correct arithmetical errors that it [may][might] discover on the face of a tender". It was said that the current wording placed too strong an onus on the procuring entity in that it might become a matter of subsequent dispute whether an error was or was not apparent on the face of a tender and whether a procuring entity would be liable, for example, to a supplier or contractor whose tender would have been the lowest had the procuring entity detected the error. In support of the existing text, and in particular opposition to the expression "may correct purely arithmetical errors", several varying views were expressed: that the proposed wording allowed too much discretion to the procuring entity as to the examination of tenders and as to correcting arithmetical errors; that the procuring entity was expected to check tenders with appropriate care and that the proposed words did not sufficiently reflect that expectation; that the checking of tenders was necessary in order to avoid rejecting a tender that could have been adopted had the procuring entity discovered the arithmetical error. Particular emphasis was placed on the view that the existing language represented an unfair distribution of the risk that suppliers and contractors might not prepare their tenders carefully. It was questioned whether the Model Law should place procuring entities in a position of possible liability for failing to notice an error in a tender when in fact the error was due to the carelessness of the supplier or contractor.

165. After discussion, the Commission adopted the view that, in order to accommodate the concern raised, the provision should use wording to refer to arithmetical errors along the lines of "that are apparent on the face of a tender and that are discovered during tender evaluation" or "that are discovered on the face of the tender". It was felt that the revised wording would avoid placing an undue responsibility on the procuring entity for discovering arithmetical errors, while ensuring that, when an arithmetical error was discovered, there would be a procedure to correct it. The Commission did not adopt the suggestion to replace in the proposed wording the words "are discovered" by wording such as "may discover", "might discover" or "reasonably might have discovered" since such wording might be understood as establishing a standard of care to be observed by the procuring entity, something that was not the purpose of the provision.

166. The Commission adopted the proposal to replace in paragraph (1)(b) the words "shall give notice" by "shall give prompt notice".

167. Subject to those modifications, the Commission adopted paragraph (1).

Paragraph (2)

168. The Commission adopted paragraph (2) unchanged.

Paragraph (3)

169. It was suggested to delete paragraph (3)(b), which could make it possible for a tenderer to avoid the conclusion of the contract by refusing to accept a correction of an arithmetical error. It was said that there were cases in which contractors or suppliers purposely included arith-

metrical errors in tenders so as to retain a possibility of refusing to accept a correction and to then have the tender rejected in accordance with that paragraph (3), or so to be able to insist on the erroneous price in the event that would be advantageous. However, in support of the retention of paragraph (3)(b), it was said that the risk of a supplier or contractor acting in bad faith was outweighed by the problems that might arise when, as the result of the absence of a clear rule in the Model Law, the parties would be in disagreement as to whether there existed an arithmetical error and how it should be dealt with.

170. The proposal to add in paragraph (3)(b) the words "or its representative who submitted the tender" after the words "supplier or contractor" was not adopted on the ground that throughout the Model Law it could generally be assumed that a supplier or contractor might act through a representative.

171. After deliberation, the Commission adopted paragraph (3) unchanged.

Paragraph (4)

172. A suggestion was made to amend paragraph (4)(b)(i) to read along the following lines: "The successful tender shall be (i) the tender from the tenderer which has been determined to be fully capable of undertaking the contract and whose tender bears the lowest tender price." The purpose of the amendment was to allow the procuring entity to take into account, in addition to the price, also the capability of the tenderers to perform the contract. The proposed modification did not attract much support. It was agreed that, once a supplier or contractor was found to be qualified and its tender accepted as envisaged in article 29(3)(a), slight differences among the suppliers or contractors as to their capability to perform the contract should not be used as a factor in evaluating the tenders. Otherwise, an undesirable degree of subjectivity would be injected into the evaluation of tenders that would open the door to improper practices. To guard against this risk in tendering proceedings, the qualification decision should be simply an "in or out" decision, and not a criterion for comparing tenders.

173. As to paragraph (4)(c)(iii), which the Commission decided by consensus to retain in its present form, a view was expressed that its deletion would have been preferable since, as a matter of principle, after establishing that the tenderer was qualified and that the quality of the goods met the specifications, the price should be sole the criterion for evaluating tenders. It was also stated that paragraph (4)(c)(iii), by introducing factors extraneous to the goods or construction being procured, ran counter to the thrust of the Model Law. Furthermore, for the same reasons that prompted the Commission to make single-source procurement (article 16(g)) subject to approval, it would have been advisable to make also the use of such more subjective factors enumerated in paragraph (4)(c)(iii) subject to the approval of a high governmental authority in order to limit abuse.

174. The Commission agreed to provide in paragraph (4)(d) that the use of a margin of preference had to be reflected in the record of the procurement proceedings; as a consequence, the Commission decided to include in

article 11(1) information on the use of a margin of preference as an element of the record of procurement proceedings.

175. Subject to the modification of paragraph 4(d), the Commission adopted paragraph (4).

Paragraph (5)

176. The Commission agreed to state expressly in paragraph (5) that the exchange rate for converting tender prices was the exchange rate to be indicated in the solicitation documents in accordance with article 21(r). It was observed that, if the solicitation documents did not set forth the currency and exchange rate as required by article 21(r), the omission would have to be clarified in a procedure for clarification of the solicitation documents, as specified in article 23. Subject to that modification and to review of the paragraph by the drafting group, the paragraph was adopted.

Paragraphs (6), (7) and (8)

177. The Commission adopted paragraphs (6), (7) and (8) unchanged.

Article 30. Rejection of all tenders

178. The Commission adopted article 30 unchanged.

Article 31. Negotiations with suppliers and contractors

179. A concern was expressed that article 31, which precluded the procuring entity from negotiating with suppliers or contractors with regard to the tenders submitted, failed to afford the procuring entity with sufficient flexibility to deal with cases in which all the tender prices were excessively high due apparently to a price-fixing scheme among the suppliers and contractors. In order to address that concern, it was suggested to create an exception by adding at the beginning of article 31 wording along the lines of "Except in cases where the procuring entity has reasons to believe that there is a price-fixing agreement between the suppliers". In response, it was noted that article 31 was not intended to address the problem of price-fixing, but was considered to be essential to generally preserve the integrity of tendering. It was pointed out that once suppliers or contractors knew that negotiation might take place after submission of tenders, they would have little incentive to offer their best prices. Instead, suppliers and contractors would increase their tender prices measurably in anticipation of being pressured to reduce them, and procuring entities would in the end pay more than necessary. It was suggested that, from the standpoint of the long-term integrity of the procurement system, it would be preferable to deal with cases of collusion by providing for rejection of all tenders under article 30, rather than by weakening the general rule of no negotiation. In addition, the procuring entity would still have access to other possible measures such as administrative disbarment proceedings. It was further pointed out that cases of price-fixing could be dealt with also under other bodies of law, such as criminal or competition law, the application of which was not excluded by the Model Law.

180. After deliberation the Commission adopted article 31 unchanged.

Article 32. Acceptance of tender and entry into force of procurement contract

Paragraphs (1) and (2)

181. The Commission adopted paragraphs (1) and (2) unchanged.

Paragraph (3)

182. The Commission agreed to replace the words "where the procurement contract is required to be approved" by the words "where the solicitation documents stipulate that the procurement contract is subject to approval". It was felt that such a clearer statement of the role of the solicitation documents in giving notice to suppliers and contractors of formalities required for entry into force of the procurement contract would be useful. Subject to the modification, the Commission adopted paragraph (3).

Paragraphs (4) and (5)

183. The Commission adopted paragraphs (4) and (5) unchanged.

Paragraph (6)

184. A proposal was made that, in order to promote transparency in the procurement process, the notice of the award of the procurement contract currently given only to suppliers and contractors that participated in the tendering proceedings, should be extended to the general public by requiring publication of the notice of the procurement contract. It was further suggested that, in order to achieve even broader transparency, such a publication requirement should be extended to other procurement methods as well. In support of this proposal, it was stated that such notification, in addition to providing transparency, could also be useful to subcontractors who might have an interest in the procurement. A concern was expressed, however, that requiring an across-the-board publication for every award of a procurement contract would be too onerous and expensive on the procuring entity.

185. In order to meet the aims of the proposal as well as to take account of the concern that had been raised about it, the Commission decided upon a twofold approach. The first half of the solution was to add to article 11(1)(b) the information concerning award of procurement contracts. This would mean that the information would be included in the portion of the record of the procurement proceedings made available to the general public under article 11(2). The second half of the solution was to add a new article ("11 bis") that would state the general rule that notices of procurement contract awards should be published; at the same time, this rule would not be applicable to awards where the contract price was below a certain value, the exact value being left to enacting States to determine. It was further agreed that, for those States that so wished, the procurement regulations could provide the manner of the publication of the notice of award.

186. Subject to the above decisions, the Commission adopted paragraph (6).

Chapter IV. Procedures for procurement methods other than tendering

Article 33. Two-stage tendering

187. The Commission adopted article 33 unchanged.

Article 34. Request for proposals

188. The Commission adopted article 34 unchanged.

Article 35. Competitive negotiation

Paragraphs (1), (2) and (3)

189. The Commission adopted paragraphs (1), (2) and (3) unchanged.

Paragraph (4)

190. The Commission agreed, in order to make clearer the role of the best-and-final-offer procedure, to add the following sentence at the end of paragraph (4): "The procuring entity shall select the successful offer on the basis of such best and final offers." Subject to that modification, the Commission adopted paragraph (4).

Article 36. Request for quotations

Paragraph (1)

191. It was proposed to require the procuring entity, in describing the components of the price quotation, to indicate those charges, duties and taxes in the supplier's country that are to be excluded. It was stated that the rationale behind this proposal was to enable the suppliers and contractors to prepare their price quotations on the basis of all the relevant information applicable to the price calculation. That proposal was not accepted, as the Commission felt that the matter was already adequately dealt with in paragraph (1). The Commission adopted paragraph (1) unchanged.

Paragraph (2)

192. The Commission adopted paragraph (2) unchanged.

Paragraph (3)

193. A concern was raised that the decision on which supplier or contractor to award the contract was not always based on the price only and that the phrase "responsive to the needs of the procuring entity" was too vague and did not properly reflect the other considerations. It was suggested that the phrase "most beneficial to the procuring entity" would better reflect these other considerations. A countervailing view was that this would make the considerations other than price too subjective, when in fact what was meant to be referred to were basic requirements such as place and time of delivery. After deliberation the Commission agreed that words such as whether the quotation "meets the need of the procuring entity" would be adequate.

194. The Commission also considered whether the reference to the "reliability" of the supplier offering the lowest quotation should be retained, or whether reference should be made instead to the supplier having to be "qualified", as this would be consistent with the terminology used in article 6. The concern was raised that introduction of the notion of reliability would be confusing, and would raise the possibility of an undesirable degree of subjectivity and the attendant risk of corruption. In favour of retaining the existing reference to reliability, it was stated that use of this expression was meant to coincide with the simple, relatively informal nature of request-for-quotations proceedings. On the basis of the foregoing discussion the Commission retained the existing expression (see, however, paragraphs 197-201).

195. The Commission adopted paragraph (3) subject to the modification it had agreed upon.

Article 37. Single-source procurement

196. A question was raised as to the necessity of retaining article 37 in view of the paucity of detail contained therein concerning the procedures to be followed. The Commission affirmed that the article should be retained, noting with approval the decision of the Working Group that the treatment in the Model Law of the procedures to be followed in the methods of procurement other than tendering should be relatively skeletal compared to the detailed approach with respect to tendering proceedings.

197. The Commission then turned its attention to a proposal to include in article 37 a reference to the reliability of the supplier or contractor, analogous to the reference that had been included in article 36 with respect to request for quotations. In doing so, the Commission considered further the question that had been raised in the discussion of article 36 with respect to whether a mere reference to "reliability" would be sufficient, or whether it would be preferable to refer rather to a requirement that the supplier or contractor had to be "qualified". Differing views and concerns were expressed in this regard.

198. One view was that a mere reference to reliability would suffice, in particular because saying anything more, such as using the word "qualified", would raise the risk of importing into single-source procurement the full panoply of rules and procedures concerning proof of qualifications set out in articles 6 and 7, something which would be excessive in view of the expedited, less formal nature of request-for-quotations and single-source procurement. The contrary view, in support of using the expression "qualified" rather than "reliable", was that such a risk of importing to a disproportionate degree the procedures of article 6 should not be an actual concern since article 6 was merely an enabling provision that did not itself mandate the use of any particular degree of qualification procedures in any given case of procurement. It was again suggested that the more concrete risk in fact was that the use of any term other than "qualified" would sow uncertainty, confusion and an undesirable degree of subjectivity and risk of corruption in request-for-quotation and single-source procurement, since it would not be clear what criteria could be used to evaluate the reliability of suppliers and contractors. In response, this difficulty was characterized as essentially

not an obstacle, since at any rate no criteria other than those mentioned in article 6(2) could be legitimately used to measure the qualifications or reliability of suppliers and contractors, once it was clear that article 6 applied, no matter what the procurement method was.

199. The Commission then considered how the Model Law could take into account and reconcile the differing views and concerns that had been raised. One solution that was considered was to institute the desired degree of flexibility in articles 36 and 37 by authorizing the procuring entity to apply the criteria in article 6(2) to request-for-quotations and single-source procurement to the extent possible or necessary. That approach was not followed, in particular because it was felt that it was unnecessary and inappropriate to refer in articles 36 and 37 to such flexibility since flexibility was sufficiently established in the enabling provisions of article 6.

200. Another possible approach was simply to avoid any mention in articles 36 and 37 of the qualification or, for that matter, of the reliability of suppliers and contractors, on the assumption that article 6 would apply and would provide the necessary degree of flexibility with respect to the extent of application of qualification criteria and procedures. This basic approach was found to be appealing. Yet in considering this approach, it was realized that it might necessitate a further revision of article 6, since it could not be assumed that article 6, in its present form, was directly applicable, even though that may have been the intent of the Working Group draft. In particular, it was pointed out that there appeared to be no general rule in article 6, applicable to all methods of procurement, requiring the procuring entity to enter into procurement contracts only with qualified suppliers and contractors; nor, for that matter, did article 6 contain an express definition of the notion of "qualified". In its express terms, article 6 merely authorized the procuring entity to assess the qualifications of suppliers or contractors, and to that end to seek information as to matters referred to in article 6(2). This approach in article 6 did not raise a problem for tendering proceedings because article 29(3)(a) completed the picture with respect to tendering proceedings by requiring the rejection of tenders submitted by suppliers or contractors deemed unqualified. However, no such rule requiring suppliers or contractors to be qualified under the pain of rejection was established for any of the procurement methods other than tendering, something that the Commission considered a gap in the Model Law that should be filled.

201. In order to fill that gap, while addressing the other concerns that had been raised, the Commission decided that article 6 needed to be amended further. That amendment would be aimed at: establishing clearly the rule that, no matter what the method of procurement, suppliers and contractors needed to be qualified in order to enter into a procurement contract with the procuring entity; providing a definition of "qualified"; and ensuring a sufficient degree of flexibility for the procuring entity as regards the extent to which qualifications were to be examined in particular procurement proceedings. The Commission endorsed this approach and referred the matter to the drafting group.

202. Subject to the above decision with regard to article 6, the Commission adopted article 37 unchanged.

Chapter V. Review

203. The Commission noted the special character of chapter V in that it concerned matters that touched upon the established constitutional and administrative arrangements of States, and that for that reason States would differ with regard to the precise procedures and structures used to implement the right to review. It was further noted that the text appearing in brackets at various points in chapter V was intended to present alternatives and options to enacting States.

Article 38. Right of review

Paragraph (1)

204. The view was expressed that the requirement that the supplier or contractor suffer a "loss or injury" as a result of the procuring entity's breach of duty should be deleted in article 38(1), as the breach of duty of the procuring entity should be a sufficient ground establishing the right of review for the supplier or contractor. However, the prevailing view was that it was a generally accepted principle of law that a cause of action required both breach of an obligation and damage resulting therefrom, and that this principle would help to limit the extent of disruption of procurement proceedings resulting from claims for review.

205. The Commission adopted paragraph (1) unchanged.

Paragraph (2)

206. It was noted that the matter referred to in subparagraph (c) would now be encompassed in subparagraph (a), in view of the decision to move the provisions on restricted tendering to chapters II and IV. Accordingly, subparagraph (c) should be deleted. It was also noted that the reference in subparagraph (d) to article 28(1) was mistaken and should be replaced by a reference to article 30(1). Lastly, it was decided to add to the list of exemptions in paragraph (2) a reference to the omission referred to in article 21(s). Subject to those modifications, the Commission adopted paragraph (2).

Article 39. Review by procuring entity (or by approving authority)

207. The Commission adopted article 39 unchanged.

Article 40. Administrative review

208. The Commission adopted article 40 unchanged.

Article 41. Certain rules applicable to review proceedings under article 39 [and article 40]

209. The Commission adopted article 41 unchanged.

Article 42. Suspension of procurement proceedings

210. The Commission adopted article 42 unchanged.

Article 43. Judicial review

211. The Commission adopted article 43 unchanged.

C. Report of the drafting group

212. The entire text of the draft Model Law was submitted to a drafting group for implementation of the decisions taken by the Commission and revision to ensure consistency within the text and between language versions. The Commission, at its 510th to 512th meetings, held on 15 and 16 July 1993, considered the report of the drafting group. The Commission noted that, in addition to the changes agreed upon by the Commission, the drafting group had made a number of changes of a purely drafting nature.

213. It was noted that, in regard to article 6, paragraphs (6) and (7), the drafting group had found it difficult to implement the decision of the Commission (paragraphs 41-47). Pursuant to that decision, paragraph (7) provided the supplier or contractor with a right to correct material inaccuracies or incompleteness in the qualification information, but only until the deadline of submission of tenders. The supplier or contractor therefore had no right to correct such deficiencies after the tenders had been opened, which in all probability was when the deficiencies would be discovered in procurement proceedings in which no prequalification had taken place. The drafting group suggested this paragraph would be workable if the right to correct was extended to give a reasonable time after the deadline for the submission of tenders or to give time for rectification until the conclusion of the procurement proceedings.

214. In considering this proposal a concern was raised that allowing the suppliers or contractors to correct information about qualifications after the opening of the tenders would open a door to abuse. A proposal was made that the matter would be sufficiently covered if the provision provided that the procuring entity could not disqualify a supplier or contractor for non-material inaccuracies or incompleteness, but that such a supplier or contractor may be disqualified if it failed to remedy the deficiencies promptly if requested to do so by the procuring entity. Under this approach, no opportunity is given to correct material defects in the qualification information after the deadline for submission of tenders. No such time limit is imposed for non-material defects, which may be corrected after the deadline. After deliberation, the Commission agreed to this proposal, which would be reflected in a new paragraph (6)(c). As a consequence, paragraph (7) was deleted.

215. It was noted that, in implementing the decision of the Commission to relocate article 22 to chapter I (paragraph 131), the drafting group found it appropriate to divide article 22 into two articles. A new article ("12 ter"), dealing with the language question addressed in article 22(4), would provide that the prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations should be formulated in the official language of the enacting State and in a language customarily used in international trade, except where the procurement was to be limited to domestic suppliers or contractors. It was agreed that the provision would be formulated so as to take account of States in which one or more official languages were among those used in international trade.

216. In article 34(9), the Commission noted that it would be necessary to delete subparagraph (d), in line with the decision concerning article 6(1).

D. Adoption of the Model Law and recommendation

217. The Commission, after consideration of the text of the draft Model Law as revised by the drafting group,⁴ adopted the following decision at its 512th meeting, on 16 July 1993:

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

Noting that procurement constitutes a large portion of public expenditure in most States,

Noting that a model law on procurement establishing procedures designed to foster integrity, confidence, fairness and transparency in the procurement process will also promote economy, efficiency and competition in procurement and thus lead to increased economic development,

Being of the opinion that the establishment of a model law on procurement that is acceptable to States with different legal, social and economic systems contributes

to the development of harmonious international economic relations,

Being convinced that the UNCITRAL Model Law on Procurement of Goods and Construction will significantly assist all States, including developing countries and States whose economies are in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist,

1. *Adopts* the UNCITRAL Model Law on Procurement of Goods and Construction as it appears in annex I to the report of its current session;

2. *Requests* the Secretary-General to transmit the text of the UNCITRAL Model Law on Procurement of Goods and Construction, together with the Guide to Enactment of the Model Law, to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Procurement of Goods and Construction when they enact or revise their laws, in view of the desirability of improvement and uniformity of the laws of procurement and the specific needs of procurement practice.

E. Discussion of draft Guide to Enactment

218. The Commission, after adopting the Model Law, engaged in a discussion of the draft Guide to Enactment of the Model Law prepared by the Secretariat. At the outset, the Commission was agreed that it would be preferable for the Guide to be reviewed and adopted by the Commission itself, in the plenary and at the present session, in view of the important role that the Guide would play in assisting legislatures in preparing legislation based on the Model Law. The Commission agreed that it would request the Secretariat to finalize the Guide, in order to reflect the changes to the Model Law agreed upon at the present session and to take into account the suggestions made during the discussion of the Guide.

Introduction

219. It was suggested that, in view of the fact that the introduction might function as an executive summary of the Guide, it should be recast so as to sufficiently emphasize important principles and features of the Model Law. These included in particular: an explanation of the objectives of the Model Law; a brief description of the various methods of procurement available under the Model Law and the general rule of tendering as the norm; the role of procurement regulations; and the rule, subject to certain exceptions, of participation by suppliers and contractors without regard to nationality. It was observed that, with such a revision, the introduction would present an even stronger endorsement of the importance and value of the Model Law. It was also suggested that the purpose of the Guide as a background report to executive authorities (paragraphs 5-8) should be stressed in clearer terms.

⁴The following table indicates new article numbers assigned to the provisions of the UNCITRAL Model Law on Procurement of Goods and Construction upon adoption by the Commission.

No. of article in Model Law	No. of draft article before the Commission	No. of article in Model Law	No. of draft article before the Commission
Preamble	Preamble	25(a) to (l)	21(a) to (l)
1	1	25(m)	new
2	2	25(n) to (z)	21(m) to (y)
3	3	26	23
4	4	27	24
5	5	28	25
6	6	29	26
7	7	30	27
8	8	31	28
9	9	32	29
10	10	33	30
11(1)(a) to (h)	11(1)(a) to (h)	34	31
11(1)(i) and (j)	11(1)(j) and (k)	35	32
11(1)(k)	new	36	33
11(2) to (4)	11(2) to (4)	37	partly new and partly based on
12	new		18(3)
13	12		
14	22(1), (2), (3)	38	34
15	22(4)	39	35
16	13	40	36
17	14	41	37
18	new	42	38
19	15	43	39
20	16	44	40
21	17	45	41
22	18(1) and (2)	46	42
23	19	47	43
24	20		

Preamble

220. No changes were suggested.

Article 1

221. It was suggested that the Guide should emphasize that under the Model Law the scope of application of the Model Law could be delimited based on procurement regulations only if the regulations were issued in a transparent and open way. It was suggested that this could be done by inserting after the second sentence of paragraph 2 under article 1 wording along the lines of "States excluding the application of the Model Law by way of procurement regulations should take note of article 5."

Articles 2 and 3

222. It was suggested that, in paragraph 2 under article 2, the factor in subparagraph (g) would be deleted in view of the scope of the factor in subparagraph (b). No changes were suggested under article 3.

Article 4

223. It was suggested that paragraph 1 should refer also to paragraph 9 of the introduction. Reference was made to the importance of the observation in paragraph 2 that, in urgent cases in which the procuring entity could choose to resort to procurement methods other than tendering, procurement should be limited to the quantities required to deal with the urgent circumstances.

Articles 5, 6 and 7

224. No changes were suggested.

Article 8

225. It was suggested to make it clearer that the reason that the margin of preference under article 29(4)(d), and article 17, were being referred to in paragraphs 2 and 3 under article 8 was their importance to the rule of international participation set forth in article 8.

Article 9

226. It was suggested that language should be included drawing the attention of legislators to the fact that article 9 did not answer all the technical and legal questions raised by the use of EDI communications in the context of procurement proceedings and that other areas of the law would apply to ancillary questions such as the electronic issuance of a tender security, and other matters beyond the sphere of "communications" under the Model Law.

Articles 10 and 11

227. No changes were suggested.

Article 12

228. It was suggested that, for additional clarity in the last sentence of paragraph 1, the word "elsewhere" should be inserted before the words "in place". It was also suggested that the words "employees of public procuring entities" should be added after the words "Government officials", as the latter did not necessarily include the former.

Article 13

229. It was suggested that, because of its importance, article 13 merited a somewhat expanded discussion. In particular, it was suggested that, either here or in the introduction, the decision to express in the Model Law strong preference for tendering should be discussed, with particular reference to the objectives listed in the preamble. It was also observed that reference to "best value" in the last line of paragraph 1 should be deleted, since whether tendering was likely to provide the best value even in exceptional cases was a question of policy to be decided by the procuring entity.

Article 14

230. With regard to the second sentence of paragraph 1, it was suggested that the attention of States should be drawn to the possibility that, in cases in which procuring entities were unable to formulate specifications, before deciding to opt for an alternative method of procurement, they might consider whether the specifications could be prepared with the assistance of consultants. It was also suggested that the language of paragraph 1 refer to "non-feasibility" instead of to "inability" in line with the change in wording agreed in article 14(1) concerning cases in which it was difficult or impossible for the procuring entity to finalize specifications.

Article 15

231. It was suggested that the Guide should refer to rule that procurements should not be subdivided in order to avoid use of tendering proceedings.

Articles 16 and 17

232. No changes were suggested.

Article 18

233. It was suggested that the second sentence of paragraph 1 should be revised, as it was unlikely that in all States the procurement law would specify all publications in which invitations to tender would be published. With regard to paragraph 3, it was suggested that reference to cases of high-value construction as grounds for resort to restricted tendering should be deleted, as this was not envisaged in the Model Law as a permissible ground. It was stated that the case would serve better as an example of where prequalification would be desirable.

Article 19

234. No changes were suggested.

Articles 20 and 21

235. No changes were suggested.

Article 22

236. It was suggested that the title should be shortened and changed so as to reflect the principles of objectivity and non-discrimination. It was also noted that the last sentence of paragraph 1 should be either deleted or recast as its meaning was unclear. It was suggested that paragraph 3 should be modified so as not to cast a negative light to the issuance of bilingual solicitation documents, since this was the practice in a variety of States having more than one official language. What needed to be stressed instead was that a supplier or contractor should be able to base its rights and obligations on either language version. It was observed that there could be less difficulty if it were made clear in the solicitation documents that both language versions were equally authoritative.

Article 23

237. The suggestion was made that the emphasis on the right of the procuring entity to modify the solicitation documents as "fundamental and necessary" was too strong and might be misread as encouraging modification of solicitation documents. The word "important" was suggested as an alternative.

Article 24

238. It was suggested that the reference to "any language" should be changed to "a language used in international trade".

Article 25

239. It was noted that in paragraph 2 it should be emphasized that the decision of the procuring entity to extend the deadline for submission of tenders was not discretionary and not subject to review. It was suggested that the last two sentences of paragraphs 3 and 4 should be redrafted or deleted.

Article 26

240. No changes were suggested.

Article 27

241. It was suggested that paragraph 6 should be expanded to reflect the change in the Model Law decided by

the Commission concerning the point in time after which modification or withdrawal of the tender was subject to forfeiture of the tender security. Another suggestion was that the word "transferable" appearing in the second sentence of paragraph 6 should be replaced by a more appropriate word.

Article 28

242. No changes were suggested.

Article 29

243. It was observed that some of the wording used in paragraph 5 might be misread as recommending the widest possible application of margins of preference, when in fact the purpose of the Guide here was merely to call attention to the reasons for the use of margins of preference. To this end, it was suggested that the words "advantages of" be substituted by the words "reasons for".

Article 30

244. No changes were suggested.

Article 31

245. It was suggested that the Guide, in addition to referring to the problem of undesirable "auctioning off" of procurement contracts as a ground for prohibiting negotiations, should also mention that prices offered in expectation of negotiations were often higher.

Article 32

246. It was noted that the drafting of paragraph 3 would be reconsidered. It was suggested that, in paragraph 6, the words "should be in accordance" should be replaced by the words "shall be in accordance".

Introduction to chapter IV

247. It was suggested that the drafting of the third sentence should be reviewed, in particular the use of the words "to incorporate".

Article 33

248. No changes were suggested.

Article 34

249. It was suggested that the last sentence of paragraph 2 should be revised so as to make it clear that the use of the wider notification procedure should not be cast aside casually.

Article 35

250. It was noted that the wording in paragraph 1 referring to article 35 as a "skeleton provision" would be modified since it was not fully in line with the informal, relatively unregulated nature of competitive-negotiation proceedings. It was further suggested that paragraph 3 should be redrafted.

Article 36

251. It was observed that it would be useful to indicate that the procuring entity could use internationally recognized systems of terminology such as INCOTERMS.

Article 37

252. It was noted that the description of single-source procurement, as was the case for the description of request for quotations, was minimal and could be usefully expanded. It was also recalled that the introduction would be expanded to include a more detailed summary, in lay language, of the various types of procurement methods available under the Model Law. It was also suggested that in the context of discussion of article 37 the attention of legislators should be drawn to the applicability to single-source procurement of the general provisions of the Model Law, including article 11 on record requirements and the new article on the publication of notices of procurement contract awards.

Introduction to chapter V

253. It was suggested that in paragraph 7 it could be added that the procuring entity and the contractor or supplier were not precluded by the Model Law from submitting to arbitration, in appropriate circumstances, a dispute relating to the procedures in the Model Law. At the same time it was emphasized that the decision not to treat arbitration in the Model Law was a deliberate one, stemming from the rather narrow scope for arbitration in the procedures envisaged in the Model Law.

Article 38

254. It was suggested that in the second sentence of paragraph 1 the words "as such" should be deleted so as to make clearer the intended effect of article 38 to limit the right to review to suppliers and contractors. It was suggested that the third sentence should either be made clearer or deleted. The penultimate sentence in the same paragraph was questioned as merely paraphrasing the Model Law, something that raised the risk of diverse interpretations. It was also suggested that the present text should be modified so as to avoid suggesting that the degree of detriment required to have standing was a question of "capacity".

Article 39

255. It was noted that in the first sentence of paragraph 3 the word "promptly" would be inserted before the word "filed" and the words "and resolved" would be deleted. It was also noted that the points made in paragraph 8 would be amplified.

Article 40

256. It was observed that in the second sentence of paragraph 12 the word "large" should be deleted.

Article 42

257. It was observed that it should be explained in the Guide that article 42 struck a balance between the right of the supplier or contractor to have a complaint reviewed and the need of the procuring entity to conclude a contract in an economic and efficient way. It was also noted that it might be made clearer that the overall period of suspension was not to exceed 30 days.

258. Subject to the implementation by the Secretariat of the changes necessary in order to reflect decisions of the Commission on the Model Law, and the suggestions made by the Commission, the Commission adopted the Guide. The Commission agreed that the exact format in which the Model Law and the Guide would be published could be left to the Secretariat, subject to the procedures for publication of United Nations documents and the budgetary restrictions. The Commission agreed that, in the case that the two texts would be published in two separate documents, the attention of readers of one document should be drawn to the other by way of a footnote to be inserted in both documents.

F. Future work relating to the procurement of services

259. The Commission had before it a note by the Secretariat on possible future work on the elaboration of model statutory provisions on procurement of services (A/CN.9/378/Add.1). The note addressed the desirability and feasibility of preparing such model provisions, the differing considerations with respect to the procurement of services and the procurement of goods or construction, and the possible content of model statutory provisions. The note also presented the draft text of possible amendments to the UNCITRAL Model Law on Procurement of Goods and Construction that would be designed to expand its scope to cover the procurement of services.

260. As regards the desirability of preparing model provisions on the procurement of services, the note recalled that the Working Group had decided to limit the Model Law, at least initially, to the procurement of goods and construction, primarily because the procurement of services was governed by different considerations than those that governed the procurement of goods or construction. In this

light the note suggested that, with the adoption of an UNCITRAL Model Law dealing with procurement of goods and construction, the Commission might consider it desirable to proceed with the preparation of provisions on procurement of services. Furthermore, it was noted that a number of States already considering enacting legislation on the basis of the Model Law had expressed the need for a comprehensive model for a legislative framework for procurement also covering the procurement of services. The view was expressed that since a number of States had already shown an interest in the development of model statutory provisions on the procurement of services, it would be opportune for the Commission to prepare such provisions without delay now that the Model Law had been adopted.

261. A concern was expressed, however, that the preparation of model statutory provisions on the procurement of services might conflict with the work being carried out under the auspices of the General Agreement on Tariffs and Trade (GATT) on expansion of the GATT Agreement on Government Procurement to cover services. It was stated that it might be more prudent to await finalization of the work in GATT so as to ensure compatibility between the two projects. A countervailing view was that there was no risk of conflict between the work being carried out in GATT because, while the work in GATT concerned general access to trade in services, work by the Commission would be focused on the question of how the procurement of services would be carried out. It was also pointed out that the Model Law already provided that, in case of a conflict, treaty obligations of States would prevail. The prevailing view was that the Working Group should proceed with the preparation of draft provisions, while ensuring compatibility between the two projects, something that would be facilitated by the fact that GATT was scheduled to finalize its work in December 1993, while the Working Group would be presenting its work to the Commission in May 1994.

262. Differing views were expressed as to the best possible way in which the Commission should proceed in formulating the model provisions. One view was that, as recommended in the note by the Secretariat, an additional chapter, IV *bis*, should be added to the Model Law, dealing exclusively with the procurement of services. Another view was that the model provisions on services should be "self-standing" since the Model Law on Procurement of Goods and Construction had already been adopted and was available to be used without any further revision. After deliberation, the Commission agreed that the two approaches were not mutually exclusive and that the draft provisions on services should be presented in a manner that was suitable both for States that had adopted the Model Law on Procurement of Goods and Construction, and for States considering simultaneous adoption of provisions for goods, construction and services.

III. LEGAL ISSUES IN ELECTRONIC DATA INTERCHANGE

263. At its twenty-fourth session, in 1991, the Commission was agreed that the legal issues of electronic data in-

terchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a Working Group.⁵

264. At its twenty-fifth session, in 1992, the Commission had before it the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (*ibid.*, paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.⁶

265. At its current session, the Commission had before it the report of the Working Group on Electronic Data Interchange on the work of its twenty-fifth session (A/CN.9/373). The Commission expressed its appreciation for the work accomplished by the Working Group. The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.

266. The view was expressed that, in addition to preparing statutory provisions, the Working Group should engage in the preparation of a model communication agreement for optional use between EDI users. It was explained that most attempts to solve legal problems arising out of the use of EDI currently relied on a contractual approach. That situation created a need for a global model to be used when drafting such contractual arrangements. It was stated in reply that the preparation of a standard communication agreement for universal use had been suggested at the twenty-fourth session of the Commission. The Commission, at that time, had decided that it was premature to engage immediately in the preparation of a standard communication agreement and that it might be preferable, provisionally, to monitor developments in other organizations, particularly the European Communities and the Economic Commission for Europe.⁷ After discussion, the Commission reaffirmed its decision to postpone its consideration of the matter until the texts of model interchange agreements currently being prepared within those organizations were available for review by the Commission.

267. It was suggested that, in addition to the work currently under way in the Working Group, there existed a need for considering particular issues that arose out of the use of EDI in some specific commercial contexts. The use of EDI in procurement and the replacement of paper bills of lading or other documents of title by EDI messages were given as examples of topics that merited specific considera-

⁵Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 306-317.

⁶*Ibid.*, Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

⁷*Ibid.*, Forty-sixth Session, Supplement No. 17 (A/46/17), para. 316.

tion. It was also suggested that the Commission should set a time limit for the completion of its current task by the Working Group. The widely prevailing view, however, was that the Working Group should continue to work within its broad mandate established by the Commission. It was agreed that, only after it had completed its preparation of general rules on EDI, the Working Group should discuss additional areas where more detailed rules might be needed.

268. The Commission reaffirmed the need for active cooperation between all international organizations active in the field. It was agreed that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role with respect to the legal issues of EDI. The Commission decided that the Secretariat should continue to monitor legal developments in other organizations such as the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE), the European Communities and the International Chamber of Commerce (ICC) and report to the Commission and its relevant Working Groups on the work accomplished within those organizations.

IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT

269. The Commission, at its twenty-second session, in 1989, decided that work on a uniform law on guarantees and stand-by letters of credit should be undertaken, and entrusted that task to the Working Group on International Contract Practices.⁸

270. The Working Group had commenced its work on the topic at its thirteenth session by considering possible issues of a uniform law. At its fourteenth and fifteenth sessions, the Working Group had examined draft articles 1 to 7 of the uniform law and further issues to be dealt with in a uniform law. At its sixteenth session the Working Group had examined draft articles 1 to 13 and at its seventeenth session draft articles 14 to 27 of the uniform law prepared by the Secretariat. The reports of those sessions of the Working Group were contained in documents A/CN.9/330, A/CN.9/342, A/CN.9/345, A/CN.9/358 and A/CN.9/361.

271. At its current session, the Commission had before it the reports of the Working Group on the work of its eighteenth and nineteenth sessions (A/CN.9/372 and A/CN.9/374). The Commission noted that the Working Group had during its eighteenth session examined draft articles 1 to 8 and during its nineteenth session draft articles 9 to 17 of the draft Convention on International Guaranty Letters prepared by the Secretariat.

272. The Commission noted that the Working Group had requested the Secretariat to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 17 of the draft Convention.

The Commission further noted that, during the eighteenth session of the Working Group, the United States of America had submitted draft rules on stand-by letters of credit on the assumption that independent guarantees and stand-by letters of credit would be dealt with in separate parts of the future Convention. It was agreed at that session that the Working Group could appropriately determine whether there would be a need for such treatment in separate parts when it would be made clear which, and how many, provisions should be applicable exclusively to bank guarantees or to stand-by letters of credit.

273. The Commission expressed its appreciation for the valuable work done so far by the Working Group on a matter that was complex and on which few models existed. The Commission, however, also expressed its concern about the slow progress made by the Working Group so far and requested it to consider methods of carrying out its task more expeditiously. Several observations were made that the progress of work in the Working Group was negatively affected by reopening issues that had been considered and agreed upon and by submitting new proposals on settled questions. The Commission requested the Working Group to proceed with its work expeditiously so as to complete it before the twenty-eighth session of the Commission in 1995.

V. CASE LAW ON UNCITRAL TEXTS (CLOUT)

A. Introduction

274. Based on a decision by the Commission taken at its twenty-first session (1988),⁹ the Secretariat had established a system for collecting, and disseminating information on, court decisions and arbitral awards relating to the Conventions and Model Laws that had emanated from the work of the Commission. The acronym for the system was CLOUT ("Case law on UNCITRAL texts").

275. Currently, the following legal texts were covered by the system: The Convention on the Limitation Period in the International Sale of Goods (New York, 1974), and as amended by the Protocol of 1980; United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); UNCITRAL Model Law on International Commercial Arbitration (1985); and the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978).

276. The system would also cover other Conventions and Model Laws as they enter into force or were implemented by States, including the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991); UNCITRAL Model Law on International Credit Transfers (1992); and the UNCITRAL Model Law on Procurement of Goods and Construction (1993).

⁸Ibid., *Forty-fourth Session, Supplement No. 17 (A/44/17)*, para. 244.

⁹Ibid., *Forty-third Session, Supplement No. 17 (A/43/17)*, paras. 98-109.

277. The system relied on a network of national correspondents, designated by the States that were parties to one of the Conventions or have enacted legislation based on a Model Law. A national correspondent could be an individual, a governmental unit or body or a suitable non-governmental institution. The duty of national correspondents was to collect court decisions and arbitral awards, and prepare abstracts of them in one of the official languages of the United Nations. An abstract, normally up to one half of a page long, provided summary information about the facts and propositions of law in the decision or award, and enabled readers to decide whether it was worthwhile to obtain and examine the complete decision or award. The Secretariat stored the decisions and awards in their original form, translated the abstracts into the other five United Nations languages, and published the abstracts in the six United Nations languages.

278. The abstracts were published as part of the regular documentation of UNCITRAL under the identifying symbol A/CN.9/SER.C/ABSTRACTS/ followed by the consecutive number. The decisions and awards were available to any interested person upon request and against a fee for copying and sending them. A more detailed explanation of the system was contained in the document entitled "Case law on UNCITRAL texts (CLOUT), User guide" (A/CN.9/SER.C/GUIDE/1). The first compilation of 20 abstracts relating to the United Nations Sales Convention and the UNCITRAL Model Arbitration Law was published under the symbol A/CN.9/SER.C/ABSTRACTS/1.

279. The abstracts were subject to the copyright of the United Nations. According to the copyright notice, Governments and governmental institutions might reproduce or translate abstracts without permission, but were requested to inform the United Nations of such reproduction or translation. All requests by others for permission to reproduce or translate abstracts were to be referred to the United Nations Publications Board. The Board, in deciding on such requests in consultation with the UNCITRAL secretariat, would be guided by the objectives of the system, which was to provide worldwide awareness in the application of UNCITRAL legal texts.

280. With a view to enhancing the usefulness of the system, the Secretariat intended to publish at an appropriate time separate indices for the texts covered by the system. Each index will be based on a classification scheme in the form of a "thesaurus" of issues that followed the order of the provisions of the respective text, with additional sub-categories of issues as appropriate.

B. Considerations by the Commission

281. The Commission noted with pleasure the issuance of the two first CLOUT publications. The conviction was expressed that the system will be beneficial in several respects. Among the benefits mentioned were a better understanding by practitioners of the statutory texts covered by the system, improved quality of teaching in those areas of international trade law, increased awareness about those texts, promotion of uniform interpretation, availability to

the Commission of information about how the texts were understood and applied in the national laws, and an unprecedented reduction of costs and language barriers in the exchange of information on case law.

282. It was suggested that in the further elaboration of the system, and in particular in preparing the thesaurus, account should be taken of the need to facilitate searching for decisions relevant to a given issue.

283. It was considered that it would be useful to include the information gathered by the CLOUT system in the programmes of seminars and other training activities organized under the auspices of the Commission.

284. The Commission heard with interest information about a non-profit project established by the Centre for Comparative Legal Studies, a joint venture between the Italian National Research Council, the University "La Sapienza", Rome, and the International Institute for the Unification of Private Law (UNIDROIT), in the context of which a computerized database was established for case law relating to the United Nations Sales Convention and the Convention on the Limitation Period in the International Sale of Goods. The information in the database was arranged according to a thesaurus of issues that followed the order of provisions of the Conventions and included additional sub-categories of issues; in the preparation of that thesaurus use was made of a draft thesaurus prepared by the secretariat of the Commission. It was said that the Centre was ready to cooperate in the CLOUT system established by the Commission. It was noted that the Secretariat would explore possible ways of such cooperation in accordance with the purposes and policies underlying the system established by the Commission.

285. The Commission expressed its appreciation to the national correspondents and the Secretariat for their work relating to the system, urged States to cooperate with the Secretariat in the operation of the system and to facilitate the carrying out of the tasks of the national correspondents.

VI. FUTURE PROGRAMME OF WORK

A. Introduction

286. Pursuant to the decision by the Commission taken at the twenty-fourth session, the Secretariat organized, in the context of the twenty-fifth session of the Commission, the UNCITRAL Congress on International Trade Law around the theme "Uniform commercial law in the twenty-first century". The Congress was held from 18 to 22 May 1992 in the General Assembly Hall at United Nations Headquarters in New York.

287. One of the aims of the Congress was to provide participants, who included practising lawyers, government officials, judges, arbitrators and academics, with a forum in which to voice their practical needs as a basis for future work by the Commission and other formulating agencies.

288. At the current session the Commission had before it a note entitled "Proposals for possible future work made at the UNCITRAL Congress" (A/CN.9/378). The note listed topics on which proposals for the preparation of substantive legal texts had been made at the Congress. The note also listed other suggestions aimed at enhancing coordination with other agencies involved in international trade law, promoting uniformity in the interpretation of uniform texts and intensifying the dissemination of information concerning texts emanating from the Commission.

289. To facilitate decisions by the Commission on possible future work, the Secretariat prepared introductory notes on some of the topics suggested at the Congress. Those introductory notes, presented in addenda to document A/CN.9/378, dealt with the following topics: procurement of services (addendum 1, which was considered under the agenda item "New international economic order: procurement" (paragraphs 259-262)); guidelines for pre-hearing conferences in arbitral proceedings (addendum 2); assignment of claims (addendum 3); cross-border insolvency (addendum 4); and legal issues in privatization (addendum 5). It was noted that the Secretariat intended to present further similar notes on other topics discussed at the Congress.

B. Considerations by the Commission

1. UNCITRAL Congress

290. The Commission expressed its satisfaction with the discussions at the Congress and its appreciation for the excellent organizational work by the Secretariat. The Commission took note with satisfaction of the many favourable reports of, and positive reactions to, the Congress, including, for example, the publication of a special issue of a Spanish trade law journal dedicated to the activities of UNCITRAL. However, it noted with concern that the proceedings of the Congress had not yet been published and requested the Secretariat to do all it could to expedite their publication.

2. Pre-hearing conferences

291. At the UNCITRAL Congress, as well as at other forums discussing international arbitration, it was observed that the principle of discretion and flexibility in the conduct of arbitral proceedings might in some circumstances make it difficult for participants to predict the manner of proceeding and to prepare for the various stages of arbitral proceedings. In connection with such observations, it was stated that those difficulties could be avoided or reduced by holding at an early stage of arbitral proceedings a "pre-hearing conference" between the arbitrators and the parties in order to discuss and plan the proceedings. Furthermore, it was suggested at the Congress that it would be useful to prepare guidelines for pre-hearing conferences.

292. Pursuant to the above discussion at the Congress, the Secretariat prepared for the Commission a note entitled "Guidelines for pre-hearing conferences in arbitral proceedings" (A/CN.9/378/Add.2), which described the practice of holding pre-hearing conferences, suggested that the Commission should prepare guidelines for pre-hearing con-

ferences and gave a tentative outline of topics that might be addressed in such guidelines. In addition, the note considered possible future work by the Commission on the issues of multi-party arbitration and the taking of evidence in arbitration, and in particular the appropriateness of dealing with those issues in the context of guidelines for pre-hearing conferences.

293. Strong support was expressed in the Commission for undertaking the preparation of guidelines for pre-hearing conferences. It was observed that such guidelines would provide welcome assistance to arbitrators and parties both in deciding whether to hold a pre-hearing conference and in conducting such a conference. It was suggested that the guidelines should preserve the beneficial flexibility of arbitral proceedings and avoid suggesting solutions that would be complex, overregulate the proceedings or approximate arbitral proceedings to court proceedings. Some reservations were voiced about the usefulness of the suggested work on the ground that pre-hearing conferences could make arbitral proceedings more rigid than desirable, might lead to conflicts, and possibly present an administrative burden.

294. After deliberation, the Commission decided to proceed with the preparation of guidelines for pre-hearing conferences, for which the note prepared by the Secretariat would constitute a good basis.

295. Recalling that at its nineteenth session in 1986 it had taken the view that multi-party arbitration and the taking of evidence in arbitration gave rise to issues that merited further consideration,¹⁰ the Commission agreed that some issues in multi-party arbitration and the taking of evidence could usefully be dealt with in the guidelines, as suggested in the note. It was further agreed that, after completing work on guidelines, the Commission would consider whether any further work on multi-party arbitration and the taking of evidence would be necessary.

296. The Secretariat was requested to prepare for the twenty-seventh session of the Commission, in 1994, a draft of guidelines on pre-hearing conferences. The Commission planned to discuss the draft guidelines at the session in 1994, after considering draft model legislative provisions on procurement of services, and to adopt guidelines on pre-hearing conferences at that session or at the twenty-eighth session in 1995.

3. Assignment of claims

297. One of the topics proposed during the Congress for possible future work by the Commission was assignment of claims.

298. The Commission had before it a note prepared by the Secretariat on assignment of claims and related matters (A/CN.9/378/Add.3). The note described briefly some of the legal issues in assignment of claims that gave rise to problems in international trade; those issues were: differ-

¹⁰Ibid., *Forty-first Session, Supplement No. 17 (A/41/17)*, paras. 254-258.

ences among national laws concerning the validity of assignments of claims; differing requirements for a valid assignment of a claim to be effective towards the debtor; conflicts of priority between the assignee and another person asserting a right in the assigned claim. The note suggested that a study should be prepared on the possible scope of uniform rules on assignment of claims and on possible issues to be dealt with in the rules.

299. It was observed that significant differences existed among national rules on assignment of claims and that it would be difficult to reach agreement on unified solutions. Furthermore, legal issues in the area of assignment of claims touched upon other areas of law, such as security interests and insolvency, that were not unified and where unification was unlikely to be achieved in the foreseeable future. It was further observed that the Governing Council of UNIDROIT had a few weeks ago decided that a study be prepared on the feasibility of a universal model law on security interests; any work by the Commission would thus be wasteful duplication of work. On the basis of those observations it was suggested not to undertake work on assignment of claims.

300. The prevailing view, however, was in favour of requesting the Secretariat to prepare a feasibility study as suggested in the note. It was stated in support of that view that more research and information was needed for the Commission to decide on the feasibility of any work of unification; it was the very purpose of the study to provide such information and to identify any particular area in which unification efforts appeared to be promising. Moreover, it was not to be viewed as a duplication of work if the Secretariat undertook such a feasibility study on assignment of claims in the face of the above decision of UNIDROIT which related to the vast and largely different area of security interests; obviously, the Secretariat would consult with UNIDROIT and other international organizations when preparing the study and would, if unification efforts were regarded as promising, discuss with UNIDROIT concrete measures of coordination and co-operation. A number of delegations reiterated their concern that duplication of efforts should be avoided. It was pointed out in response that, on the basis of the information in the Secretariat note and in the report of the Secretary-General of UNIDROIT, no duplication was likely to occur.

301. After deliberation, the Commission decided to request the Secretariat to prepare, in consultation with UNIDROIT and other international organizations, a study on the feasibility of unification work in the field of assignment of claims and to decide at its twenty-seventh session, on the basis of that study, whether or not work should be undertaken by the Commission.

4. *Cross-border insolvency*

302. At the UNCITRAL Congress it was proposed that the Commission should consider undertaking work on international aspects of bankruptcy.

303. As a consequence of that proposal, the Commission had before it a note prepared by the Secretariat on cross-

border insolvency (A/CN.9/378/Add.4). The note considered the following legal issues that might give rise to problems due to a lack of harmony among national laws: the effects of liquidation proceedings in one State on assets located in another State; cross-border judicial assistance in insolvency matters; the extent to which all creditors may participate in insolvency proceedings; priority rules in distribution of assets to creditors; extra-territorial effects of cross-border compositions; recognition of security rights in insolvency proceedings; and the impeachment of a debtor's transaction prejudicial to creditors. The note also provided a brief description of previous work at the international level towards harmonization of laws in the area.

304. Concerns were expressed about the feasibility of a project to harmonize rules on international aspects of insolvency. It was said that other organizations that had initiated similar projects encountered many difficulties in reaching agreed solutions and that the texts prepared by those organizations had not led to the desired result or to wide acceptance. The view was expressed that, in light of those concerns, the Commission should not undertake work in this field of law.

305. The prevailing view, however, was that the practical problems caused by the disharmony among national laws governing cross-border insolvencies warranted further study of legal issues in cross-border insolvencies and possible internationally acceptable solutions. It was stated that the reasons for the unsuccessful experience of other organizations should be carefully studied and taken into account in future deliberations of the Commission.

306. After deliberation, the Commission requested the Secretariat to prepare for a future session of the Commission an in-depth study on the desirability and feasibility of harmonized rules of cross-border insolvencies. The study should consider which aspects of cross-border insolvency law lent themselves to harmonization and what might be the most suitable vehicle for harmonization.

5. *Legal issues in privatization*

307. At the UNCITRAL Congress, a suggestion was made for the Commission to consider preparation of a legal guide on "privatization contracts", i.e., contracts by which State-owned enterprises were transferred to private parties. The purpose of such a guide would be to help States in the process of privatization as well as to protect the legitimate interests of private investors.

308. The Commission had before it a note entitled "Legal issues in privatization" (A/CN.9/378/Add.5). The note summarized the legislative and institutional framework needed for the implementation of privatization programmes and described some clauses specific to contracts for the sale of enterprises.

309. The Commission considered that the policies of States regarding privatization differed considerably and that, as a result, national laws to implement those policies did not lend themselves to unification. In addition, it was considered that many issues to be covered in those laws

pertained to areas other than trade law. As a result of those considerations, it was concluded that the Commission should not undertake work concerning legislation relating to privatization.

310. As to legal issues in privatization contracts, the Commission considered that those issues depended on State policies and that solutions considered appropriate in one State might not be useful in others. Nevertheless, it was considered that the need for any work on those issues might be reconsidered, should the development of contract practices in that area so indicate.

6. *Build, Operate and Transfer (BOT)*

311. At the UNCITRAL Congress it was proposed that the Commission should consider undertaking work in the area of the Build, Operate and Transfer (BOT) project financing concept. At the current session, the Commission had before it a note on possible future work (A/CN.9/378), in which the Secretariat reported on the specific features of BOT and the work being undertaken on a note for the next session of the Commission on the desirability and feasibility of possible future work in this area. In this respect the Secretariat informed the Commission that it was closely monitoring the work by UNIDO on the preparation of "Guidelines for the Development, Negotiating and Contracting of BOT projects". The Commission noted with appreciation the efforts of the Secretariat and emphasized the relevance of BOT and the utility of the introductory note being prepared by the Secretariat.

7. *Other proposals*

312. It was reported that, as the result of a private initiative, an international moot arbitration competition based upon the legal texts formulated by the Commission was being organized, consisting of regional rounds, followed by an international final round scheduled to take place in March 1994. The purpose of the exercise is to promote and expand familiarity with and understanding of UNCITRAL legal texts.

VII. COORDINATION OF WORK

313. The Commission had before it a report of the Secretary-General on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/380). The report was prepared in order to update and supplement the report submitted at the twenty-third session of the Commission (A/CN.9/336), which covered activities of international organizations up to 15 February 1990. It was based on information available to the Secretariat from 15 February 1990 generally up to March 1993. In addition, it contained a new chapter summarizing the activities of international organizations on training and assistance.

314. In the context of the coordination of work, representatives of the Asian-African Legal Consultative Committee (AALCC) and the International Institute for the Unification of Private Law (UNIDROIT) made statements concerning the activities of their respective organizations. The Commission noted with satisfaction the close cooperation between it and those other organizations.

315. It was also observed that work at UNCTAD on a draft international code of conduct on the transfer of technology (see A/CN.9/380, para. 39), which involved mainly legal issues, had slowed down, and it was suggested that the Commission cooperate with UNCTAD with a view to expediting completion of this important project. It was also suggested that the Commission should monitor work at UNCTAD on restrictive business practices (see A/CN.9/380, para. 112), since the substantive issues arising with regard to this topic were of a legal rather than trade policy nature.

316. The Commission noted with appreciation the efforts of the Secretariat to monitor the activities of international organizations related to the harmonization and unification of international trade law.

VIII. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

317. The Commission considered the status of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) ("the Limitation Convention"), the Protocol amending the Limitation Convention (Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) ("the UNCITRAL Bills and Notes Convention") and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) ("the United Nations Terminal Operators Convention"). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Arbitration Law"). The Commission had before it a note by the Secretariat on the status of those Conventions and of the Model Law as at 13 July 1993 (A/CN.9/381).

318. The Commission was pleased to note that, since the report submitted to the Commission at its twenty-fifth session (1992), Slovakia deposited an instrument of succession to the ratification by the former Czechoslovakia of the Limitation Convention, to the accession of the former Czechoslovakia to the Protocol amending the Limitation Convention, to the ratification by the former Czechoslova-

kia of the United Nations Sales Convention and to the signature by the former Czechoslovakia of the Hamburg Rules.

319. The Commission noted with pleasure the accession of Bangladesh, Barbados and Turkey to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the deposit by Slovenia of an instrument of succession to the accession by former Yugoslavia to that Convention.

320. The Commission noted with pleasure that Mexico had acceded to the UNCITRAL Bills and Notes Convention. The Convention required eight more adherences for entry into force.

321. With respect to the UNCITRAL Arbitration Model Law, the Commission noted with pleasure that legislation based on the Model Law had been enacted in Peru and Tunisia.

322. Representatives and observers of a number of States reported that official action was being taken with a view to adherence to the United Nations Sales Convention, the Limitation Convention as amended by the Protocol, the Hamburg Rules, the UNCITRAL Bills and Notes Convention and to adoption of legislation based on the UNCITRAL Model Arbitration Law.

323. The Commission noted that there was some uncertainty as to whether newly formed States considered themselves bound by the Conventions to which their predecessor States were parties. It therefore called upon those newly formed States to clarify their position and to notify the Secretary-General accordingly.

324. It was agreed that, in addition to the useful document issued for each annual session of the Commission listing States that had become parties to legislative texts of the Commission, it would be useful for Governments to receive during the year from the Secretariat information on developments concerning those texts, including information, to the extent available, as to States that were considering adoption of those texts. In that connection, States were invited to designate a person or an organ that would receive such information.

325. The Commission recalled that the Hamburg Rules had entered into force on 1 November 1992. It was noted that, as of that date, the liability regime of the Hamburg Rules coexisted with liability regimes based on the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924) (Hague Rules) and that for goods carried in a given vessel the applicable regime depended on whether the goods were loaded or discharged in a State party to the Hamburg Rules or whether the transport document was issued in such a State. It was suggested that, in view of such undesirable diversity of liability regimes, it was recommendable to promote unification of regimes on the basis of the Hamburg Rules. In that context, the Commission was pleased to note that in resolution 47/34 of 25 November 1992, the General Assembly requested the Secretary-General to make increased efforts to promote wider adherence to the Convention.

326. The Commission was informed that in 1993 the secretariat of the Economic and Social Commission for Asia and the Pacific published a book entitled *Guidelines for Maritime Legislation* (Guidelines Volume I), third edition (ST/ESCAP/1076), which commented upon the Hamburg Rules and the United Nations Terminal Operators Convention. As to the Hamburg Rules, the book advised States already parties to the Hague Rules, so as to modernize the existing regime, to add to the regime based on the Hague Rules certain provisions based on the Hamburg Rules. It was observed that this advice was prone to lead to disparity and inconsistency and ran counter to the recommendations contained in General Assembly resolutions. As to the United Nations Terminal Operators Convention, the book expressed the view that there was no need for legislation based on the Convention and that it was preferable to leave the liability issues covered by the Convention to be subject to contractual terms. It was observed that that view did not take into account that one of the principal reasons for the preparation of the Convention was the use by terminal operators of general contract conditions containing broad exclusions and limitations of liability.

327. The Commission heard expressions of serious concern about the type of advice given in the Guidelines, the fact that the advice given fostered continued disharmony of law, and the fact that the secretariat of the Commission was not invited to participate in the preparation of the book. It was considered to be unacceptable that a United Nations publication should express views that questioned in an unbalanced and biased way the advisability of adherence to Conventions prepared by United Nations diplomatic conferences.

328. The Commission called upon the Economic and Social Commission for Asia and the Pacific to undertake, in cooperation with the secretariat of the Commission, immediate revision of the Guidelines and to issue the revised publication within the shortest possible time.

IX. TRAINING AND TECHNICAL ASSISTANCE

329. The Commission had before it a note by the Secretariat that set out the activities that had been carried out in respect of training and assistance during the period between the twenty-fifth and the current sessions of the Commission, as well as possible future activities in that field (A/CN.9/379). The note indicated that, since the statement of the Commission at its twentieth session (1987) "that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past",¹¹ the Secretariat had endeavoured to devise a more extensive programme of training and assistance than had been previously carried out.

330. As announced to the twenty-fifth session of the Commission in 1992, the Fifth UNCITRAL Symposium on International Trade Law was held on the occasion of the twenty-sixth session of the Commission, having taken place from 12 to 16 July 1993. As was the case at the Fourth Symposium in 1991, lecturers were invited prima-

¹¹Ibid., *Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

rily from delegations to the twenty-sixth session and from the Secretariat. In order to save on the cost of interpretation and to be able to increase the communication between participants themselves, the Symposium was held in French and English only. The travel costs of 20 participants from African countries were paid from the UNCITRAL Trust Fund for Symposia. In addition, 38 individuals attended without such financial assistance.

331. It was reported that, in view of the relative cost-effectiveness of national seminars compared to regional seminars, the Secretariat had since the previous session emphasized the holding of strings of national seminars. The following national seminars had taken place since the previous session: (a) Bangkok, Thailand, held in cooperation with the Ministry of Foreign Affairs and attended by approximately 150 participants; (b) Jakarta and Surabaya, Indonesia, held in cooperation with the Ministry of Foreign Trade and attended by approximately 150 participants; (c) Lahore, Pakistan, held in cooperation with the Export Promotion Bureau and the Research Society for International Law and attended by approximately 75 participants; (d) Colombo, Sri Lanka, held in cooperation with the Attorney-General's Department, the Bar Association of Sri Lanka and the University of Colombo, and attended by approximately 160 participants; (e) Dhaka, Bangladesh, held in cooperation with the Export Promotion Bureau and the Bangladesh Institute of Law and International Affairs and attended by approximately 70 participants; (f) Kiev, Ukraine, held in cooperation with the Ministry of Foreign Economic Relations and attended by approximately 30 participants; (g) Warsaw, Poland, held in cooperation with the Polish Chamber of Commerce and attended by approximately 40 participants; (h) Rogaska Slatina, Slovenia, held in cooperation with the Law School of Maribor and Slovenian Government authorities and attended by approximately 90 participants.

332. It was noted that Secretariat members had participated in and contributed to seminars and courses related to international trade law organized by other organizations such as the European Community (EC), the Organisation for Economic Co-operation and Development (OECD), the International Labour Organisation (ILO) and the London Court of Arbitration.

333. It was reported that the Secretariat expected to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law, especially for developing countries and newly independent States. For the remainder of 1993, additional sites for seminars being planned included Argentina, Azerbaijan, Belarus, Brazil, Georgia, Kyrgyzstan, Mongolia, the Republic of Moldova and Uzbekistan. It was planned that additional requests for seminars that had been received from various African, Latin American and Caribbean countries would be met in 1994. It was emphasized by the Secretariat that its ability to implement these plans was contingent upon the receipt of sufficient funds in the form of contributions to the Trust Fund for Symposia.

334. The Secretariat reported that direct legal technical assistance had been provided to a number of countries considering adoption of legislation or based on

UNCITRAL texts. This frequently involved review of draft legislation and often took place in the form of an exchange in writing of observations and suggestions. Where considered more appropriate, and in case availability of funds permitted it, this type of assistance has also taken place in conjunction with seminars or through specific missions for that purpose.

335. It was also noted that, in line with the Secretary-General's policy of developing an integrated approach for the development assistance activities of the United Nations system, the Secretariat had initiated contacts with the United Nations Development Programme (UNDP), the main funding, planning and coordinating body of technical development assistance within the United Nations system. This approach particularly aims at an appropriate integration of UNCITRAL's technical assistance activities into the United Nations technical assistance programmes, in particular in the area of law reform. Contact had also been initiated with the Legal Advisory Services for Development (LASD), a recently established entity within the United Nations Secretariat. It was also noted that cooperation had been established with organizations outside of the United Nations system, for example, with the SIGMA programme of OECD in the area of procurement, and with the Pacific Economic Cooperation Council (PECC), regarding an action programme on harmonization of trade law in the Pacific basin.

336. The Secretariat reported that growing awareness of the UNCITRAL legal texts in many countries, in particular developing countries and newly independent States, was resulting in increased requests for technical assistance from individual Governments and regional organizations. It was also noted that no funds for the travel of participants and lecturers had been provided for in the regular budget. As a result, expenses had to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia. Particular attention was drawn in this respect to the fact that the amount of funds needed for UNCITRAL training and technical assistance in the area of international trade law were comparatively small while the benefits to be drawn from modernization and progressive harmonization of legal rules in the area of international trade were considerable.

337. Of particular value had been the contributions made to the UNCITRAL Trust Fund for Symposia on a multi-year basis, because they permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such contributions had been received from Canada and Finland. In addition, the annual contributions from France and Switzerland had been used for the training and technical assistance programme. Financial contributions had also been made by Cyprus. A specific contribution to the funding of the Fifth UNCITRAL Symposium had been received from Denmark. Yet, while the demand for training and technical assistance was increasing sharply, the availability of funds had actually diminished.

338. The Commission expressed its appreciation to all those who had participated in the organization of UNCITRAL seminars, and in particular to those that had given financial assistance to the programme of seminars

and the UNCITRAL Trust Fund for Symposia. The Commission also expressed its appreciation to the Secretariat for its efforts to conduct an expanded programme of seminars and symposia. Recognizing the crucial importance of training and technical assistance as one of the major vehicles of the UNCITRAL dissemination and communication system, the Commission noted the need for States to consider making contributions to the UNCITRAL Trust Fund for Symposia so as to enable the Secretariat to meet the increasing demands for training and technical assistance, especially in developing countries and newly independent States. In addition, the need was noted for increased cooperation and coordination with development assistance agencies, particularly those within the United Nations system.

X. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

A. General Assembly resolution on the work of the Commission

339. The Commission took note with appreciation of General Assembly resolution 47/34 of 25 November 1992 on the report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session. In particular, the Commission took note of the request by the General Assembly, expressed in paragraph 12 of resolution 47/34, that the Fifth Committee, in order to ensure full participation by all Member States, continue to consider granting travel assistance, within existing resources, to the least developed countries that are members of the Commission, as well as, on an exceptional basis, to other developing countries that are members of the Commission at their request, in consultation with the Secretary-General, to enable them to participate in the sessions of the Commission and its working groups. The Commission further took note of the recommendation of the General Assembly, expressed in paragraph 13 of resolution 47/34, that the Commission pay special attention to the rationalization of the organization of its work and consider all possibilities for rationalization, in particular the holding of consecutive meetings of its working groups, and of the Assembly's request, in paragraph 14 of the same resolution, that the Secretary-General submit a report on the implementation of paragraphs 12 and 13 to the Assembly at its forty-eighth session.

340. The Commission considered the recommendation of the General Assembly contained in paragraph 13 of resolution 47/34. It was observed that the Commission had on three previous occasions, at its twenty-first session (1988), at its twenty-third session (1990) and at its twenty-fifth session (1992), considered the rationalization of its working methods, including the issue of whether the holding of consecutive meetings for its working groups was practicable and whether it could result in savings on the cost of the travel expenses for delegations to UNCITRAL meetings. The Commission had concluded that the holding of consecutive meetings for its working groups was impracticable. It was noted that because of the nature of the work assigned to each working group, delegations were normally composed of different experts. The holding of consecutive

working group meetings would not result in a lesser number of experts travelling to such meetings and would not therefore result in savings on travel costs for delegations. It was further observed that even where the same experts might be able to travel to more than one working group meeting, the length of time that the experts might be required to be away from their duty stations, if working group meetings were to be consecutive, might be too long. Many experts might not be able to afford long periods of absence from their work. Moreover, it was observed that such a practice might encourage States to keep the same experts already attending one working group meeting for the following one, notwithstanding that those experts might not be the appropriate ones, to the detriment of the work of the Commission.

341. The Commission further observed that the holding of consecutive working group meetings would not result in saving on staff travel costs since different members of the UNCITRAL secretariat were normally assigned to service each working group. The members of the secretariat were customarily involved in the preparation of background research studies analysing various aspects of the subject under consideration by the working group to which they were assigned. It was noted that it would be impracticable to assign a member of staff who had not been involved in the preparation of documents relating to a particular working group to service that working group. The holding of consecutive working group meetings would not therefore result in a reduction in the number of members of the secretariat travelling to such meetings. It was suggested that the upcoming working group sessions, with two instances of consecutive meetings (see paragraphs 345-347), would provide an opportunity for witnessing the practical effects of consecutive meetings and would in all likelihood demonstrate the above disadvantages to the work of the Commission.

342. In the context of the discussion on the rationalization of the work of the Commission, it was emphasized that a rational and successful use of conference resources required the availability of the pre-session documents in all official languages at a sufficiently early time so as to allow for consultations within the given countries. It was noted with concern that many documents for the current and for recent sessions had not been available well in advance of the session, largely due to the severe shortage of human resources in the Secretariat. The Commission was agreed that all efforts should be made to remedy that situation, in particular by allowing exceptions to any hiring freeze or by otherwise recruiting additional staff.

B. Bibliography

343. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/382).

C. Date and place of the twenty-seventh session of the Commission

344. It was decided that the Commission would hold its twenty-seventh session from 31 May to 17 June 1994 in New York.

D. Sessions of the working groups

345. It was decided that the Working Group on Electronic Data Interchange would hold its twenty-sixth session from 11 to 22 October 1993 at Vienna and its twenty-seventh session from 28 February to 11 March 1994 in New York.

346. It was decided that the Working Group on International Contract Practices would hold its twentieth session from 22 November to 3 December 1993 at Vienna and its twenty-first session from 14 to 25 February 1994 in New York.

347. It was decided that the Working Group on the New International Economic Order would hold its sixteenth session from 6 to 17 December 1993 at Vienna and, if needed

for the completion of its work on procurement of services, would hold its seventeenth session from 14 to 25 March 1994 in New York.

ANNEX I

UNCITRAL Model Law on Procurement of Goods and Construction

[Annex I is reproduced in part three, I, of this *Yearbook*.]

ANNEX II

List of documents before the Commission at its twenty-sixth session

[Annex II is reproduced in part three, V, A, of this *Yearbook*.]

B. United Nations Conference on Trade and Development (UNCTAD): extracts from the report of the Trade and Development Board on the first part of its fortieth session (TD/B/40(1)/14 (Vol. I))*

“(a) *Progressive development of the law of international trade: twenty-sixth annual report of the United Nations Commission on International Trade Law*

1. At its 832nd (closing) meeting, on 1 October 1993, the Trade and Development Board took note of the report of the United Nations Commission on International Trade Law on its twenty-sixth session (A/48/17), circulated to the Board under cover of a note by the UNCTAD secretariat (TD/B/40(1)/9).

2. The Board further noted that, under the provisions of General Assembly resolution 2205 (XXI), the comments made on the report would be transmitted to the General Assembly.⁴

⁴For the statement by the representative of the United States of America on the UNCITRAL report, see section II.B below.”

[. .]

“II. STATEMENTS OF POSITION

B. Statement by the United States of America in connection with the report of the United Nations Commission on International Trade Law (agenda item 9(a))

1. The representative of the *United States of America* said that his Government fully supported the work of the United Nations Commission on International Trade Law

(UNCITRAL). In particular, as the report on the twenty-sixth session noted, the United States commended the Commission’s completion at its plenary session of the UNCITRAL Model Law on Procurement of Goods. Capping a four-year effort, the Model Law reflected generally accepted principles for publicly funded government purchasing which were also consistent with existing GATT guidelines on procurement. These principles included: a structured administrative system for government-sector purchasing and contracting; transparency of laws and regulations; generally open bidding, including foreign bidding; and administrative or judicial remedies. The project involved participation by international lending agencies, including the World Bank. He was also pleased to note that, at its past plenary session, the Commission had agreed to a further one-year effort to complete an additional portion of the Model Law which would cover procurement of services.

2. One area in which the Commission was working, which had a direct bearing on work being done in UNCTAD, was the continuing work in a relatively new field of law—the preparation of a convention on international bank guarantees and standby letters of credit, and the preparation of international rules on electronic commerce. This tied in, of course, with the work which UNCTAD was doing in the Ad Hoc Working Group on Trade Efficiency, and would have significant world-wide impact. The legal issues surrounding rapidly changing technologies were important for all countries, and for the world of trade.

3. The United States Government was therefore pleased to receive this report of UNCITRAL’s progress, and commended the work it was doing.”

*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 15 (A/48/15), part two, sect. I, B.

C. General Assembly: report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session: report of the Sixth Committee (A/48/613)

I. INTRODUCTION

1. The item entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session" was included in the provisional agenda of the forty-eighth session of the General Assembly pursuant to Assembly resolution 47/34 of 25 November 1992.

2. At its 3rd plenary meeting, on 24 September 1993, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.

3. In connection with the item, the Sixth Committee had before it the following documents:

(a) Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session;¹

(b) Report of the Secretary-General on the implementation of paragraphs 12 and 13 of General Assembly resolution 47/34 on granting travel assistance to delegates of developing countries (A/48/296).

4. The Sixth Committee considered the item at its 3rd, 4th and 33rd meetings, on 4 and 5 October and 19 November 1993. The summary records of those meetings (A/C.6/48/SR.3, 4 and 33) contain the views of the representatives who spoke on the item.

5. At the 3rd meeting, on 4 October, Mr. Sani L. Mohammed (Nigeria), Chairman of the United Nations Commission on International Trade Law at its twenty-sixth session, introduced the Commission's report on the work of that session. At the 4th meeting, on 5 October, the Chairman of the Commission made a closing statement.

II. CONSIDERATION OF PROPOSALS

A. Draft resolution A/C.6/48/L.6

6. At the 33rd meeting, on 19 November, the representative of Austria introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session" (A/C.6/48/L.6), sponsored by *Argentina, Australia, Austria, Azerbaijan, Belarus, Brazil, Bulgaria, Canada, Cyprus, the Czech Republic, Denmark, Finland, France, Greece, Italy, Kyrgyzstan, Morocco, Myanmar, Norway, Poland, the Russian Federation, Singapore, Sweden, Thailand, Turkey,*

Ukraine and Venezuela, later joined by *Germany, Hungary, Kenya, Nigeria and Spain*.

7. At the same meeting, the Secretary of the Committee made a statement concerning paragraph 5 of the draft resolution (see A/C.6/48/SR.33).

8. Also at the same meeting, the Committee adopted draft resolution A/C.6/48/L.6 without a vote (see paragraph 14, draft resolution I).

B. Draft resolution A/C.6/48/L.7

9. At the 33rd meeting, the representative of Austria introduced a draft resolution entitled "Model Law on Procurement of Goods and Construction of the United Nations Commission on International Trade Law" (A/C.6/48/L.7), sponsored by *Argentina, Australia, Austria, Belarus, Canada, Cyprus, Denmark, France, Italy, Kyrgyzstan, Poland, the Russian Federation, Thailand, Ukraine and the United States of America*, later joined by *Germany, Hungary, Kenya, Nigeria and Spain*.

10. At the same meeting, the Committee adopted draft resolution A/C.6/48/L.7 without a vote (see paragraph 14, draft resolution II).

C. Draft resolution A/C.6/48/L.8

11. At the 33rd meeting, the representative of Austria introduced a third draft resolution entitled "United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)" (A/C.6/48/L.8), sponsored by *Australia, Austria, Cyprus, Kyrgyzstan, Morocco, Sweden and Thailand*, later joined by *Hungary and Nigeria*.

12. At the same meeting, the Committee adopted draft resolution A/C.6/48/L.8 without a vote (see paragraph 14, draft resolution III).

13. The representative of Japan made a statement in explanation of position after the adoption of the draft resolutions (see A/C.6/48/SR.33).

III. RECOMMENDATIONS OF THE SIXTH COMMITTEE

14. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolutions:

[The texts are not reproduced in this section. Draft resolutions I, II and III were adopted, with editorial changes, as General Assembly resolutions 48/32, 48/33 and 48/34 (see section D below).]

¹Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17).

I. PROCUREMENT

A. Report of the Working Group on the New International Economic Order on the work of its fifteenth session (New York, 22 June-2 July 1992) (A/CN.9/371) [Original: English]

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order.¹ The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). The Working Group requested the Secretariat to prepare a first draft of a Model Law on Procurement and an accompanying commentary taking into account the discussion and decisions at the session (A/CN.9/315, para. 125).

2. At its eleventh session (5-16 February 1990), the Working Group considered a draft of the Model Law on Procurement and an accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25). The Working Group requested the Secretariat to revise the text of the Model Law taking into account the discussion and decisions at the session and agreed that the commentary would not be revised until after the text of the Model Law had been settled. In addition, the Working Group requested the Secretariat to prepare for the

twelfth session draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity (A/CN.9/331, para. 222).

3. At its twelfth session (8-19 October 1990), the Working Group had before it the second draft of the Model Law (A/CN.9/WG.V/WP.28), and the draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity (draft articles 36-42, contained in A/CN.9/WG.V/WP.27). At that session, the Working Group reviewed the second draft of articles 1 to 27. The Working Group requested the Secretariat to revise articles 1 to 27 to take account of the discussions and decisions concerning those articles at the twelfth session (A/CN.9/343, para. 229). During the adoption of the report of the twelfth session, the Secretariat was further requested to prepare a report for the thirteenth session on conditions and procedures for use of competitive negotiation.

4. At its thirteenth session (15-26 July 1991), the Working Group had before it the second draft of articles 28 to 35 (contained in A/CN.9/WG.V/WP.30), a redraft of articles 1 to 27, taking into account the deliberations and decisions at the twelfth session (also contained in A/CN.9/WG.V/WP.30), the draft articles on review (articles 36 to 42, in A/CN.9/WG.V/WP.27), as well as a note by the Secretariat on competitive negotiation (A/CN.9/WG.V/WP.31). At that session, the Working Group reviewed articles 28 to 42

¹Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

and requested the Secretariat to revise those articles to take account of the discussion and decisions at the thirteenth session (A/CN.9/356, para. 196).

5. At the fourteenth session, the Working Group reviewed articles 1 to 27 as revised following the twelfth session (contained in A/CN.9/WG.V/WP.30), as well as articles 28 to 41 (article 42 having been deleted at the thirteenth session), revised to reflect the decisions taken at the thirteenth session (A/CN.9/WG.V/WP.33). Also reviewed by the Working Group was the annex to document A/CN.9/WG.V/WP.33, which contained several new provisions that had been added either as a result of decisions taken at the thirteenth session or at the initiative of the Secretariat, as well as a number of changes to the first portion of the Model Law (articles 1 to 27) that flowed from the Working Group's decisions at the twelfth session with regard to articles 28 to 42. The Working Group also had before it a note on suspension of the procurement proceedings that it had requested at the thirteenth session (A/CN.9/WG.V/WP.34). The Working Group requested the Secretariat to revise the draft articles of the Model Law to reflect the deliberations and decisions at the fourteenth session (A/CN.9/359, para. 247). The Working Group also agreed that a commentary giving guidance to legislatures enacting the Model Law should be given priority, without precluding the possibility of preparation at a later stage of commentaries with other functions. It was further agreed that completion of the Working Group's consideration of the Model Law should not be delayed until the preparation by the Secretariat of a draft commentary (A/CN.9/359, para. 249).

6. The Working Group, which was composed of all States members of the Commission, held its fifteenth session in New York from 22 June to 2 July 1992. The session was attended by representatives of the following States members of the Working Group: Bulgaria, Cameroon, Canada, Chile, China, Egypt, France, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Nigeria, Poland, Russian Federation, Spain, Thailand, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

7. The session was attended by observers from the following States: Brazil, Colombia, Côte d'Ivoire, Indonesia, Iraq, Malta, Marshall Islands, Myanmar, Pakistan, Philippines, Romania, Switzerland and Viet Nam.

8. The session was also attended by observers from the following international organizations:

- (a) *United Nations organizations*: World Bank;
- (b) *Intergovernmental organizations*: European Communities, European Space Agency, Inter-American Development Bank;
- (c) *International non-governmental organizations*: International Bar Association.

9. The Working Group elected the following officers:

Chairman: Mr. Robert Hunja (Kenya)

Rapporteur: Mr. Hossein Ghazizadeh (Islamic Republic of Iran)

10. The Working Group had before it the following documents:

- (a) Provisional agenda (A/CN.9/WG.V/WP.35);
- (b) Procurement: draft articles 1 to 41 of Model Law on Procurement (A/CN.9/WG.V/WP.36).

11. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Procurement.
4. Other business.
5. Adoption of the report.

12. The deliberations and decisions of the Working Group with respect to its consideration of draft articles 1 to 41 of the Model Law on Procurement are contained in chapter I of the present report.

13. The Working Group established a drafting group to which it referred the draft articles of the Model Law following its approval of the substance of those articles. The Working Group reviewed the report of the drafting group and adopted the text of the draft Model Law on Procurement as set forth in the annex.

DELIBERATIONS AND DECISIONS

I. Discussion of draft articles 1 to 41 of the Model Law on Procurement (A/CN.9/WG.V/WP.36)

General remarks

14. Prior to commencing its review, the Working Group recalled that at its fourteenth session it had expressed the intention to complete its task of preparing the draft Model Law at the fifteenth session for presentation to the Commission at its twenty-sixth session.

Preamble

15. The Working Group reaffirmed the decision taken at its fourteenth session that the Model Law should contain a preamble as such an overall statement of the objectives of the law would be useful in the application and interpretation of the Model Law. As to the precise formulation of the preamble, the view was expressed that subparagraphs (d), (e) and (f) in the current draft of the preamble overlapped and were vague and might therefore be merged, or perhaps even deleted. The prevailing view, however, was that the subparagraphs were useful as they indicated the distinct objectives of the Model Law and the various types of procedural obligations and intended beneficiaries of the Model Law. It was further observed that terms used in the preamble, to the extent that they were unclear, might be elaborated upon in the commentary. After deliberations, the Working Group approved the substance of the preamble and referred to the drafting group the possible refinement in the wording.

16. The Working Group next considered whether it would be desirable to include in the Model Law explanatory footnotes aimed at giving guidance on specific provisions to legislatures enacting the Model Law. In this instance, the Working Group was considering a proposal to include such a footnote for the preamble, indicating that States might wish to place the contents of the preamble in a substantive provision. There was general agreement that the provisions of the Model Law should be self-standing and that guidance to legislatures should be confined to the commentary, rather than being given also in footnotes.

Article 1

Scope of application

17. The Working Group considered the revised version of article 1 as contained in document A/CN.9/WG.V/WP.36.

18. Concerns were expressed that paragraph (2)(c), by permitting a State to exclude certain types of procurement from the Model Law through the procurement regulations, might lead to abusive exclusions of the Model Law. However, it was generally agreed that the Model Law had to provide such an option to enacting States. Moreover, it was observed that a degree of transparency existed in that the procurement regulations would have to be published. It was also suggested that the commentary might urge caution in the use of procurement regulations to exclude the Model Law.

19. The Working Group affirmed the approach taken in paragraph (2), which allowed certain sectors to be excluded, while permitting the procuring entity to apply the Model Law in those sectors on an ad hoc basis. The Drafting Group was requested, however, to consider ways of making the meaning of paragraph (2) clearer. Suggestions included, for example, relocating the closing words of subparagraph (c) to the *chapeau* or adding a separate paragraph concerning ad hoc applications of the Model Law in excluded sectors.

20. The Working Group agreed to replace the word "declares" in the closing portion of paragraph (2)(c) by the words "expressly declares" to ensure that the declaration was sufficiently clear to those concerned, and would be included in the instrument used to solicit participation in the procurement proceedings.

21. Subject to the above modification, the Working Group found article 1 to be generally acceptable.

Article 2

Definitions

22. The Working Group considered the revised version of article 2 as contained in document A/CN.9/WG.V/WP.36.

23. It was suggested that, for ease of reference, the definitions should be placed in alphabetical order in each respective language version of the Model Law. A counter-

vailing view was that, given the relatively low number of definitions, the hierarchical approach used here, as well as in other Commission texts, was preferable.

"Procurement" (subparagraph (new a))

24. As had been the case at the fourteenth session, a question was raised as to the manner in which the definition dealt with incidental services. In particular, the view was expressed that the mathematical formula used to define incidental services (expressed in the words "if the value of those incidental services does not exceed that of the goods or construction themselves") was of questionable utility. It was suggested that that language raised difficulties in particular because construction consisted to a large degree of services. Along those same lines it was suggested that a discussion in the commentary, decided upon at the fourteenth session, concerning the determination of whether services were incidental might not be sufficient and that the Model Law should be self-explanatory on that point. Again, however, the prevailing view was to retain the use of the mathematical formula. It was noted that the language in question was in line with the Working Group's earlier decision that, at least for the present time, the Model Law should not address the procurement of services and that it was usefully consistent with the language in the GATT Agreement on Government Procurement.

25. After deliberation, the Working Group decided that the definition of "procurement" was generally acceptable. The Drafting Group was requested, however, to ensure that all the language versions of the Model Law were fully aligned with respect to the various means of acquisition referred to in the definition.

"Procuring entity" (subparagraph (a))

26. The Working Group found the definition of "procuring entity" to be generally acceptable. A proposal was made that both option I and option II should be applicable to organs of local self-government. The general view, however, was that the present structure was suitable, as it was the understanding of the Working Group that option I was intended to cover organs of self-government, while option II was not.

"Goods" (subparagraph (b))

27. Doubts were raised as to the utility of retaining the reference to "systems" that had been added pursuant to a decision at the fourteenth session. While it was recognized that the reference to "systems" was intended to take account of the fact that goods were often procured as elements integrated into a package or system, it was generally felt that such circumstances were adequately covered without the addition of the word "systems". It was also noted that the term would create uncertainty, in particular with respect to procurement of software. In that regard, it was suggested that, were the word "systems" to be retained, a distinction might have to be made between off-the-shelf procurement of software and procurement of software tailored to the specifications of the procuring entity, the latter type of procurement presumably falling within the realm of services. It was also observed that the discussion suggested the likely need to eventually formulate provisions covering

the procurement of services. After deliberation, the Working Group agreed to the deletion of the reference to "systems".

"Construction" (subparagraph (c))

28. The Working Group found the definition of "construction" to be generally acceptable.

"Currency" (subparagraph (g))

29. The Working Group agreed to a suggestion to replace the words "unit of account" by the words "monetary unit of account".

"Contractor or supplier" (subparagraph (i bis))

30. A question was raised as to whether the reference in the definition to "any . . . potential party, according to the context" might not be overly broad, particularly when applied to the right of recourse under article 36. It was suggested that the definition might have to be limited in some fashion so that it would not be misread as encompassing, for example, subcontractors of potential contractors and suppliers. The exclusion of any mention at all of potential contractors and suppliers, or the inclusion of a narrow link to the procurement proceedings, were not considered to be practical alternatives, in particular since there would be cases, including in the recourse context, where the Model Law would intend to refer to very broad categories of contractors and suppliers (e.g., all the potential contractors or suppliers producing a particular type of goods). In view of the above, the Working Group affirmed the broad approach taken in the general definition, subject to the possibility that the term would have to be specifically limited in substantive provisions in order to exclude in certain contexts contractors and suppliers with insufficient proximity.

31. The Working Group referred to the drafting group a proposal to replace throughout the Model Law the terms "contractor and supplier" and "contractor or supplier" by a single word such as "supplier", which could be done by indicating in the definition that the term "supplier" encompassed the term "contractor". Such a definition would be necessary, in particular to take account of legal systems in which the two terms traditionally carried distinct meanings.

Additional definitions

32. The Working Group agreed to a proposal to add a definition of "procurement contract" as "a contract between the procuring entity and the contractor resulting from the procurement proceedings". It also agreed to a proposal to return the definition of "tender security" from article 26 to its former position in subparagraph (f), in particular since that term appeared in several places prior to article 26. The Working Group considered, but did not go along with, a proposal to restore definitions of the various methods of procurement. The Working Group was of the general view that such definitions, if they included substantive elements, might conflict with other substantive provisions of the Model Law. If definitions of procurement methods were to be merely descriptive references to the substantive provisions, as had been the case with the definitions that the Working Group had previously decided to delete, they would serve little if any purpose, thereby unnecessarily

burdening the Model Law. At the same time, it was observed that, on their face, terms such as "competitive negotiation proceedings" might not be readily recognized and that it could be useful to provide some descriptions in the commentary or in a covering memorandum, if not in introductory paragraphs in the substantive provisions.

Article 3 bis

International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

33. The Working Group considered the revised version of article 3 bis as contained in document A/CN.9/WG.V/WP.36.

34. The Working Group affirmed its decision at the fourteenth session (reflected in subparagraph (c)) to give precedence over the Model Law to intergovernmental agreements on procurement concluded within a federal State. The view was expressed that the text of the subparagraph should make it clear that the subparagraph was not intended to deal with the situation where the application of the Model Law was met with a constitutional impediment, particularly in the case of federal States in which the national government did not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

35. It was agreed that the scope of subparagraph (c) should be expanded to refer not only to agreements between the federal Government and a subdivision, but also to agreements between subdivisions. Such an expansion could be relevant in particular where the Model Law was enacted by a subdivision of a federal State. Accordingly, the following suggested reformulation of subparagraph (c) was transmitted to the drafting group:

"(c) agreements between a Government in [name of federal State] and another Government in [the federal State]."

36. Subject to the above modifications, the Working Group found article 3 bis to be generally acceptable.

Article 4

Procurement regulations

37. The Working Group considered the revised version of article 4 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

38. In the discussion of article 4, it was observed that there would in all likelihood be instances where the Model Law would be enacted, at least at an initial stage, without being accompanied by procurement regulations, and that the Model Law should therefore provide a body of self-standing rules. It was further observed that the possibility of such cases arising would have to be kept in mind in particular where the Model Law contemplated the procurement regulations as a source of authority for action by the procuring entity.

Article 5

Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

39. The Working Group considered the revised version of article 5 as contained in document A/CN.9/WG.V/WP.36.

40. The Working Group agreed to expand article 5 so as to obligate the procuring entity to maintain systematically the various materials that were the subject of the article, as well as to make those materials available promptly. Subject to that modification, the Working Group found article 5 to be generally acceptable.

Article 7

Methods of procurement

41. The Working Group considered the revised version of article 7 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

42. The Working Group was in general agreement with the thrust of paragraph (1), namely, that tendering proceedings should be the method of procurement normally used. It also agreed to the deletion of the word "only", which was felt to be superfluous. A proposal was made to replace the words "tendering proceedings" by the words "public tendering" so as to give additional emphasis to the open, competitive character of tendering proceedings. However, that proposal did not receive support, in particular because of a concern that the proposed new term would lead to uncertainty in the context of limited tendering carried out pursuant to article 12(2)(a).

Paragraphs (new 2) and (new 3)

43. As had been the case at previous sessions, differing views were expressed as to the desirability of presenting in the Model Law the entire array of procurement methods currently included, with particular attention being paid on this point to two-stage tendering, request for proposals and competitive negotiation. According to one view, it was sufficient to include, of those three, just two-stage tendering, while possibly mentioning the others in the commentary. Another, similar view was that one method should be retained, but that it should be request for proposals. Both of those approaches were fuelled in particular by a concern that the Model Law should not recommend the use of competitive negotiation, which was described as the method of procurement subject to the lowest degree of discipline and thereby the most likely to lead to abuse.

44. The prevailing view, as had been the case previously, was that the Model Law should be as inclusive as possible and that, since each of the three methods in question were used in practice, they should be available under the Model Law. In support of inclusion of competitive negotiation, it was suggested that that method of procurement was used in a number of States and was an appropriate method of procurement in certain circumstances. When properly utilized, competitive negotiation was said to be capable of promot-

ing economy and efficiency in procurement. It was also suggested that inclusion of competitive negotiation would foster competition since, without having competitive negotiation as an available option, some procuring entities would resort to less competitive methods, in particular single-source procurement.

45. A view was expressed that limited tendering proceedings, permitted under article 12(2)(a), should be made more visible in the Model Law by being listed in paragraph (new 2) as one of the methods other than tendering. The Working Group decided to deal further with the question of limited tendering in its review of article 12.

46. It was noted that a number of issues were left outstanding by the decision of the Working Group at the fourteenth session that the Model Law should not recommend that enacting States necessarily incorporate each of the methods of procurement other than tendering listed in paragraph (new 2), though such a possibility would not be excluded. That decision stemmed in particular from a recognition that there was a degree of overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation in that each of those methods was geared, at least in part, to cases in which the procuring entity was not in a position to formulate specifications to the level of detail required for tendering proceedings. The issues left outstanding by that decision included: how to deal with differences in the conditions for use of two-stage tendering, request for proposals and competitive negotiation given the decision to make those methods interchangeable; whether there was any point in retaining the hierarchical order of preference set forth in paragraph (new 3) to be used when the circumstances of a particular procurement fit the conditions for use of more than one of the methods of procurement referred to in paragraph (new 2); and how to deal with overlap between competitive negotiation and single-source procurement with respect to research contracts and national security procurements.

47. As regards the conditions for use of the three procurement methods in question, the Working Group noted that the conditions for use of competitive negotiation covered two situations not covered by the other methods of procurement, namely, urgency not related to catastrophic events (new article 34(b)) and failed tendering proceedings (new article 34(e)). As a result, an enacting State that did not incorporate competitive negotiation would be left without a procurement method to cover those two situations. In order to eliminate this gap, the Working Group decided that the conditions for use for the three methods of procurement should be identical not only with respect to the case of incomplete specifications, but also with regard to the circumstances covered in new article 34(b) and (e). It also agreed that it would look further at cases of urgency when it reached the articles dealing with the methods in question.

48. In the course of its consideration of paragraph (new 2), the Working Group decided that it would be preferable to assemble in article 7 the conditions for use of each of the methods of procurement other than tendering. Those conditions were presently found in the respective articles governing the use of those methods. It was felt that that structure would be clearer and that it would alleviate to some

degree the concern underlying a proposal to include definitions of the procurement methods—a proposal that did not itself attract sufficient support.

49. The Working Group then turned to the question of whether the Model Law should recommend that enacting States incorporate any, only one, or one or more of two-stage tendering, request for proposals and competitive negotiation, or whether no attempt should be made to indicate whether only one or more than one of those methods should be incorporated. On this question, the Working Group reached the conclusion that the Model Law should recommend the adoption of at least one of those three methods, so as to avoid suggesting that cases not suitable for tendering could generally be dealt with through single-source procurement. The Working Group was of the view that, beyond the recommended minimum of one of those methods, it would be preferable not to attempt to limit the choices presented to the enacting State. It was recognized that an enacting State might legitimately see a benefit in incorporating more than one of the three methods so as to give procuring entities added flexibility in choosing procurement methods most appropriate for the circumstances of individual cases.

50. The Working Group drew the conclusion that, taking into account the evolution of article 7, the hierarchical order of preference set forth in paragraph (new 3) would no longer serve a purpose and should therefore be deleted. It was generally felt that the order of preference, which was designed to address the problem of overlap between earlier versions of the conditions for use of two-stage tendering, request for proposals and competitive negotiation, no longer played any role as a result of the assimilation of the conditions for use for those three methods. The decision to remove the order of preference was also motivated by the widely shared view that the objectives of the Model Law would be best served by giving the procuring entity some discretion to select the procurement method best suited to individual cases on the basis of the principles enunciated in the preamble.

51. It was pointed out that an overlap remained between, on the one hand, competitive negotiation (and now also two-stage tendering and request for proposals), and, on the other hand, single-source procurement, as regards research contracts. It was suggested that the overlap with respect to that case, as well as perhaps the similar overlap with respect to national security and national defence, might be addressed by limiting resort to single-source procurement in such cases to instances where there was only one possible contractor or supplier. As regards research contracts, the question was raised whether such contracts, which might be characterized as having a service nature, at all fell within the scope of the Model Law. In response, it was pointed out that the research contracts addressed in the Model Law involved the purchase of a prototype and therefore could properly be considered as involving the procurement of goods.

Paragraph (5)

52. It was suggested that the record requirement in paragraph (5) could be usefully strengthened by requiring a procuring entity that had to choose between two or more of two-stage tendering, request for proposals and competitive

negotiation to state the grounds and circumstances underlying the decision to choose one over the other one or two methods. It was stated that such a formulation would serve the objective of transparency. While there was sympathy for the thrust of the suggestion, the Working Group was generally of the view that such a requirement could probably already be read in paragraph (5) and would be necessitated at any rate by good administrative and regulatory practice. The Working Group requested the Drafting Group to consider further whether the existing formulation covered the matter adequately. A proposal to eliminate the words "grounds and", which had been added to align the text with similar provisions elsewhere in the Model Law, did not receive support.

53. The Working Group found article 7 to be generally acceptable, subject to the above modifications.

Article 8

Qualifications of contractors and suppliers

54. The Working Group considered the revised version of article 8 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (new 1)

55. The Working Group found paragraph (new 1) to be generally acceptable.

Paragraph (1)

56. The Working Group considered whether to retain subparagraph (a)(ii), which authorized the procuring entity to require contractors and suppliers to show that they were not insolvent. That question was prompted by the apparent possibility that the broad grant of authority in subparagraph (new i) to demand evidence with respect to the financial resources of contractors and suppliers could be read as covering the same ground as subparagraph (a)(ii). The prevailing view was that both subparagraphs (a)(ii) and (a)(new i) should be retained as they dealt with distinct aspects of the qualifications of contractors and suppliers. It was noted, for example, that a contractor or supplier might possess sufficient technical competence and financial resources as required by subparagraph (a)(new i), and yet still fail to satisfy the requirements of subparagraph (ii) by reason of suspension or court administration of business activities.

Paragraph (2)

57. A proposal was made to delete the second sentence of paragraph (2), which prohibited a procuring entity from imposing additional criteria, requirements or procedures with respect to the qualifications of contractors and suppliers, other than those provided for in paragraph (1)(a). In support of the proposal, it was stated that a procuring entity should have the flexibility to impose additional criteria should it be deemed necessary to do so. However, the proposal did not receive support. It was generally felt that the qualification of contractors and suppliers should be based on criteria clearly established in the Model Law and set out in the prequalification documents and that the establishment of additional criteria might lead to the abusive exclusion of particular contractors and suppliers.

Paragraphs (2 bis), (2 ter) and (2 quater)

58. The Working Group found paragraphs (2 bis), (2 ter) and (2 quater) to be generally acceptable.

Paragraph (3)

59. The Working Group next considered the question of when the cut-off time should be for the presentation by contractors and suppliers of proof of qualifications. While mention was made of the possibility of extending the deadline to the time of award of the procurement contract, there was general sympathy for the approach taken in paragraph (3), which set the deadline at the commencement of the examination of tenders, proposals or offers. However, there was a concern that that formulation might be imprecise and give rise to disputes. In view of the above, the Working Group decided that the cut-off time should be the deadline for the submission of tenders.

Other issues

60. It was proposed that article 8 should contain a provision restricting the right of the procuring entity to disqualify contractors and suppliers owing to minor omissions or errors in the evidence presented as proof of qualifications. To that end, it was suggested that the Model Law should require the procuring entity to permit contractors and suppliers a limited period of time to correct minor errors and deviations occurring in the documents. It was stated that such a restriction would help to promote fairness and competition by curbing abusive disqualification of contractors and suppliers. The Working Group noted that there was a link between that question and the provisions in article 28 (1 bis) concerning the responsiveness of tenders and that, subject to the discussion of article 28, it might be considered as adequately dealt with there.

61. A concern was expressed that article 8 as currently drafted did not actually require the procuring entity to qualify a contractor or supplier that had met the conditions set out in paragraph (1)(a), although such a requirement might be implied in the totality of the relevant provisions. The prevailing view was that the obligation to qualify contractors and suppliers that met the requirements derived from the provisions of article 8, in particular paragraphs (2), (2 bis) and (2 ter), concerning the procedures and criteria for evaluation. Another source of the obligation, in tendering proceedings, was the obligation of the procuring entity under article 28 to evaluate tenders in accordance with criteria set forth in the solicitation documents. It was also pointed out that such an obligation derived from the general principles of administrative law in many countries.

62. With the amendment adopted with respect to paragraph (3), the Working Group found article 8 generally acceptable.

*Article 8 bis**Prequalification proceedings*

63. The Working Group considered the revised version of article 8 bis as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

64. The Working Group found paragraph (1) to be generally acceptable.

Paragraph (2)

65. The view was expressed that the mention of "the procedures specified in the invitation to prequalify" might unduly narrow the scope of the provision and that a formulation along the lines of "the terms and conditions specified in the invitation to prequalify" might be more appropriate. It was also stated that, since the suggested wording would cover such issues as the obligation for each contractor or supplier to pay the price charged for the prequalification documents, the specific mention of the price would not be needed. While it was generally agreed that a broader wording such as the one suggested should be used, it was also generally felt that the express reference to the obligation to pay the price charged for the prequalification documents served a useful purpose and should be retained. As regards the price of those documents, a view was expressed that a proviso should be added to the effect that the price charged for the prequalification documents should reflect the actual cost of those documents and should not be so high as to discourage participation by any contractor or supplier.

Paragraph (3)

66. The Working Group next considered the manner in which the Model Law should address the required contents of the prequalification documents. At the previous session, the Working Group had decided, with a view to ensuring uniformity of law, that the Model Law should list the required contents in detail rather than merely referring to the procurement regulations.

67. At the current session, a view was expressed that the listing of the requirements in paragraph (3), and particularly in subparagraphs (c), (d), (e) and (g) might put an excessive burden on the procuring entity and should therefore be deleted. However, the Working Group reaffirmed the decision made at the last session that the requirements listed in paragraph (3) were an indispensable bare minimum that would otherwise have to be listed in the procurement regulations, and that the right to use the procurement regulations to list additional requirements was available under subparagraph (g). It was noted that article (3)(d) overlapped with article 14(1)(d), which was incorporated into the prequalification documents by way of the *chapeau* to paragraph (3), and that the two provisions could be consolidated.

Paragraphs (3 bis) to (6)

68. The Working Group found paragraphs (3 bis) to (6) to be generally acceptable.

*Article 8 ter**Participation by contractors and suppliers*

69. The Working Group considered the revised version of article 8 ter as contained in document A/CN.9/WG.V/WP.36.

70. The Working Group again affirmed the basic principle enunciated in article 8 *ter*, namely, that contractors and suppliers should, with limited exceptions, be permitted to participate in procurement proceedings without regard to nationality. The Working Group proceeded to consider further refinements of the article.

Paragraph (1)

71. At the outset, the view was expressed that it was not sufficiently clear that paragraph (1) was composed of two distinct components, the first (subparagraph (a)) referring to the closure of procurement proceedings to all but domestic contractors and suppliers for reasons of economy and efficiency, and the second (subparagraph (b)) referring to nationality-based restrictions stemming from factors such as tied-aid arrangements and boycott legislation.

72. As to the first component (subparagraph (a)), the view was expressed that permitting restriction to domestic participants on the basis of "economy and efficiency" was an imprecise and vague notion that might be considered as contrary to the general principles set forth in the preamble, in particular international competition as a means of maximizing economy and efficiency in procurement. An alternate, perhaps more objective standard that was reported to be used widely to delineate international from domestic procurement was the value of the procurement.

73. In addition, it was suggested that the various types of cases that were relevant to article 8 *ter* might not be clear from the current formulation. Those cases included: low value procurements of goods available locally, for which the procuring entity would not solicit international tenders, but from which it would not exclude foreign contractors and suppliers; the exclusion of foreign participants, in order, for example, to promote local capacity in a given sector; and mandatory embargoes, for example, Security Council sanctions. With that possible scope in mind, the Working Group proceeded to a further review of article 8 *ter*.

74. As to the first type of case, it was noted that there would be cases where it would be inappropriate to require the procuring entity to engage in costly, time-consuming procedures designed to attract international competition, for example in cases where small amounts were involved. At the same time, it was suggested that in such cases there was no need to exclude foreign contractors from certain procurements if such foreign contractors were naturally kept out of those procurement proceedings for market reasons. In addition, it was pointed out that exclusion of foreigners on grounds of nationality might be economically unjustified even in the case of small procurements since foreign contractors might have a local place of business. In the course of the discussion, it was urged that the only realistic course would be for the Model Law to recognize the fact that States would wish to retain the right to limit procurement in some cases to domestic suppliers.

75. The Working Group considered several proposals designed to accommodate low-value, small procurements without excluding foreign participation. One proposed reformulation of subparagraph (a) was as follows:

"... except that:

(a) in the case of tendering for smaller size contracts, where international participation is unlikely, the special procedures to attract such competition as set forth in articles ... shall not apply;"

76. That proposal was objected to on the grounds that the notion of small procurements was ambiguous and could receive different interpretations, though it was agreed that small procurements could be addressed in a separate provision in the provisions on tendering. A proposal of a somewhat similar nature was to refer in subparagraph (a) to "soliciting" participation rather than to "permitting" participation, thereby putting the focus on the types of measures the procuring entity would or would not have to take in a given case.

77. Other suggestions were to move subparagraph (a) into a separate provision or to move article 8 *ter* in its entirety back to chapter II of the Model Law. That approach would confine the presumption of internationality and the exceptions thereto to tendering proceedings. While some support was expressed in favour of that proposal, the Working Group affirmed its earlier decision to transfer the provision on participation by contractors and suppliers from chapter II to the general provision of the Model Law in chapter I so as to apply the presumption of internationality to all methods of procurement. That modification was intended to encourage greater openness in procurement and equal treatment of foreign contractors and suppliers when procurement proceedings involving methods other than tendering were conducted on an international footing. At the same time, the procuring entity would not be compelled to engage in international procurement when deemed counter to economy and efficiency or on other grounds mentioned in the article.

78. It was pointed out that subparagraph (b) might be regarded as containing sufficient grounds for the types of domestic procurement situations being contemplated in subparagraph (a). The Working Group agreed with that approach and accordingly decided that subparagraph (a) could be deleted. It was also noted that reference would be made in the commentary of the practice of States concerning domestic procurement and to the fact that such procurement was not excluded under the Model Law.

79. As to the content of subparagraph (b), the Working Group affirmed the decision it had taken previously to include the procurement regulations as a source of authority for restriction of participation on the basis of nationality.

Paragraphs (new 1 bis) and (1 bis)

80. The Working Group found paragraphs (new 1 bis) and (1 bis) to be generally acceptable. It was noted, however, that almost all of the articles referred to in paragraph (1 bis) concerned tendering proceedings and that the provision might therefore be placed into chapter II.

Paragraph (3)

81. The need for retaining paragraph (3) was questioned on the grounds of the general presumption of internationality in tendering proceedings, and because, in other

methods of procurement, contractors and suppliers were often singled out by the procuring entity for participation in the procurement proceedings. The Working Group felt that the usefulness of the provision justified its retention.

Article 9 bis

Form of communications

82. The Working Group considered the revised version of article 9 *bis* as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

83. The Working Group affirmed the decision taken at the fourteenth session that the Model Law should enable procuring entities to engage in procurement proceedings involving non-traditional forms of communications such as electronic data interchange ("EDI"). It also noted that the notion of "record", referred to in paragraph (1), was a key function of a written document that could be fulfilled through electronic means of communication.

84. Various views were expressed with regard to the formulation of article 9 *bis*, which attempted to include in a consolidated provision on form of communication the authority needed to enable the procuring entity to employ, if it so chose, EDI and other modern communication and information techniques in procurement proceedings. One view was that the approach taken in article 9 *bis* was over-complicated and might be perceived as imposing the use of EDI on countries where access to such technology was limited, and furthermore the blanket superimposition of such procedures on traditionally paper-based countries was said to be fraught with hazards. A particular concern was expressed in that regard with respect to the provision in article 24(4) authorizing the submission of tenders in forms other than writing.

85. A countervailing view was that the approach taken in the draft was basically sound in that it enabled the use of EDI without imposing it on those who wished to continue to use paper-based procedures. Attention was also drawn to the need for the Model Law to recognize, rather than hinder, the existing use of EDI in procurement, as well as to facilitate the future expansion of such techniques. It was said that the lack of such an orientation would limit the acceptability of the Model Law.

86. A key question was the manner in which the notion of writing should be treated. It was noted in that regard that the current chapter displayed two possible approaches to the use of the word "writing". Paragraph (1) could be read as defining writing as including any form that provided a record, while in article 24(4) reference was made to writing as separate from other forms that provided a record.

87. A proposal to delete all mention of writing was not accepted. It was stated that that would go too far since the Model Law provisions had been developed with the traditional paper-based documentation in mind and the technical implications of the use of EDI in procurement proceedings

and the question of guaranteeing confidentiality in the context of EDI had not been considered during the development of the Model Law. It was further emphasized that the use of EDI was not uniformly available worldwide.

88. After deliberation, the Working Group decided to retain paragraph (1) along its present lines, but that an appropriate balance could be struck by including at the beginning of the paragraph the words "Subject to the provisions of this Law".

Paragraph (2)

89. It was proposed to delete paragraph (2) on the grounds that paragraph (1) encompassed all the communications referred to in paragraph (2). Another proposal was to apply the telephone option to all communications. It was pointed out that the instances referred to in paragraph (2) did not involve specific deadlines. Were such a two-stage procedure to be applied to communication involving deadlines, the question would arise whether both the telephone and the confirmation stages had to be completed by the deadline. It was agreed, however, that the reference to "telephone" could be deleted as it was covered by the term "any means of communication" and it was not necessary to single out any one system of communication.

Paragraph (3)

90. Differing views were expressed with regard to paragraph (3). Questions were raised as to whether its meaning was clear. A proposal was made for the deletion of paragraph (3). In support of that proposal it was stated that paragraph (3) had no relevance in a provision dealing with records. Another proposal was to relocate paragraph (3) to the chapter dealing with tendering proceedings. A prevailing view was that the provision should be retained in article 9 *bis* as it addressed concerns that contractors and suppliers lacking access to EDI should not suffer discrimination in the procurement proceedings. The Drafting Group was requested, however, to consider possible ways of making the paragraph clearer.

Article 10

Rules concerning documentary evidence provided by contractors and suppliers

91. The Working Group considered the revised version of article 10 as contained in document A/CN.9/WG.V/WP.36 and found the article to be generally acceptable. It referred to the Drafting Group a suggestion that the word "when" should be replaced by the word "if", and that the word "may" should be replaced by the word "shall".

Article 10 ter

Record of procurement proceedings

92. The Working Group considered the revised version of article 10 *ter* as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

93. While the view was expressed that the provisions contained in article 10 *ter* were too detailed and excessively onerous for the procuring entity, the prevailing view was that the provisions achieved the right balance in view of the crucial role of records in fostering transparency and other objectives of the Model Law. It was further observed that records were essential for the effectiveness of review procedures.

94. The Working Group considered the question whether the Model Law should require disclosure of the portion of the record referred to in subparagraph (*f ter*). One possibility was that subparagraph (*f ter*), which concerned the grounds for restricting tendering proceedings under article 12(2), should remain outside the disclosure requirement. According to that approach, the real significance of the record required in subparagraph (*f ter*) was considered to be for internal government audit. Such an approach would help to limit litigation. However, the Working Group favoured making subparagraph (*f ter*) subject to disclosure, as that would give meaning to the record requirement for the issue in question and foster transparency by enabling excluded contractors and suppliers to become aware of their exclusion, and to perhaps avoid exclusion in the future. That would also protect the public interest in the correct expenditure of public funds.

95. It was suggested that the word "grounds" in subparagraph (*h*) might be replaced with the words "grounds and circumstances" in order to align the subparagraph with similar text elsewhere in the Model Law.

Paragraphs (2) and (2 bis)

96. The Working Group considered again the desirability of retaining paragraphs (2) and (2 *bis*) in view of the limits contained therein on disclosure of the record of the procurement proceedings. The view was expressed that the extent of full, public disclosure could be usefully broadened to include the entire record with limited exceptions, such as the matters referred to in paragraphs (2 *bis*)(*a*) and (*b*). Supporters of the existing formulation stated that the paragraph properly allocated disclosure to the public at large and to participating contractors and suppliers. After deliberation, the Working Group decided to maintain paragraphs (2) and (2 *bis*) along their present lines.

Paragraph (2 ter)

97. The Working Group next considered the question of the exact point in time when the portion of the record referred to in subparagraph (*f bis*) of paragraph (1) should be made available pursuant to paragraph (2 *ter*). That portion of the record contained information on rejection of a tender, proposal or quotation on the grounds that the submitting contractor or supplier had offered an inducement to the procuring entity or any of its officials. A view was expressed that the time proposed in paragraph (2 *ter*)(i.e., after the termination of the procurement proceedings or the entry into force of the procurement contract was late) would not allow a contractor or supplier to meaningfully contest an allegation pursuant to article 10 *quater*. From two possible time limits—the time of the allegation of

misconduct or the time of the decision to reject the tender, proposal or quotation—the Working Group chose the time of the decision to reject. During the discussion, the attention of the Working Group was drawn to the interplay between the Model Law and the criminal law of the enacting State. For example, the duty to disclose pursuant to paragraph (2 *ter*) may conflict with a prosecutor's desire to prevent disclosure due to an ongoing criminal investigation.

Paragraph (4)

98. The Working Group found paragraph (4) to be generally acceptable.

*Article 10 quater**Inducements from contractors and suppliers*

99. The Working Group considered the revised version of article 10 *quater* as contained in document A/CN.9/WG.VI/ WP.36.

100. In line with its decision with respect to article 10 *ter* (2 *ter*), it was agreed to indicate in article 10 *quater* the time when the procuring entity was required to inform the contractor or supplier concerned of an allegation under article 10 *quater*. Early disclosure would give an opportunity for the contractor or supplier to respond to the allegations. The proposal was adopted.

*Article 12**Solicitation of tenders and of applications to prequalify*

101. The Working Group considered the revised version of article 12 as contained in document A/CN.9/WG.VI/ WP.36.

Paragraph (1)

102. The Working Group noted that the reference at the end of the paragraph to publication of the notice of proposed procurement should refer instead to publication of the invitation to tender or of the invitation to prequalify in order to align the text with the terminology used elsewhere in the Model Law. Subject to that modification, paragraph (1) was found to be generally acceptable.

Paragraph (1 bis)

103. The Working Group found paragraph (1 *bis*) to be generally acceptable.

Paragraph (2)

104. The suggestion made in connection with article 7, namely, that the limited tendering procedure provided for in paragraph (2) should receive greater prominence in the Model Law was repeated, but again failed to attract support.

105. The Working Group next considered whether the manner in which the procuring entity selected contractors

and suppliers from whom it was to solicit tenders could somehow be rendered more objective. It was suggested that the current formulation, which referred to the obligation to select a sufficient number of contractors and suppliers in order to ensure adequate competition, might be bolstered by referring to the obligation of the procuring entity to select "quality" firms or to make its selection on an objective basis. Other proposals included referring to the obligation of the procuring entity to select the contractors and suppliers to be approached "in accordance with the provisions" of the Model Law, and the consolidation of subparagraphs (c) and (a) of paragraph (2).

106. After deliberation, the Working Group decided to neither add language along the lines suggested nor to implement the other proposed changes. It was judged that in and of themselves terms such as "quality firms" and "objective" were not clear and would not provide any additional clarity, and that the second sentence of paragraph (2)(a) provided sufficient safeguards.

Article 14

Contents of invitation to tender and invitation to prequalify

107. The Working Group considered the revised version of article 14 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

108. The Working Group declined to support a proposal to delete subparagraphs (d) and (d bis). It did agree, however, to add to subparagraph (d bis) a cross reference along the lines of "in accordance with article 8 *ter*". This was to avoid the implication that subparagraph (d bis) was the source of an independent right of the procuring entity to restrict participation in the tendering proceedings on the basis of nationality. The Working Group found the paragraph to be otherwise generally acceptable.

Paragraph (2)

109. The Working Group found paragraph (2) to be generally acceptable.

Article 17

Solicitation documents

110. The Working Group considered the revised version of article 17 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 19

Charge for solicitation documents

111. The Working Group considered the text of article 19 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 20

Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification and solicitation documents

112. The Working Group considered the revised version of article 20 as contained in document A/CN.9/WG.V/WP.36.

Paragraphs (1) and (1 bis)

113. It was noted that the Working Group, at its fourteenth session, had adopted the current wording of paragraph (1) with a view to referring simply to the prohibition of specifications and related requirements that created obstacles to participation by contractors or suppliers in the procurement proceedings, without specifying whether a subjective "intent" or an objective "effects" test was to be followed for the identification of those obstacles, leaving that matter to be determined under other laws. It was suggested that the reference to "obstacles to participation" might be further refined to refer to obstacles to "non-discriminatory", or "equal" participation. The Working Group found paragraph (1) to be generally acceptable.

114. As regards paragraph (1 bis), it was suggested that the principle that specifications and related requirements which created obstacles to foreign contractors and suppliers could appropriately be merged with the general provision contained in paragraph (1). The Working Group referred the matter to the Drafting Group.

Paragraphs (2), (3) and (4)

115. The Working Group found paragraphs (2), (3) and (4) to be generally acceptable.

Article 22

Clarifications and modifications of solicitation documents

116. The Working Group considered the revised version of article 22 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

117. A view was expressed that the second sentence of paragraph (1) put an excessive burden on the procuring entity by requiring that procuring entity to communicate to all contractors and suppliers to which it had sent the solicitation documents the responses it had made to any request for clarification of the solicitation documents. It was suggested that such responses should simply be placed at the disposal of the contractors upon request. The prevailing view, however, was that the contractors and suppliers had no independent way of finding out that a request for clarification had been made and that the Model Law should therefore provide equal access to information for all contractors and suppliers. Accordingly, the Working Group found paragraph (1) to be generally acceptable. It was agreed, however, that the paragraph should make it clear that, where the response by a procuring entity to a request

for clarification was in the form of responses to a set of detailed questions submitted by a contractor or supplier, the questions would have to be communicated to all contractors and suppliers together with the responses.

Paragraphs (2) to (4)

118. The Working Group found the text of paragraphs (2) to (4) to be generally acceptable.

Article 23

Language of tenders

119. The Working Group considered the revised version of article 23 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 24

Submission of tenders

120. The Working Group considered the revised version of article 24 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

121. It was recalled that the Working Group, at its fourteenth session, had decided to replace the concept of "sufficient time" by the concept of "reasonable time" in the second sentence of paragraph (1). Questions remained at the current session as to that provision. One view was that the second sentence should be deleted since it might give rise to disputes as to the adequacy of the period of time allowed by the procuring entity for preparation of tenders. While support was expressed for the retention of a reference to the time for preparation of tenders, the Working Group decided that the notion of "reasonable time" was not universally used and would, in many countries, not be regarded as an objective criterion. The Working Group decided to delete the second sentence and to discuss in the commentary the need to provide adequate time for preparation of tenders.

Paragraph (2)

122. The Working Group found paragraph (2) to be generally acceptable.

Paragraph (2 bis)

123. The Working Group considered paragraph (2 bis) from the viewpoint of the extent to which the procuring entity should have the right, for its own purposes, to extend the deadline for submission of tenders. One view was that the procuring entity should have to obtain prior consent from all contractors and suppliers. Another view was that paragraph (2 bis) was of doubtful utility and could be deleted. It was pointed out that the possibility of not being able to make a timely submission could be regarded as an ordinary business risk. Yet another view was that the procuring entity should always have the unilateral right to extend the deadline, since that would encourage competi-

tion without adversely affecting anyone. It was stated in that connection that the problem of expiry of the validity period of tender securities would not be insurmountable as new expiry dates could be arranged for the tender securities.

124. The Working Group noted that similar points had been raised at the previous session and found the approach taken in paragraph (2 bis) to be generally acceptable.

Paragraph (4)

125. The Working Group was agreed that the word "single" should be added before the words "sealed envelopes".

126. Differing views were expressed as to whether the second sentence of paragraph (4) should be retained. The sentence was aimed at accommodating the use of EDI for the submission of tenders.

127. One view was that the second sentence of paragraph (4) might put too much emphasis on the use of new communication techniques and might thereby have gone beyond merely enabling procuring entities to use EDI. It was said that the application of EDI to procurement, while already proven to be feasible for issuance of solicitation documents and invitations to tender, was more problematic with regard to submission of tenders. Concerns cited included disadvantages caused by the uneven availability of EDI, and limitations of EDI, at least at the current stage of technical development, with respect to a number of functions traditionally performed by paper-based tendering techniques. These included preventing disclosure to the procuring entity of the content of a tender prior to the deadline for the submission of tenders, for example through the use of sealed envelopes, how to handle opening of electronic tenders, and whether it would be possible to accept in a given proceeding a mix of written and electronic tenders. A view was expressed that prior to including more in the Model Law on EDI than an enabling provision, it would be useful to consider in greater detail the legal aspects of the application of EDI to procurement.

128. A countervailing view was that the second sentence was merely an enabling provision that did not impose the use of EDI upon those who could or would not use it. It was further urged that the orientation of the Model Law should be towards providing standards applicable to procurement employing rapidly emerging techniques, as well as to traditional techniques. It was also pointed out that the current formulation was intended to be aligned with similar language found in other UNCITRAL texts, such as the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, as well as with the work being undertaken by UNCITRAL with a view to facilitating the use of EDI.

129. After deliberation, the Working Group decided to retain the writing requirement for submission of tenders and to delete the second sentence of paragraph (4), with its suggestion of paperless tenders. It was noted that the commentary would indicate that, notwithstanding the restriction in paragraph (4), States were free to elaborate paperless tendering proceedings, but that that would necessitate the

examination of a number of issues (e.g., form of tender security in a paperless submission) and might require the elaboration of special regulations.

Paragraph (4 bis)

130. The Working Group found paragraph (4 bis) to be generally acceptable.

Article 25

Period of effectiveness of tenders; modification and withdrawal of tenders

131. The Working Group considered the text of article 25 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 26

Tender securities

132. The Working Group considered the revised version of article 26 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (new 1)

133. The Working Group noted that the definition contained in paragraph (new 1) would be returned to its former position in article 2 as a result of the decision reached earlier. As to the content of that definition, the Working Group considered a proposal to incorporate the term "indemnities" into the illustrative list of forms of tender securities. It was suggested that the new term might serve either as a replacement for or as a supplement to the reference to guarantees. However, owing to uncertainty as to the meaning of the term, and in view of the relative financial certainty offered by guarantees, as well as the prevalence of the use of guarantees, it was decided not to add the reference to indemnities. The Working Group did agree that the paragraph should refer to "bank guarantees" rather than simply to "guarantees", so as to identify more precisely the instrument in question amid the myriad instruments readers of the Model Law might call to mind when seeing simply the word "guarantees". It was felt that that would add clarity and would not suggest that only guarantees issued by banks were contemplated since the list was illustrative. The Working Group also noted a suggestion to replace the words "secure the obligation" by the words "secure the fulfilment of the obligation".

Paragraph (1)

134. A suggestion was made to refer in subparagraph (a bis) to the form and "substance" of the tender security rather than to its form and "terms". That suggestion was not regarded as adding clarity to the text. The Working Group noted that the explanatory footnote for subparagraph (b) would be deleted pursuant to the decision to confine guidance to legislatures to the commentary.

135. The Working Group next considered whether the provision in subparagraph (b bis) needed to make it clear that the procuring entity, despite having given a confirmation of the acceptability of a particular issuer, retained the right to reject a tender security upon discovery of the insolvency of the issuer. It was suggested to add words along the following lines:

"... provided that the procuring entity may at any time after notification to the contractor or supplier reject the tender security if it discovers that the issuer of the tender security, or the confirming institution, has become insolvent or otherwise lacks creditworthiness."

136. The Working Group agreed to an addition of that nature since it was said to be helpful for some legal systems. It was recognized that in certain other legal systems such an explicit provision would not be necessary since the right of the procuring entity to reject in such cases would derive from general principles of law. It was also agreed that the commentary would explain that the language in question was optional.

137. Several comments were made as to the formulation of subparagraph (d). One observation was that the first sentence suggested a more significant degree of discretion on the part of the procuring entity to dictate the terms to be included in the tender security than was actually available, since the second sentence imposed a strict limitation that actually prescribed the procuring entity's range of choices for the terms of the tender security. It was suggested that the first sentence should be deleted. The Working Group agreed to add to subparagraph (d) an additional ground for the call of a tender security, namely, failure to comply with any other condition precedent to the signature of the procurement contract specified in the solicitation documents.

138. Another comment was that the *chapeau* of subparagraph (d) might be simplified and made more clear. However, the Working Group was unable to agree on a modified version of the *chapeau*, in particular because the existing formulation was seen as having the advantage of containing language that was not likely to be construed as referring specifically to either independent or to accessory guarantees. Support was also expressed for the retention of the first sentence on the ground that it made it clear that the procuring entity was to specify in the solicitation documents its requirement for the terms of the tender security. The Working Group requested the Drafting Group to consider whether it was sufficiently clear that independent guarantees were encompassed in the provision.

Paragraph (2)

139. The Working Group found paragraph (2) to be generally acceptable.

Article 27

Opening of tenders

140. The Working Group considered the revised version of article 27 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 28

Examination, evaluation and comparison of tenders

141. The Working Group considered the revised version of article 28 as contained in document A/CN.9/WG.V/WP.36.

142. The discussion revealed the need for the Drafting Group or the Secretariat to review the order in which the elements of the evaluation process were presented herein so as to ensure proper alignment of the sequence of article 28 with the actual order of actions in practice.

Paragraph (1)

143. The Working Group found subparagraph (a) to be generally acceptable.

144. A proposal was made to add a provision giving contractors and suppliers the right to correct factual and historical errors in their submissions. It was stated that that would help to ensure that the right of the procuring entity to correct purely arithmetic errors was not abused and to limit the rejection of tenders as unresponsive on the basis of minor factual and historic errors. The proposal was not accepted, as the Working Group was of the view that the matter was adequately addressed in particular by the procedure in subparagraph (a) for clarification of tenders. The Working Group also declined to support a proposal to delete as excessively onerous on the procuring entity the underlined language in subparagraph (b) imposing an obligation on the procuring entity to give notice of a correction to the submitting contractor or supplier. Accordingly, the Working Group found the present text of subparagraph (b) to be acceptable.

Paragraph (1 bis)

145. The Working Group referred to the Drafting Group a proposal that the word "may" in subparagraph (a) should be replaced by the word "shall" and that the word "only" in the same subparagraph should be deleted so as to clarify the meaning of paragraph (1 bis).

146. Various suggestions were made aimed at clarifying the meaning of the expression "minor deviations that do not materially alter" contained in subparagraph (b). One proposal was to add language to the effect that "a deviation is considered material if it alters in any substantial way the quality, quantity or time of performance of the contract or which limits the contractor's or supplier's rights or obligations under the procurement contract". In support of the proposal it was stated that it was necessary to clarify the term "materially" as it was vague and might lead to abuse and to frivolous grounds being used to disqualify tenders on the grounds that they were unresponsive. In opposition it was stated that the proposed wording did not clarify what might constitute a minor deviation any further than the present text as the word "substantial" was equally vague. The proposal was not accepted. Other proposals that did not get broad support included treatment of minor deviations under the rubric of clarifications under paragraph (1), and the combination of subparagraph (a) and the second sentence of subparagraph (b) so as to include in the defi-

nition of "minor deviations" the notion of quantification. It appeared to be difficult to go beyond what was in the current draft, in particular since the manner of application of the Model Law in any given case would depend to a significant degree on the disposition and approach of the procurement officer in any given case.

147. Another proposal was to insert the words "or if it contains factual errors or oversights which are capable of being corrected without a change of substance in the tender" after the first sentence in subparagraph (b). It was stated that that would ensure that tenders were not considered as unresponsive for containing factual errors or oversights which could easily be rectified. The proposal was accepted and referred to the Drafting Group. It was suggested that the word "characteristics" should be replaced by the words "any characteristics".

148. It was agreed that the space left vacant in subparagraph (d) by virtue of an earlier deletion should now be occupied by a reference to rejection or non-acceptance of tenders stained by inducements prohibited under article 10 *quater*. The proposal was accepted.

Paragraph (7)

149. It was noted that the reference to rejection in subparagraph (a) needed to be modified in view of the Working Group's decision, as reflected in paragraph (2), to limit the use of the word "rejection".

150. It was agreed that the reference in the *chapeau* of subparagraph (c) to the solicitation documents was superfluous and should be deleted. The Working Group noted that the matter was already covered in article 17 (*e bis*).

151. A question was posed as to the list in subparagraph (d)(iii) illustrating the types of factors that might be taken into account in determining the lowest evaluated tender. The concern here was that many of the items listed involved a high degree of subjectivity. However, the prevailing view was that the thrust and basic content of subparagraph (d)(iii) were satisfactory though further refinement would not be excluded. Subject to the modification agreed upon, the Working Group found paragraph (7) to be generally acceptable.

152. A proposal was made to delete the reference at the beginning of subparagraph (e) to authorization by the procurement regulations of the use of a margin of reference. The rationale behind that suggestion was the belief that the requirement of authorization by the procurement regulations was implicit in the final portion of subparagraph (e) which required the margin of preference to be calculated in accordance with the procurement regulations. Another proposal, going to the substance of the matter, was that any authoritative role for the procurement regulations with respect to margins of preferences should be abandoned so as not to tie the hands of the procuring entity and not to disadvantage enacting States that did elaborate procurement regulations. However, those proposals encountered opposition. It was felt that the requirement of authorization by the procurement regulations was an important element for transparency that should be retained and that required adequate emphasis in the Model Law.

153. It was suggested that subparagraph (e) should include a requirement for the preparation of a record in accordance with article 10 *ter* that would be subject to disclosure.

154. A proposal was made to add to article 17(1)(e *bis*) a reference to paragraph (7)(e).

Paragraphs (8), (8 bis), (8 ter) and (9)

155. The Working Group found paragraphs (8), (8 *bis*), (8 *ter*) and (9) to be generally acceptable.

Article 29

Rejection of all tenders

156. The Working Group considered the revised version of article 29 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 30

Negotiations with contractors and suppliers

157. The Working Group considered the text of article 30 as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 32

Acceptance of tender and entry into force of procurement contract

158. The Working Group considered the revised version of article 32 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

159. The Working Group found paragraph (1) to be generally acceptable.

Paragraphs (2) and (3)

160. A view was expressed that the notion of the entry into force of the procurement contract upon dispatch of a notice of acceptance of the tender should give way to the notion of entry into force upon the conclusion of a procurement contract. It was stated that, under paragraph (3), tenders might be modified one or more times and that, if the contract were to enter into force upon dispatch of the notice of acceptance of the tender, it might be uncertain what the terms of the accepted tender were. Providing that the contract entered into force only upon the signature of a written contract document would eliminate that uncertainty. However, the Working Group affirmed the decision made at its previous sessions that the Model Law should present options with respect to the manner of entry into force of the procurement contract reflecting differences in national practice.

161. As to whether, in paragraphs (2) and (3), reference should be made to the "receipt" of the notice of acceptance of the tender, rather than to its dispatch, the Working Group recalled its previous discussions. It was noted that the "receipt" approach was used in the United Nations Sales Convention, article 18(2). However, the "dispatch" approach had been considered to be more appropriate in the particular circumstances of procurement. In essence, what was at stake was the risk of a delay or a failure in the transmission of the notice. In order to bind the contractor or supplier to a procurement contract or to obligate it to sign a written procurement contract, the procuring entity had to give the notice while the tender was in force and effect. Under the "receipt" approach, if the notice was properly transmitted or conveyed to a transmitting authority by the procuring entity, but the transmission was delayed, lost or misdirected owing to no fault of the procuring entity, so that the notice was not received by the contractor or supplier before the expiry of the period of effectiveness of its tender, the procuring entity would lose its right to bind or obligate the contractor or supplier. Under the "dispatch" theory, that right of the procuring entity was preserved. In the event of a delay, loss or misdirection of the notice, the contractor or supplier might not learn before the expiration of the period of effectiveness of its tender that the tender had been accepted; but in most cases, that consequence would be less severe than the loss of the right of the procuring entity to bind the contractor or supplier. Accordingly, the Working Group affirmed its decision that the reference should be to the "dispatch" of the notice.

Paragraph (3 bis)

162. It was suggested that the requirement that the decision should be made within a reasonable time after the dispatch of the notice should be deleted. Such a requirement might be considered as unnecessarily restrictive, as well as superfluous, since, in the case of excessive delay, the validity period of the tender would in any case lapse. It was also suggested that the words "or, as the case may be, be executed" in the second sentence should be deleted, since that language barred signature of a procurement contract prior to the issuance of the approval, if required. The modification was intended to accommodate the practice in a number of countries of not considering requests for final approvals until after signature of the procurement contract.

163. Yet another suggestion was to delete both the remainder of paragraph (3 *bis*) and the first sentence of paragraph (3 *ter*), on the grounds that the rules contained in those provisions already resulted from the limitation inherent in the period of validity of the tenders. The prevailing view, however, was that those provisions, while they could be simplified, should be maintained. With a view to such simplification, the Working Group adopted the following consolidation of paragraph (3 *bis*) and the first sentence of paragraph (3 *ter*):

"Where the procurement contract is required to be approved by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated amount of time following the dispatch of the notice of acceptance of the tender that will be required to obtain the approval."

Paragraphs (3 ter) to (6)

164. The Working Group found paragraphs (3 *ter*) to (6) to be generally acceptable.

*New article 33 bis**Conditions for use of two-stage tendering*

165. The Working Group considered the revised text of new article 33 *bis* as contained in document A/CN.9/WG.V/WP.36.

166. The Working Group considered the conditions for use of two-stage tendering in the light of its decision, taken in connection with article 7, that, to the extent possible, the conditions for use of two-stage tendering, request for proposals and competitive negotiation should be assimilated. In that regard, the Working Group affirmed the condition in paragraph (a), which referred to cases in which the procuring entity for one reason or another was not in a position to formulate specifications to the level of detail required for tendering proceedings.

167. Beyond the case of incomplete specifications, the Working Group considered whether other conditions for use, in particular those set forth in new article 34, should be made applicable to two-stage tendering. It was agreed that two-stage tendering should be available for the conditions set forth in new article 34(c), (d) and (e). It was agreed, at the same time, that two-stage tendering was not a method of procurement suited to the sole ground of urgency and that therefore the provision in new article 34(b) would not apply to two-stage tendering.

168. As it had in connection with the discussion of article 7, the question arose as to whether the conditions for use of the various methods would be presented in one article or section in the Model Law. The Working Group decided to take the question up after it had completed its review of the articles concerning the methods of procurement.

169. Subject to the expansion of the conditions for use of two-stage tendering as described above, the Working Group found new article 33 *bis* to be generally acceptable.

*Article 33 bis**Procedures for two-stage tendering*

170. The Working Group considered the revised version of article 33 *bis* as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

*Article 33 ter**Conditions for use of request for proposals*

171. The Working Group noted that, as had been agreed, the condition in subparagraph (a) would be applicable to request for proposals, as well as to two-stage tendering and

competitive negotiation. It was also agreed that the conditions referred to in subparagraphs (c), (d) and (e) of new article 34 would also be applicable to request for proposals. As to the non-catastrophic urgency cases referred to in subparagraph (b) of new article 34, the Working Group noted a concern that if such circumstances were not covered in request for proposals, enacting States that incorporated request for proposals would not have a procurement method designed to deal with non-catastrophic urgency. It was suggested that the problem might be solved by including the condition in new article 34(b) among the conditions for use of request for proposals. However, objections were raised to that on the grounds that request for proposals was not a method suited for cases of urgency. The Working Group noted that possible solutions might lie in expanding the urgency ground for use of single-source procurement to cover cases of non-catastrophic urgency. The Working Group decided to consider further the matter in connection with its review of the conditions for use of competitive negotiation and single-source procurement.

172. The Working Group agreed to remove from article 33 *ter* (a), (b) and (c) the references found therein to a number of procedures to be followed in conducting request-for-proposals proceedings. Those references, which concerned the number of contractors and suppliers to be included in the competition and the manner of selection of the winning proposal, had been included in the article on conditions for use of request for proposals in part to help to distinguish that method of procurement from two-stage tendering and competitive negotiation. It was agreed that now that the problem of overlap in the conditions for use of those methods had been addressed, that rationale for the inclusion of procedures in the article on conditions for use had faded away and they should be deleted from article 33 *ter*. However, the Working Group affirmed the importance of those procedures and requested the Drafting Group to ensure that they were adequately covered in article 34 *quater*.

*Article 33 quater**Procedures for request for proposals*

173. The Working Group considered the revised version of article 33 *quater* as contained in document A/CN.9/WG.V/WP.36.

Paragraph (new 1)

174. The Working Group decided that paragraph (new 1) should be aligned with the formulation in article 12(1 *bis*), used therein to require the publication in newspapers and trade journals of the invitation to tender or to prequalify. It was also agreed that the words "economy or efficiency" should be replaced by the words "economy and efficiency". The Working Group found paragraph (new 1) to be otherwise generally acceptable.

Paragraphs (1) to (6)

175. The Working Group found paragraphs (1) to (6) to be generally acceptable.

Paragraph (7)

176. The Working Group requested the Drafting Group to review the formulation of subparagraph (a) so as to ensure that it would not imply that all the evaluation factors had to be reproduced in every modification of the request for proposals. A suggestion was made that the addition of the word "relevant" before the word "modification" would remedy the problem. It was also observed that it should be made clear that subparagraph (a) was not a source of any additional obligation with respect to the disclosure of factors beyond that already stated in paragraph (2).

177. The Working Group recalled that at the fourteenth session it had taken the view that the procedures set forth in subparagraphs (b) and (c) could be considered as optional or illustrative, and, at the current session, it considered whether to retain or to delete those provisions. In considering the matter, the Working Group noted that the two provisions had been added in order to render request-for-proposals proceedings more disciplined. As no objections were raised to the retention of the provisions, the Working Group decided that they should be retained, and not merely in an optional or illustrative role, but rather as mandatory.

Paragraph (8)

178. The Working Group agreed to the replacement of the words "The award" at the beginning of the paragraph by the words "Any award" so as to take account of the possibility that the procuring entity would not accept any of the proposals submitted to it.

179. The view was expressed that paragraph (8) should make it clear that the procuring entity was to award the procurement contract only to the contractor or supplier that submitted the proposal that best met the needs of the procuring entity as determined in accordance with the factors for evaluating the proposals.

*New article 34**Conditions for use of competitive negotiation*

180. The Working Group considered the revised version of new article 34 as contained in document A/CN.9/WG.V/WP.36.

181. The Working Group generally agreed to the retention of the existing conditions for use of competitive negotiation. At that point it also considered further which procurement methods should cover cases of urgency, and how the urgency condition for use might be formulated for the methods to which it would relate. The Working Group agreed that the catastrophic-urgency condition in article 35(new 1)(c) should be retained as a ground for the use of single-source procurement and that the unforeseeable urgency cases covered in new article 34(b) should be retained as a ground for the use of competitive negotiation.

182. Concerning the gap with regard to cases of non-catastrophic urgency that the scheme would leave in States that did not incorporate competitive negotiation, the Work-

ing Group attempted to find a solution by giving the procuring entity the discretion and flexibility needed in order to select the most appropriate procurement method in cases of urgency. It was agreed that that could be done by including in new article 34 and in article 35 parallel conditions for cases of urgency. Under that approach, non-catastrophic urgency would remain as a condition for use of competitive negotiation; in addition, use of competitive negotiation would also be authorized for cases of catastrophic urgency. Similarly, single-source procurement would be available both for cases of catastrophic urgency as well as for urgency not involving catastrophic causes. That approach would provide States that did not incorporate competitive negotiation with a method of procurement to cover cases of non-catastrophic urgency.

183. As regards the catastrophic urgency case already covered in article 35 (new 1)(c) and now to be added to new article 34, a suggestion was made that the provision might be reformulated so that it would not refer specifically to catastrophic circumstances but instead would refer to a compelling and urgent public interest that made it impossible or imprudent for the procuring entity to deal with more than one contractor or supplier.

184. The attention of the Working Group was drawn to the added significance of the record requirement in article 7(5) under such a more flexible, discretionary scheme. A suggestion to restrict the availability of competitive negotiation in cases of urgency by providing that the competitive negotiation proceedings would have to expedite the conclusion of a procurement contract was regarded as unworkable as the procuring entity could not be expected to know in advance whether competitive negotiation rather than some other method would be sure to result in a more expedited proceeding.

185. As regards the condition in subparagraph (e), questions were raised as to the extent to which research contracts, even those leading to the purchase of a prototype, could be treated under the rubric of procurement of goods and construction. The Working Group was of the view that such research contracts should be contemplated by the conditions for use of competitive negotiation. At the same time, it was noted that article 35(new 1)(e) set forth an identical condition for the use of single-source procurement. It was decided that the overlap was advantageous in that it would give to the procuring entity the flexibility to select a method of procurement that best fit the circumstances of a given case. Accordingly, it was decided to retain research contracts leading to the procurement of a prototype as a condition for use for each of the two methods. In that connection, emphasis was again placed on the importance of the record requirement in article 7(5).

*Article 34**Procedures for competitive negotiation*

186. The Working Group considered the revised version of article 34 as contained in document A/CN.9/WG.V/WP.36.

187. A view was expressed that article 34 contained very few procedures regulating the conduct of competitive negotiation proceedings, as compared, in particular, to the provisions on request for proposals. In response, it was pointed out that the method of competitive negotiation was often adopted because the procuring entity could not determine in advance all of the criteria to be used.

188. The Working Group found article 34 to be generally acceptable.

New article 34 bis

Conditions for use of request for quotations

189. The Working Group considered the revised version of new article 34 *bis* as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 34 bis

Procedures for request for quotations

190. The Working Group considered the revised version of article 34 *bis* as contained in document A/CN.9/WG.V/WP.36 and found that article to be generally acceptable.

Article 35

Single-source procurement

191. The Working Group considered the revised version of article 35 as contained in document A/CN.9/WG.V/WP.36.

192. The Working Group reaffirmed its decision taken during its consideration of new article 34 that a provision along the lines of new article 34(b) should be transposed into article 35.

193. The Working Group also affirmed that it was appropriate for article 35(new 1)(e), which permitted the procuring entity to use single-source procurement for research contracts, to be retained. The Working Group found article 35 to be generally acceptable.

194. Having completed its review of the conditions for use of the various methods of procurement, the Working Group next considered the drafting matter of the location of the conditions for use. In particular, the question was raised as to whether all the conditions for use, including those for single-source procurement and request for quotations, should be moved into article 7, or into a cluster of articles near article 7, or whether only the conditions for use of two-stage tendering, request for proposals and competitive negotiations should be assembled in one place. A related question was whether the urgency conditions applicable to single source and competitive negotiations should be in

article 7. Another question concerned possible consolidation of references to the approval requirement governing resort to the methods of procurement other than tendering.

195. While sympathy was expressed for the advantages of consolidating all the conditions for use in article 7, concern was voiced that were all the conditions to be included in article 7, the article would be excessively long and apparently rather complex.

196. Another suggestion, which attracted the support of the Working Group and was referred to the Drafting Group, was that all common conditions should be dealt with in article 7, and that conditions specific to a particular method should be dealt with in individual articles relating to those methods. Under such a scheme, conditions for the use of single source and request for quotations would essentially be handled separately as they were specific to those methods. A parallel suggestion was that article 7 should be moved from chapter 1, which dealt with a variety of general provisions, into a separate chapter dealing with procurement methods and their conditions of use. Within that context the conditions for the use of single source and request for quotations could be handled separately. The Working Group noted that any consolidation of the conditions for use of all the methods would appear to leave the Model Law without an article specifically devoted to single-source procurement, as there were no procedures spelled out for single-source procurement. It was suggested that that might be remedied by retaining in article 35 language patterned on paragraph (new 1).

Article 36

Right to review

197. The Working Group considered the revised version of article 36 as contained in document A/CN.9/WG.V/WP.36.

198. The Working Group decided to retain the asterisk footnote to the title of chapter IV, on review. It was felt that an exception to the decision not to have footnotes on the face of the Model Law was warranted by the significance of the information contained in the footnote. That footnote explained the difference in the character of the provisions on review, namely, that some States might wish to use those provisions only to measure the adequacy of existing review procedures. The Working Group agreed that the special nature of chapter IV should also be discussed in greater detail in the commentary.

199. As to the formulation of the footnote, it was agreed that reference should be made to "constitutional and other considerations", rather than merely to "constitutional considerations". That modification was aimed at encompassing obstacles to the incorporation of chapter IV other than of a constitutional nature.

Paragraph (1)

200. The concern was expressed that the rule of standing, which referred to "any contractor or supplier that has an interest in obtaining a procurement contract", might overly

broaden the scope of the provision. It was also stated that that could spawn uncertainty and unjustified litigation and run counter to the decision taken by the Working Group in article 2 to limit the use of the term "contractor or supplier" to exclude contractors and suppliers with insufficient proximity in any given context (see paragraph 30). In view of the above concern, it was suggested to rephrase the paragraph as follows:

"(1) Subject to paragraph (2), any contractor or supplier claiming to have suffered loss or injury because of a breach of a duty imposed by this Law may seek review of the act, decision or procedure in accordance with articles 37 to 41."

201. The view was expressed, however, that the suggested words "claiming to have suffered loss or injury" might still open too widely the right for contractors or suppliers to seek review, a right which should be granted only to those contractors or suppliers who had actually suffered loss or injury. It was pointed out that until the facts had been adjudicated, a petition for review could only be said to "claim" injury, and, moreover, even if injury was suffered and not merely risked, at the time when review might be sought, precise information as to the extent of the loss actually suffered might not be available. The Working Group also affirmed that the right to seek review should not be limited to *ex post facto* remedies but should also be open to contractors and suppliers that claimed to risk suffering loss or injury.

202. The view was expressed that the reference to article 40 was inappropriate since that article dealt with judicial proceedings. However, it was generally felt that, while article 36 was not geared mainly to judicial review, administrative review might also be of some relevance to court proceedings.

Paragraph (2)

203. Notwithstanding that a view was expressed that the reference to "domestic suppliers or contractors" should be retained, it was generally agreed that the reference should be deleted from subparagraph (b) to ensure consistency with article 8 *ter*.

204. The view was expressed that subparagraph (c) should be expanded to refer also to two-stage tendering and to requests for proposals.

205. The Working Group reaffirmed that the distinction between duty and discretion and, when a duty was imposed, the purpose of that duty, should serve as the basis for distinguishing between provisions that gave rise to a private right to review and those that did not. According to that approach, provisions obligating the procuring entity to exercise discretion would not give rise to private remedies, except to the extent that the procuring entity failed to exercise discretion at all or exercised it in an arbitrary fashion. Furthermore, there were some provisions that, as outlined in paragraph (2), involved the procuring entity's discretion and were aimed at the general public interest and therefore were not to be regarded as establishing any private rights and that in no case should give rise to a private

remedy. However, a concern was expressed that, as presently drafted, article 36 would not exempt from review all the cases of exercise of discretion that merited exemption. Accordingly, the following proposal was made:

"(f) any other decision where the procuring entity is exercising a discretion afforded to it by this Law."

206. The Working Group was hesitant to adopt the proposal. It was observed that, should such a clause be included, little would remain in the way of remedies, since so much of what the procuring entity did under the law involved the exercise of some degree of discretion. It was said that such a situation would sharply curtail the effectiveness of the review procedures as a tool for enforcement of the Model Law. The Working Group agreed that any such provision would have to be drafted with caution so as to address those concerns.

Article 37

Review by procuring entity or by approving authority

207. The Working Group considered the revised version of article 37 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

208. The Working Group found paragraph (1) to be generally acceptable.

209. It was agreed that the commentary should refer to the need for enacting States to elaborate regulations dealing with the detailed procedural requirements that should be met by a supplier or contractor in order to initiate the review proceedings. For example, such regulations could clarify whether a succinct statement made by telex, with evidence to be submitted later, would be regarded as sufficient.

Paragraph (2)

210. Concerns were expressed regarding the time periods and deadlines contained in article 37 and the subsequent articles. One concern was that the reference to "days" needed to be made consistent. It was pointed out that the reference to "days" in paragraph (2) might be inconsistent with the definition of other time periods, for example in paragraph (4), which relied on the notion of "working days", and that the same formulation should be used throughout. The view was expressed that the notion of "working day" could be retained provided that it was made clear that it referred to "working days" in the country of the procuring entity. However, it was pointed out that, in view of the variable contents of the notion in different countries, any reference to "working days" should be avoided and that time periods, throughout the Model Law, could be expressed with more certainty by the use of the term "calendar days". It was also pointed out that, since most States had enacted interpretation acts that would provide definitions of a "day" or "working day", it might be possible not to deal with the matter in the Model Law to such a degree of specificity.

211. Another concern was that the time periods and deadlines set forth in article 37 and the following provisions might be too short, to the point of hindering recourse to meaningful review. The Working Group did not favour leaving the matter open in the Model Law. It was felt desirable to indicate the preferred period of time in the Model Law. One suggestion was that the commentary should indicate that the dates set in the Model Law were norms and should discuss solutions to problems such as the effect of holidays.

212. Accordingly, the Working Group agreed that the 10-day period set forth for the procuring entity to entertain a complaint was too short, particularly in view of the international nature of the proceedings, and that it should be extended to 20 days.

213. It was also agreed that discretion should be afforded to the head of the procuring entity to entertain a complaint that had been submitted after expiration of the 20-day period. It was suggested that that could be done by replacing the words "shall not" by the words "need not".

Paragraph (3)

214. The Working Group found paragraph (3) to be generally acceptable.

Paragraph (4)

215. Subject to the increase of the period from 20 days to 30 days, the Working Group found paragraph (4) to be generally acceptable.

Paragraph (5)

216. While doubts were expressed as to the necessity of the provision in view of the availability of judicial recourse in most legal systems, the Working Group noted that a provision such as paragraph (5) on the administrative and judicial consequences of a failure by an administrative authority to act within a specific time period would be regarded as essential in many countries.

217. It was also noted that the reference to the "person" submitting a complaint needed to be changed to a reference to a "contractor or supplier" in line with the decision at an earlier session in connection with article 36 to limit the availability of review to contractors and suppliers. Paragraph (5) was found to be otherwise generally acceptable.

Paragraph (6)

218. The Working Group found paragraph (6) to be generally acceptable.

Article 38

Administrative review

219. The Working Group considered the revised version of article 38 as contained in document A/CN.9/WG.V/WP.36.

Paragraph (1)

220. As regards subparagraph (a), the view was expressed that the reference to the time when the contractor or supplier "became aware of the circumstances giving rise to the complaint" should be replaced by a mention of the time when the contractor or supplier became aware of its right to bring a complaint. That proposal was intended to address the situation where the right to review under article 37 would no longer be available to the contractor or supplier because of the entry into force of the procurement contract. It was generally agreed that subparagraph (a), or another provision in the Model Law, needed to address that situation, since the underlying principle was that a claimant should have access to article 38 review if article 37 review became unavailable.

221. As regards subparagraph (c), in accordance with the decision taken with respect to time periods in article 37, it was agreed to increase the 10-day period in subparagraph (c) to a period of 20 days. While a concern was expressed that the formulation of the subparagraph should refer to cases in which a contractor or supplier had actually been adversely affected by a decision of the head of the procuring entity, it was generally agreed that, for reasons expressed in the context of article 36 (see paragraph 201), the mention of a "claim" of injury of the contractor or supplier had to be maintained. It was noted that similar changes would be applicable to subparagraphs (a) and (b).

222. Subject to the above changes, the Working Group found paragraph (1) to be generally acceptable.

Paragraph (1 bis)

223. The Working Group found paragraph (1 bis) to be generally acceptable.

Paragraph (2)

224. It was observed that, while paragraph (1) established certain time limits for the commencement of administrative review that were linked to the point of time when the complainant became aware of the circumstances in question, the Model Law did not provide any absolute limitation period within which the administrative body should grant a remedy or dismiss the complaint. The view was expressed that, as article 38 did not displace the jurisdiction of the courts, that should be left to other national law, particularly in view of the fact that such administrative proceedings, in certain countries, might take the form of quasi-judicial proceedings involving hearings or other lengthy procedures. However, the prevailing view was that an overall period of 30 calendar days should be imposed on the administrative body. It was noted that the difficulties that might arise in some countries with such a limitation could be overcome, in particular because of the optional nature of the article.

225. It was noted that the reference in subparagraph (c) to the "person" claiming to be adversely affected would be modified to refer to a "contractor or supplier".

Paragraph (3)

226. The Working Group found paragraph (3) to be generally acceptable.

Paragraph (4)

227. The Working Group found paragraph (4) to be generally acceptable. A view was expressed, however, that the reference to the commencement of an action under article 40 was not appropriate since the review provisions did not purport to deal with questions of judicial procedure.

*Article 39**Certain rules applicable to review proceedings under article 37 [and article 38]*

228. The Working Group considered the revised version of article 39 as contained in document A/CN.9/WG.VI/ WP.36.

Paragraph (1)

229. A view was expressed that the paragraph put an excessive burden on the procuring entity and that the obligation to notify all contractors and suppliers participating in the procurement proceedings of the submission of the complaint and of its substance should be deleted. That view failed to attract support and the Working Group found paragraph (1) to be generally acceptable.

Paragraph (2)

230. The Working Group decided to add a provision to the effect that a contractor or supplier that failed to participate in the review proceedings would be barred from subsequently raising the same type of claim.

231. A view was expressed that the standard set forth in paragraph (2) to determine which contractors and suppliers would be admitted, which referred to any contractor or supplier whose interests were or "could be affected", was too vague and should be restricted to cases in which the interests of a contractor or supplier had actually been affected. It was suggested that such a limitation would help to ensure that review proceedings did not assume unmanageable proportions and unduly disrupt the procurement proceedings. The prevailing view, however, was that the existing formulation was adequate, particularly in view of the discretion remaining in the hands of the review body to determine whether a given contractor or supplier met the admission test. It was also felt that the possibility of broader participation should not be unduly restricted since it was in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

232. The view was expressed that paragraph (2) was not clear as to whether governmental authorities, in particular approving authorities, were allowed to participate in the review proceedings. It was generally agreed in that regard that the "right to participate" should expressly be extended to such authorities.

Paragraph (3)

233. It was generally agreed that the reference to a five-day period should be replaced by a reference to a seven-day period and that the text should expressly mention that the period was to run from the date of issuance of the decision by the head of the procuring entity.

234. A view was expressed that the obligation of the head of the reviewing body to provide any contractor or supplier or governmental authority that had participated in the review proceedings with a copy of the decision was excessively burdensome. The prevailing view, however, was that the obligation should be maintained.

*Article 40**Judicial review*

235. The Working Group considered the revised version of article 40 as contained in document A/CN.9/WG.VI/ WP.36.

236. A question was raised as to the need for article 40, since court jurisdiction would presumably be assured under relevant statutes.

237. It was observed that it should be made clear in the commentary that the purpose of the article was not to limit or to displace the rights to judicial review that might be available under other applicable law. An important aim, rather, was to express a recommendation and to provide guidance to those countries where appropriate judicial review mechanisms would not be available outside the Model Law. It was noted, however, that the assumption was that, under the Model Law, administrative recourse would be exhausted before judicial review could take place.

238. It was generally agreed that the current text should be refined to make it clear that an appeal could be lodged not only against a decision reached by a review body, but also against a failure by such a review body to reach a decision within a given period of time.

239. A concern was expressed as to whether article 40 would allow a procuring entity to seek judicial review of the decision of an administrative body. It was observed that the reference to article 36, which established the right for contractors and suppliers to seek review, might unduly suggest that only contractors and suppliers had a right to judicial review. It was agreed that the drafting of article 40 should be refined so as not to suggest that procuring entities were precluded from seeking judicial review of decisions reached at lower levels of the review process. The following wording was adopted:

"The [insert name(s) of court(s)] has jurisdiction in respect of petitions for judicial review of decisions reached (or not taken within the time prescribed) by review bodies under articles 37 and 38."

Article 41

Suspension of procurement proceedings

240. The Working Group considered the revised version of article 41 as contained in document A/CN.9/WG.V/WP.36.

241. It was proposed that article 41 should be placed before article 40, which dealt with judicial review. It was observed that this would clarify the fact that article 41 related to proceedings under article 37 and article 38, rather than to judicial proceedings. It was noted that its present placement was inappropriate as article 41 had nothing to do with judicial review. The proposal was accepted.

Paragraph (1)

242. A view was expressed that there should be no automatic suspension and that the procuring entity should have the discretion as to whether or not to suspend procurement proceedings in the event of a complaint. However, the Working Group reaffirmed its decision, taken at its fourteenth session, that article 41 should provide for mandatory suspension, on the condition that the complaint met certain criteria specified in the Model Law.

243. A suggestion was made that the provision should be modified to state that the suspension would be dependent upon the procuring entity "satisfying itself" that the conditions for the suspension had been met. Objections were raised to the proposal on the ground that such language would run counter to the decision that the application for a suspension should not involve an adversarial or an evidentiary process, but rather should be an *ex parte* process based on the affirmation by the complainant of certain circumstances. It was also suggested that the availability of an override of the suspension under paragraph (4) obviated the need for any further limitations. At the same time, it was recognized that, even in the context of *ex parte* allegations, the procuring entity should be enabled to look on the face of the complaint and reject frivolous complaints. The Working Group agreed to reformulate paragraph (1) so as to allow a procuring entity to satisfy itself that the complaint was not frivolous before a suspension was applied.

244. Several suggestions were made for the consideration of the drafting group as to the appropriate wording to be used to reflect the above understanding. One formulation was that the allegations should be such that, "if proven, would demonstrate that the contractor or supplier will suffer irreparable injury in the absence of a suspension". The proposal did not generate significant support. The Working Group favoured more a proposal that the allegations of the contractor or supplier should "satisfy the review body that the contractor or supplier will suffer irreparable injury in the absence of a suspension and that the complaint is not frivolous". The Working Group referred those proposals to the drafting group.

245. The Working Group considered the question of the length of the time of the suspension. A view was expressed that the period of five days provided for in paragraph (1) was too short a period of time. It was suggested that a more appropriate time would be 30 days, as this would allow the

review body sufficient time to make a decision on the complaint before it. It was also suggested that that would be in line with the time periods to which the Working Group had agreed with respect to articles 37 and 38, in particular since it would appear illogical to have 30 days to take a decision, but only 5 days for the minimum duration of a suspension. In opposition to the proposal it was pointed out that the procuring entity under paragraph (3) had the power to extend the suspension period in order to preserve the rights of the contractor or supplier submitting the complaint or commencing the action. It was further stated that having an initial very short period of suspension would limit disruption of procurement proceedings due to unwarranted suspensions, while at the same time accomplishing the essential purpose of freezing the status quo while the review body obtained an impression of the complaint and determined whether any longer suspension was merited. That approach was said to maintain an appropriate balance between the interests of the procuring entity and those of contractors and suppliers.

246. After deliberation, the Working Group decided to keep the initial period of suspension at seven days as provided for in paragraph (1). It was noted that the application of a suspension might affect time limits in the procurement proceedings, such as the deadline for the submission of tenders, and may raise the question of the validity of tender securities. As regards tender securities, it was noted that a contractor or supplier could not be required to extend its tender security as a result of the suspension of procurement proceedings, but would rather have to be allowed to withdraw from the procurement proceedings without penalty.

247. Several drafting suggestions were made with respect to paragraph (1). One was to replace the words "article 37 or 38" by the words "article 37 and/or 38". Another was to replace the words "suspends procurement proceedings" by the words "suspend procurement proceedings and deadlines" in order to clarify the meaning of suspension of the procurement proceedings. The suggestions were referred to the drafting group. The Working Group affirmed the use of the word "declaration", rather than the word "affidavit", as the latter term was not universally known.

Paragraph (2)

248. It was proposed that the words "upon issuance of a notice of acceptance" should be deleted. In support of the proposal it was stated that paragraph (2) should apply to both the situation where the issuance of the notice triggered the entry into force of a procurement contract and where the procurement contract did not enter into force until after actual signature of a contract. It was noted that article 32(5) would require paragraph (2) to apply to both situations. The proposal was accepted.

249. The Working Group considered whether paragraph (2) should place an overall limitation on the duration of suspension. It was proposed that there should be an overall limit of 30 days. In support of the proposal it was stated that without a limit, the duration of suspension might become unwieldy, in particular with respect to proceedings before administrative bodies. In opposition to the proposal it was stated that a limitation period would leave a contrac-

tor or supplier who had submitted a complaint without a remedy should an administrative body fail to make a determination within the overall limitation of 30 days. It was noted, however, that such a contractor or supplier would still presumably have judicial remedies. Subject to possible further consideration, the proposal to place an overall cap of 30 days was accepted.

Paragraph (3)

250. The Working Group found paragraph (3) to be generally acceptable.

Paragraph (4)

251. It was proposed that paragraph (4) should require inclusion in the record of information concerning a determination by the procuring entity that a complaint under paragraph (1) should not trigger automatic suspension. The proposal was accepted.

II. Report of the Drafting Group

252. The Working Group reviewed the draft articles of the Model Law as revised by the Drafting Group. At the conclusion of its deliberations on the draft articles of the Model Law, the Working Group adopted the text of the draft Model Law as contained in the annex to the present report.

III. Future work

253. The Working Group requested the Secretariat to circulate the text of the draft Model Law to Governments and interested organizations for comments. It was noted that the text of the Model Law, together with a compilation of comments by Governments and interested organizations, would be placed before the Commission at its twenty-sixth session for final review and adoption.

254. The Working Group affirmed its earlier decision that a commentary giving guidance to legislatures enacting the Model Law should be prepared. As to the timing and method of preparation of the commentary, the Working Group affirmed the decision at its previous session that, upon the preparation of the draft commentary by the Secretariat, it would convene a small and informal ad hoc working party of the Working Group to review the draft commentary. The Working Group noted that it would be desirable for representatives and observers that had taken part in the preparation of the draft Model Law to participate in the informal ad hoc working party. It was noted that the meeting of the working party would be held at Vienna, possibly in October 1992.

255. The Working Group noted with interest that a note on the desirability and feasibility of preparing uniform law provisions on the procurement of services would be prepared by the Secretariat and submitted to the Commission at its twenty-sixth session together with other studies relating to the future plan of work of the Commission. The Working Group indicated that the note by the Secretariat could envisage different possible options as to the scope of the services that would be covered by such provisions.

ANNEX

DRAFT MODEL LAW ON PROCUREMENT AS ADOPTED BY THE WORKING GROUP*

PREAMBLE

WHEREAS the [Government] [Parliament] of this State considers it desirable to regulate procurement of goods and of construction so as to promote the objectives of:

- (a) maximizing economy and efficiency in procurement;
- (b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;
- (d) providing for the fair and equitable treatment of all suppliers and contractors;
- (e) promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application*

- (1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.
- (2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:
 - (a) procurement involving national security or national defence;
 - (b) . . . (the enacting State may specify in this Law additional types of procurement to be excluded); or
 - (c) procurement of a type excluded by the procurement regulations.
- (3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers and contractors when first soliciting their participation in the procurement proceedings.

Article 2. *Definitions*

For the purposes of this Law:

- (a) "procurement" means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves;
- (b) "procuring entity" means:
 - (i)

Option 1 for subparagraph (i)

any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except . . . ; (and)

*Following the text of the draft Model Law is a comparative index indicating new article numbers assigned to the provisions of the draft Model Law following adoption by the Working Group.

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except . . .; (and)

- (ii) (each State enacting this Model Law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(c) "goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity;

(d) "construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract;

(e) "supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(f) "procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(g) "tender security" means a security provided to the procuring entity to secure the fulfilment of the obligation of a supplier or contractor submitting a tender to enter into a procurement contract if the contract is awarded to the supplier or contractor, including such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(h) "currency" includes monetary unit of account.

Article 3. *International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]*

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) treaty or other form of agreement to which it is a party with one or more other States,

(b) agreement with an intergovernmental international financing institution that is entered into by this State,

((c) agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,)

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

Article 4. *Procurement regulations*

The . . . (each State enacting this Model Law specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

Article 5. *Public accessibility of legal texts*

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection

with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

Article 6. *Qualifications of suppliers and contractors*

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers and contractors at any stage of the procurement proceedings.

(2) Subject to the right of suppliers and contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers and contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers and contractors:

(a) possess the technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;

(b) have legal capacity to enter into the procurement contract;

(c) are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(d) have fulfilled their obligations to pay taxes and social security contributions in this State;

(e) have not, and their directors or officers have not, been convicted of any criminal offence, related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract, within a period of . . . years (the State enacting this Law specifies a period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(3) Any requirement established pursuant to paragraph (2) of this article shall be set forth in the prequalification documents, if any, and in the solicitation documents and shall apply equally to all suppliers and contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers and contractors other than those provided for in paragraph (2) of this article.

(4) The procuring entity shall evaluate the qualifications of suppliers and contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents.

(5) Subject to articles 8(1) and 29(4)(d), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers and contractors that discriminates against or among suppliers and contractors or against categories thereof on the basis of nationality.

(6) The procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false or inaccurate.

(7) Except where prequalification proceedings have taken place, a supplier or contractor that claims to meet the qualification criteria shall not be precluded from participating in procurement proceedings for the reason that it has not provided proof that it is qualified pursuant to paragraph (2) of this article if the supplier or contractor undertakes to provide such proof no later than the deadline for the submission of tenders, and if it is reasonable to expect that the supplier or contractor will be able to do so.

Article 7. *Prequalification proceedings*

- (1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapters III or IV, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.
- (2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier and contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents.
- (3) The prequalification documents shall include, at a minimum, the information required to be specified in the invitation to tender by article 19 (1), except subparagraphs (f), (g) and (i) thereof, as well as the following information:
- (a) instructions for preparing and submitting prequalification applications;
 - (b) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;
 - (c) any documentary evidence or other information that must be submitted by suppliers and contractors to demonstrate their qualifications;
 - (d) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers and contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;
 - (e) any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.
- (4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity, which shall not identify the source of the request, shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify and shall be communicated to all suppliers and contractors to which the procuring entity provided the prequalification documents.
- (5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. That decision shall be based solely on the criteria set forth in the prequalification documents.
- (6) The procuring entity shall promptly notify each supplier and contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers and contractors that have been prequalified. Only suppliers and contractors that have been prequalified are entitled to participate further in the procurement proceedings.
- (7) The procuring entity shall upon request communicate to suppliers and contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.
- (8) The procuring entity may require a supplier or contractor that has been prequalified to reconfirm its qualifications in ac-

cordance with the same criteria utilized to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier and contractor that fails to reconfirm its qualifications if requested to do so and may disqualify a supplier or contractor if it finds at any time that the prequalification or reconfirmation information submitted was false or inaccurate. The procuring entity shall promptly notify each supplier and contractor requested to reconfirm its qualifications as to whether or not the supplier or contractor has succeeded in reconfirming its qualifications.

Article 8. *Participation by suppliers and contractors*

- (1) Suppliers and contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.
- (2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.
- (3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 9. *Form of communications*

- (1) Subject to other provisions of this Law or any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.
- (2) Communications between suppliers and contractors and the procuring entity referred to in articles 7(4) and (6), 11(3), 26(2)(a), 27(1)(d), 29(1), 30(3) and 32(1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.
- (3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

Article 10. *Rules concerning documentary evidence provided by suppliers and contractors*

If the procuring entity requires the legalization of documentary evidence provided by suppliers and contractors to demonstrate their qualifications in procurement proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

Article 11. *Record of procurement proceedings*

(1) The procuring entity shall prepare a record of the procurement proceedings containing the following information:

(a) a brief description of the goods or construction to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) the names and addresses of suppliers and contractors that submitted tenders, proposals, offers or quotations;

(c) information relative to the qualifications, or lack thereof, of suppliers and contractors that submitted tenders, proposals, offers or quotations;

(d) the price and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations;

(f) if all tenders were rejected pursuant to article 30, a statement to that effect and the grounds therefor, in accordance with article 30(1);

(g) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) the information required by article 12, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) in tendering proceedings in which the procuring entity sends invitations to tender or to prequalify only to particular suppliers or contractors pursuant to article 18(3), the statement required under that provision;

(j) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 13(2) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(k) in procurement proceedings in which the procuring entity, in accordance with article 8(1), limits participation on the basis of nationality, a statement of the grounds relied upon by the procuring entity for imposing the limitation.

(2) The portion of the record referred to in subparagraphs (a), (b) and (i) of paragraph (1) of this article shall be made available for inspection by any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) The portion of the record referred to in subparagraphs (c) to (g) of paragraph (1) of this article shall be made available for inspection by suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract, unless disclosure at an earlier stage is ordered by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices.

(4) The procuring entity shall not be liable to contractors and suppliers for monetary damages solely as result of failure to prepare a record of the procurement proceedings in accordance with the present article.

Article 12. *Inducements from suppliers and contractors*

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give to any current or former officer or employee of the procuring entity a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. The rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 13. *Methods of procurement*

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) A procuring entity that uses a method of procurement other than tendering proceedings pursuant to articles 14, 15 or 16 shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that particular method of procurement.

Article 14. *Conditions for use of two-stage tendering, request for proposals or competitive negotiation*

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of two-stage tendering in accordance with article 33, or request for proposals in accordance with article 34, or competitive negotiation in accordance with article 35, in the following circumstances:

(a) the procuring entity is unable to formulate detailed specifications for the goods or construction and, in order to obtain the most satisfactory solution to its procurement needs,

(i) it seeks proposals as to various possible means of meeting its needs; or,

(ii) because of the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) when the procuring entity applies this Law, pursuant to article 1(2), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 12, 29(3) or 30, and when engaging

in new tendering proceedings would be unlikely to result in a procurement contract.

(2) The procuring entity may engage in procurement by means of competitive negotiation also when:

(a) there is an urgent need for the goods or construction and engaging in tendering proceedings would therefore be impossible or imprudent, provided that the circumstances giving rise to the urgency were not foreseeable by, or a result of dilatory conduct on the part of, the procuring entity; or,

(b) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impossible or imprudent to use other methods of procurement because of the amount of time involved in using those methods.

Article 15. *Conditions for use of request for quotations*

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of a request for quotations in accordance with article 36 for the procurement of readily available goods that are not specially produced to the particular specifications of the procuring entity and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

Article 16. *Conditions for use of single-source procurement*

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in single-source procurement in accordance with article 37 when:

(a) the goods or construction are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods or construction, and no reasonable alternative or substitute exists;

(b) there is an urgent need for the goods or construction and engaging in tendering proceedings would therefore be impossible or imprudent, provided that the circumstances giving rise to the urgency were not foreseeable by, or a result of dilatory conduct on the part of, the procuring entity;

(c) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impossible or imprudent to use other methods of procurement because of the amount of time involved in using those methods;

(d) the procuring entity, having procured goods, equipment or technology from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment or technology, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods in question;

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs;

(f) the procuring entity applies this Law, pursuant to article 1(2), to procurement involving national defence or national secu-

urity and determines that single-source procurement is the most appropriate method of procurement; or

(g) procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 29(4)(c)(iii) and approval is obtained following public notice and adequate opportunity to comment, provided that procurement from no other supplier or contractor is capable of promoting that policy.

CHAPTER III. TENDERING PROCEEDINGS

Section I. *Solicitation of tenders and of applications to prequalify*

Article 17. *Domestic tendering*

In procurement proceedings in which

(a) participation is limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) the procuring entity decides, in view of the low amount or value of the goods or works to be procured, that only domestic suppliers or contractors are likely to be interested in submitting tenders,

the procuring entity shall not be required to employ the procedures set out in articles 11(2), 19(1)(h), 19(1)(i), 19(2)(c), 19(2)(d), 21(j), 21(k), 21(r), 22(4) and 27(1)(c) of this Law.

Article 18. *Procedures for soliciting tenders or applications to prequalify*

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in . . . (each State enacting this Model Law specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this article, the procuring entity may, when necessary for reasons of economy and efficiency, (and subject to approval by . . . (each State may designate an organ to issue the approval),) solicit tenders, or, where applicable, applications to prequalify, by sending invitations to tender or invitations to prequalify, as the case may be, only to particular suppliers or contractors selected by it. The procuring entity shall select a sufficient number of suppliers and contractors to ensure effective competition, consistent with the efficient conduct of the tendering proceedings. The grounds and circumstances for employing this procedure shall be recorded in the record of the procurement proceedings.

Article 19. *Contents of invitation to tender and invitation to prequalify*

(1) The invitation to tender shall contain at least the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity of the goods to be supplied or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

(d) the criteria and procedures to be used for evaluating the qualifications of suppliers and contractors, in conformity with article 8(1)(a);

(e) a declaration, which may not later be altered, that suppliers and contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8(1), as the case may be;

(f) the means of obtaining the solicitation documents and the place from which they may be obtained;

(g) the price, if any, charged by the procuring entity for the solicitation documents;

(h) the currency and means of payment for the solicitation documents;

(i) the language or languages in which the solicitation documents are available;

(j) the place and deadline for the submission of tenders.

(2) An invitation to prequalify need not contain the information referred to in subparagraphs (f), (i) and (j) of paragraph (1) of this article, but shall contain the other information referred to in paragraph (1), as well as the following information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents;

(c) the currency and terms of payment for the prequalification documents;

(d) the language or languages in which the prequalification documents are available;

(e) the place and deadline for the submission of applications to prequalify.

Article 20. *Provision of solicitation documents*

The procuring entity shall provide the solicitation documents to suppliers and contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier and contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of printing them and providing them to suppliers and contractors.

Article 21. *Contents of solicitation documents*

The solicitation documents shall include, at a minimum, the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers and contractors and relative to the reconfirmation of qualifications pursuant to article 29(6);

(c) the requirements as to documentary evidence or other information that must be submitted by suppliers and contractors to demonstrate their qualifications;

(d) the nature and required technical and quality characteristics, in conformity with article 22, of the goods or construction to

be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; any incidental services to be performed; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(e) the factors to be used by the procuring entity in determining the successful tender, including any margin of preference and any factors other than price to be used pursuant to article 29(4)(b), (c) and (d) and the relative weight of such factors;

(f) the terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) if alternatives to the characteristics of the goods, construction, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect;

(h) if suppliers and contractors are permitted to submit tenders for only a portion of the goods or construction to be procured, a description of the portion or portions for which tenders may be submitted;

(i) the manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods or construction themselves, such as transportation and insurance charges, customs duties and taxes;

(j) the currency or currencies in which the tender price is to be formulated and expressed;

(k) the language or languages, in conformity with article 24, in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers and contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) the manner, place and deadline for the submission of tenders, in conformity with article 25;

(n) the means by which, pursuant to article 23, suppliers and contractors may seek clarifications of the solicitation documents and a statement as to whether the procuring entity intends to convene a meeting of suppliers and contractors;

(o) the period of time during which tenders shall be in effect, in conformity with article 26;

(p) the place, date and time for the opening of tenders, in conformity with article 28;

(q) the procedures to be followed for opening and examining tenders;

(r) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 29(5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(s) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 38 or give rise to liability on the part of the procuring entity;

(t) the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers and contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(u) any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(v) notice of the right provided under article 38 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(w) if the procuring entity reserves the right to reject all tenders pursuant to article 30, a statement to that effect;

(x) any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 32, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(y) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Article 22. Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents or in the solicitation documents.

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the solicitation documents;

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the solicitation documents.

(4) The prequalification documents and the solicitation documents shall be formulated in . . . (each State enacting this Model Law specifies its official language or languages) (and in a language customarily used in international trade).

Article 23. Clarifications and modifications of solicitation documents

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring

entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers and contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers and contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers and contractors.

(3) If the procuring entity convenes a meeting of suppliers and contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers and contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers and contractors to take the minutes into account in preparing their tenders.

Section II. Submission of tenders

Article 24. Language of tenders

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language which the procuring entity specifies in the solicitation documents.

Article 25. Submission of tenders

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders.

(2) If, pursuant to article 23, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers and contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers and contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline due to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier and contractor to which the procuring entity provided the solicitation documents.

(5) A tender shall be submitted in writing and in a sealed envelope. The procuring entity shall on request provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Article 26. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents. The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers and contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, provide new tender securities, to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) A supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

Article 27. Tender securities

(1) When the procuring entity requires suppliers and contractors submitting tenders to provide a tender security:

(a) the requirement shall apply to all such suppliers and contractors;

(b) the solicitation documents may stipulate that the institution or entity issuing the tender security and the institution or entity, if any, confirming the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;

(c) notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an institution or entity in this State if the tender security and the institution or entity otherwise conform to requirements set forth 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);

(d) prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirming institution, if required; the procuring entity shall respond promptly to such a request;

(e) confirmation of the acceptability of a proposed issuer or of any proposed confirming institution does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirming institution, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) the procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor submitting the tender shall not relate to conduct other than:

(i) withdrawal or modification of the tender after the deadline for submission of tenders;

(ii) failure to sign the procurement contract if required by the procuring entity to do so;

(iii) failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security document, after the earliest to occur of:

(a) the expiry of the tender security;

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required;

(c) the termination of the tendering proceedings without the entry into force of a procurement contract;

(d) the withdrawal of the tender in connection with which the tender security was supplied prior to the deadline for the submission of tenders.

Section III. Evaluation and comparison of tenders

Article 28. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers and contractors that have submitted tenders or their representatives shall be permitted by the procuring entity to be present at the opening of tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers and contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

Article 29. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers and contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors apparent on the face of a tender. The procuring entity shall give notice of the correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents;

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other

requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall not accept a tender:

(a) if the supplier or contractor that submitted the tender is not qualified;

(b) if the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b) of this article;

(c) if the tender is not responsive;

(d) in the circumstances referred to in article 12.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable;

(c) In determining the lowest evaluated tender in accordance with subparagraph (b)(ii) of this paragraph, the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods or construction;

(iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers and contractors, the extent of local content, including manufacture, labour and materials, in goods being offered by suppliers and contractors, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [. . . (the enacting State may expand subparagraph (iii) by including additional factors)]; and

(iv) national defence and security considerations;

(d) If authorized by the procurement regulations, (and subject to approval by . . . (each State designates an organ to issue the approval),) in evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods. The margin of preference shall be calculated in accordance with the procurement regulations.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4)(b) of this article to reconfirm its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such reconfirmation shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to reconfirm its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 30(1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision of which tender should be accepted, except as provided in article 11.

Article 30. *Rejection of all tenders*

(1) (Subject to approval by . . . (each State designates an organ to issue the approval), and) if so specified in the solicitation documents, the procuring entity may reject all tenders at any time prior to the acceptance of a tender. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender the grounds for its rejection of all tenders, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers and contractors that have submitted tenders.

(3) Notice of the rejection of all tenders shall be given promptly to all suppliers and contractors that submitted tenders.

Article 31. *Negotiations with suppliers and contractors*

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

Article 32. *Acceptance of tender and entry into force of procurement contract*

(1) Subject to articles 29(7) and 30, the tender that has been ascertained to be the successful tender pursuant to article 29(4)(b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable

period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action which interferes with the entry into force of the procurement contract or with its performance.

(3) Where the procurement contract is required to be approved by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 26(1) or the period of effectiveness of tender securities that may be required pursuant to article 27(1).

(4) Except as provided in paragraphs (2)(b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 29(4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 30(1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers and contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the price of the contract.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 33. *Two-stage tendering*

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers and contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods or construction as well as to contractual terms and conditions of their supply.

(3) The procuring entity may engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 12, 29(3), or 30 concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers and contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods or construction to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers and contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 29(4)(b).

Article 34. *Request for proposals*

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the factors for evaluating the proposals and determine the relative weight to be accorded to each such factor and the manner in which they are to be applied in the evaluation of the proposals. The factors shall concern:

(a) the relative managerial and technical competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected;

(c) the factors for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such factor, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the factors for evaluating proposals referred to in paragraph (3) of this article, shall be communicated

to all suppliers and contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers and contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all suppliers and contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the factors referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) the price of a proposal shall only be considered by the procuring entity after completion of the technical evaluation;

(d) the procuring entity may refuse to evaluate proposals submitted by suppliers or contractors it considers unreliable or incompetent.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the factors for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those factors indicated in the request for proposals.

Article 35. *Competitive negotiation*

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers and contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers and contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

Article 36. *Request for quotations*

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods themselves, such as transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation responsive to the needs of the procuring entity and that is considered reliable by the procuring entity.

Article 37. *Single-source procurement*

In the circumstances set forth in article 16 the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single supplier or contractor.

CHAPTER V. REVIEW*

Article 38. *Right to review*

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 39 through [43].

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) the selection of a method of procurement pursuant to articles 13 to 16;

(b) the limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(c) the limitation of solicitation of tenders on the ground of economy and efficiency pursuant to article 18(3);

(d) a decision by the procuring entity under article 28(1) to reject all tenders;

(e) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 34(2).

Article 39. *Review by procuring entity (or by approving authority)*

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by,

*States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not see fit, to one degree or another, to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure.) A reference in this Law to the head of the procuring entity (or the head of the approving authority) includes any person designated by the head of the procuring entity (or by head of the approving authority, as the case may be).

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

- (a) state the reasons for the decision; and
- (b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [40 or 43]. Upon the institution of such proceedings the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [40 or 43].

Article 40. *Administrative review**

(1) A supplier or contractor entitled under article 38 to seek review may submit a complaint to [insert name of administrative body]:

(a) if the complaint cannot be submitted or entertained under article 39 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

(b) if the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) pursuant to article 39(5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 39(4); or

(d) if the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 39, provided that the complaint is submitted within 20 days after the issuance of the decision.

*States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 40 and provide only for judicial review (article 43).

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]* one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) require the payment of compensation for

Option I

any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings

Option II

loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings

as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

(g) order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 40.

Article 41. *Certain rules applicable to review proceedings under article 39 [and article 40]*

(1) Promptly after the submission of a complaint under article 39 [or article 40], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all suppliers and contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other

*Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

Article 42. *Suspension of procurement proceedings*

(1) The timely submission of a complaint under article 39 [or article 40] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers and contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 40 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

Article 43. *Judicial review*

The [insert name of court or courts] has jurisdiction over actions pursuant to article 38 and petitions for judicial review of

decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time limit, under article 39 [or 40].

Comparative index of articles

The following index indicates new article numbers assigned to the provisions of the draft Model Law on Procurement following adoption by the Working Group.

<i>Draft articles as adopted by the Working Group</i>	<i>Corresponding draft articles in A/CN.9/WG.V/WP.36</i>
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1	1
2	2
2(g)	26(1)
3	3 bis
4	4
5	5
6	8
7	8 bis
8	8 ter
9	9 bis
10	10
11	10 ter
12	10 quater
13	7(1) and (5)
14(1)	new 33 bis; new 33 ter; new 34
14(2)	new 34(b); 35 (new 1)(c)
15	new 34 bis
16	35
17	8 ter (new 1 bis) and (1 bis)
18	12
19	14
20	17(1); 19
21	17(2)
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27	26
28	27
29	28
30	29
31	30
32	32
33	33 bis
34	33 ter (1); 33 quater
35	34
36	34 bis
37	35
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**B. Working paper submitted to the Working Group on the New
International Economic Order at its fifteenth session: procurement:
revised draft articles of Model Law on Procurement: report of the
Secretary-General**

(A/CN.9/WG.V/WP.36) [Original: English]

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INTRODUCTION

1. The Commission decided at its nineteenth session in 1986 to undertake work in the area of procurement as a matter of priority and entrusted that work to its Working Group on the New International Economic Order (A/41/17, para. 243). The Working Group commenced its work at its tenth session in October 1988. It devoted that session to deliberations on the basis of a study prepared by the Secretariat that discussed possible objectives of national procurement policies and that examined national procurement laws and practices and the roles and activities of various international institutions and development funding agencies in connection with procurement (A/CN.9/WG.V/WP.22). After completing its consideration of the study the Working Group requested the Secretariat to prepare a first draft of a Model Law on Procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).

2. The first draft of articles 1 to 35 of the Model Law on Procurement and the accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25) were considered by the Working Group at its eleventh session in February 1990. The Working Group agreed that the commentary would not be revised until after the text of the Model Law had been settled and requested the Secretariat to revise the first draft of articles 1 through 35 to take account of the discussion and decisions at its eleventh session (A/CN.9/331, para. 222). At the twelfth session, the Working Group had before it the second draft of articles 1 through 35 (A/CN.9/WG.V/WP.28) as well as draft provisions on review of acts and decisions of, and procedures followed by, the procuring entity (draft articles 36 through 42, contained in A/CN.9/WG.V/WP.27). At that session, the Working Group reviewed the second draft of articles 1 through 27. At the thirteenth session, the Working Group reviewed the second draft of articles 28 to 35, and the provisions on review (article 36 to 42). It did

not have sufficient time to again review draft articles 1 to 27, which had been revised to take account of the decisions at the twelfth session, and decided to consider those articles at its fourteenth session. It also requested the Secretariat to revise articles 28 to 42, taking into account the discussions and decisions at the thirteenth session (A/CN.9/356, para. 196).

3. At the fourteenth session, the Working Group reviewed articles 1 to 27 as revised following the twelfth session (contained in document A/CN.9/WG.V/WP.30), as well as articles 28 to 42, revised to reflect the decisions taken at the thirteenth session (document A/CN.9/WG.V/WP.33). Also reviewed by the Working Group was the annex to document A/CN.9/WG.V/WP.33, which contained several new provisions that have been added either as a result of decisions taken at the thirteenth session or at the initiative of the Secretariat, as well as a number of changes to the first portion of the Model Law (articles 1 to 27) that flowed from the Working Group's decisions at the twelfth session with regard to articles 28 to 42. The Working Group also had before it the note on suspension of the procurement proceedings that it had requested at the thirteenth session (document A/CN.9/WG.V/WP.34). The Working Group requested the Secretariat to revise the draft articles of the Model Law to reflect the deliberations and decisions at the fourteenth session. That revision is presented in this report. The Working Group also agreed that a commentary giving guidance to legislatures enacting the Model Law should be given priority, without precluding the possibility of preparation of commentaries with other functions at a later stage. It was further agreed that completion of the Working Group's consideration of the Model Law should not be delayed until the preparation by the Secretariat of a draft commentary (A/CN.9/359, paras. 248 and 249).

4. Throughout the present document, changes of and additions to wording that appeared in earlier drafts of the Model Law are in italics, except in the case of headings to articles, all of which are in italics as a matter of style. Deletions from earlier drafts are indicated in notes following each article.

PREAMBLE¹

WHEREAS the Government of this State considers it desirable to regulate procurement of goods and construction so as to promote the objectives of:

- (a) maximizing economy and efficiency in procurement;
- (b) fostering and encouraging participation in procurement proceedings by contractors and suppliers, including, where appropriate, participation by contractors and suppliers regardless of nationality, and thereby promoting international trade;
- (c) promoting competition among contractors and suppliers for the supply of the goods or construction to be procured;
- (d) providing for the fair and equitable treatment of all contractors and suppliers;

- (e) promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

¹As noted in A/CN.9/359, para. 15, the Working Group affirmed at the fourteenth session its earlier decision that the statement of objectives should be set forth in a preamble. At the same time it was recognized that in some States it was not the practice to include preambles and it was therefore agreed that it should be made clear, perhaps in the commentary, that enacting States had the option of setting forth the statement of objectives in a substantive provision. Consideration might also be given to including a footnote in the text of the Model Law along the following lines:

"In enacting the Model Law, States in which it is not the practice to include a preamble in legislation may incorporate the statement of objectives in the substantive provisions of the Law instead of in a preamble."

At the same time, the Working Group may wish to consider whether it at all desirable to include on the face of the Model Law footnotes giving guidance to legislatures enacting the Model Law. It might be considered preferable to confine such guidance to the commentary.

* * *

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application**

- (1) This Law applies to all procurement by procuring entities, except as otherwise provided by this article.
- (2) This Law does not apply to
 - (a) procurement involving national security or national defence,
 - (b) ... (the enacting State may specify in this Law additional types of procurement to be excluded), or
 - (c) procurement of a type excluded by the procurement regulations,

except where and to the extent that the procuring entity declares *to contractors and suppliers when first soliciting their participation in the procurement proceedings that this Law does apply*.¹

*Article headings are for reference purposes only and are not to be used for purposes of interpretation.

¹Paragraph (2) has been restructured and reformulated pursuant to A/CN.9/359, paras. 22 and 23.

* * *

Article 2. *Definitions*

For the purposes of this Law:

(new a) "procurement" means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves;

(a) "procuring entity" means:

(i)

Option I for subparagraph (i)

any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except . . . ; (and)¹

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except . . . ; (and)¹

(ii) (each State enacting this Model Law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(b) "goods" includes raw materials, products, equipment, systems² and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity;

(c) "construction" means all work associated with the construction, re-construction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract;³

(d) [deleted]⁴

(e) [deleted]⁵

(f) [incorporated in article 26 (new 1)]⁶

(g) "currency" includes unit of account;

(g bis), (g ter), (g quater), (h), (h bis), and (i) [deleted]⁷

(i bis) "contractor or supplier" means any party or potential party, according to the context, to a procurement contract with the procuring entity;⁸

(j) [incorporated in article 28 (1 bis) (a)]⁹

¹See A/CN.9/359, para. 28.

²The Working Group may wish to consider whether the word "systems", which has been added pursuant to A/CN.9/359, para. 29, should be retained. In doing so, it may be borne in mind that that word is vague and that it is questionable whether it is consistent with the notion of a physical object, which is an essential element of the definition. The word may also raise difficulties in translation.

³See A/CN.9/359, para. 30.

⁴See A/CN.9/343, para. 34.

⁵See A/CN.9/343, para. 118.

⁶The definition of "tender security" has been incorporated in article 26 pursuant to A/CN.9/359, para. 140.

⁷The definitions of the procurement methods available under the Model Law have been deleted pursuant to A/CN.9/359, para. 33.

⁸In order to simplify the Model Law, the Working Group may wish to consider replacing the words "contractor and supplier" and the words "contractor or supplier" which are used throughout the Model Law by the word "supplier". A definition of the term "supplier" could then be included in subparagraph (i)(bis) to indicate that that term referred to all types of possible parties to a procurement contract, including "contractors".

⁹In A/CN.9/359, para. 35, the Working Group decided to delete from article 2 the definition of "responsive tender" set forth in subparagraph (j), subject to a review of the Model Law by the Secretariat to confirm that the use of that term was essentially limited to article 28. The review of the Model Law shows that to be the case. Pursuant to a suggestion by the Working Group, the substance of the definition has been incorporated in article 28 (1 bis) (a). On a separate point, the Working Group may wish to consider adding a definition of "procurement contract" as "a contract between the procuring entity and the contractor resulting from the procurement proceedings".

* * *

Article 3. [moved to preamble]

* * *

Article 3 bis. *International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]*

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) treaty or other form of agreement to which it is a party with one or more other States,

(b) agreement with an intergovernmental international financing institution that is entered into by this State,

((c) *agreements between the federal government of [name of federal State] and [subdivisions of the federal State]*),¹

the requirements of the treaty or agreement shall prevail;² but in all other respects, the procurement shall be governed by this Law.

¹In the case of enactment by the government of a federal State, the preceding language within parentheses may be incorporated so as to give precedence to agreements concluded between the government of the federal State and subdivisions of the federal State relating to matters covered by the Model Law.

²The language within parentheses in subparagraph (c) has been added pursuant to the decision in A/CN.9/359, para. 37, to allow federal States enacting the Model Law to also give precedence to agreements between the federal government and subdivisions of the federal State. The title has been modified accordingly. The Working Group may wish to consider adding to the text of the Model Law an explanatory footnote along the lines of the one included herein. Further guidance could be provided in the commentary, for example, that such language might be particularly useful in the case of enactment by a federal State in which the national government did not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law. The title of the article has been simplified, as well as modified to reflect the addition of the optional clause for federal States. The article has been broken down into subparagraphs for the purposes of clearer presentation.

³See A/CN.9/359, para. 38.

* * *

Article 4. *Procurement regulations*

The . . . (each State enacting this Model Law specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.¹

¹See A/CN.9/359, para. 40.

* * *

Article 5. *Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement*

This Law and the procurement regulations, all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments *thereof*, shall be promptly made accessible to the public.

* * *

Article 6. [deleted]¹

¹See A/CN.9/343, para. 66.

* * *

Article 7. *Methods of procurement*

(1) Except as otherwise provided by this Law, a procuring entity engaging in procurement shall do so *only* by means of tendering proceedings.¹

(new 2) The procuring entity may engage in procurement by means of²

(a) two-stage tendering, *where the conditions in new article 33 bis are satisfied*;³

(b) request for proposals, *where the conditions in article 33 ter are satisfied*;

(c) competitive negotiation, *where the conditions in new article 34 are satisfied*;

(d) request for quotations, *where the conditions in new article 34 bis are satisfied*;

(e) single source procurement, *where the conditions in article 35 are satisfied*.

(new 3) When, in accordance with this Law, the circumstances of a particular procurement fit the conditions for use of more than one of the methods referred to in paragraph (new 2), the selection of the method to be used shall be made on the basis of an order of preference corresponding to the order in which the methods are set forth in paragraph (new 2).⁴

(4) [deleted]⁵

(5) A procuring entity that uses a method of procurement other than tendering proceedings pursuant to paragraph (new 2) or (new 3) shall include in the record required under article 10 *ter* a statement of the *grounds and circumstances* on which it relied to justify the use of that method of procurement.⁶

¹Pursuant to A/CN.9/359, para. 50, the word "only" has been added to give additional emphasis to the general rule that tendering proceedings are to be engaged for all procurement, subject only to the exceptions provided for in the Model Law.

²As reported in A/CN.9/359, para. 48, the Working Group decided that the Model Law should not recommend that enacting States should necessarily incorporate each of the methods of procurement other than tendering listed in paragraph (2), though such a possibility would not be excluded. This decision stemmed in particular from a recognition that there was a

degree of overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation in that at least one of the conditions for use of each of those methods referred to cases in which the procuring entity, for one reason or another, was unable to formulate specifications to the degree of completion necessary for engaging in tendering proceedings (see new article 33 *bis* (a) and (b), article 33 *ter* (a) and new article 34(a), respectively). It was noted that that overlap reflected the fact that the practice differed from country to country as to which of those methods was used in cases of incomplete specifications. In this light, the Working Group decided (see A/CN.9/359, para. 198) that those three methods should be treated as equal options as regards cases in which the procuring entity was unable to formulate complete specifications and that it would review the question of overlap further at the present session, including the order of preference provided in paragraph (new 3). In considering the matter further, the Working Group may wish to consider the exact manner in which to implement the equality of the three methods in question (in this regard, see note 1 under new article 33 *bis*) and to focus on the following questions that arise from the decision to treat the three methods as interchangeable for cases of incomplete specifications:

(a) *Should the Model Law recommend the incorporation of a minimum number of methods other than tendering?* The Working Group may wish to consider further a proposal made at the last session, but not accepted at that time, that the Model Law should recommend a particular structure in the choice of methods of procurement other than tendering, for example, that enacting States should incorporate at least one of two-stage tendering, request for proposals or competitive negotiation (see A/CN.9/360, para. 48). Without such an approach, the inference might be drawn that cases in which tendering was an unsuitable method could be dealt with simply through single source procurement. It should also be borne in mind that the problem of overlap principally concerned two-stage tendering, request for proposals and competitive negotiation, and did not affect request for quotations or single source procurement.

(b) *Should the Model Law recommend that competitive negotiation should be incorporated, if not for the case of incomplete specifications, at least for the cases covered in new article 34(b), (c) (d) and (e)?* As a result of the decision to leave the choice of methods of procurement other than tendering optional, an enacting State that did not incorporate competitive negotiation would be left with no method of procurement tailored to meet two types of circumstances currently only covered by competitive negotiation, namely, urgency not related to catastrophic events (new article 34(b)) and failed tendering proceedings (new article 34(e)). Furthermore, for procurement involving research (new article 34(c)) and national defence or national security (new article 34(d)), the only remaining option presumably would be single source procurement. A solution might be to provide that a State that incorporated two-stage tendering or request for proposals, but not competitive negotiation, as the method to be used in cases in which the procuring entity was unable to formulate complete specifications, would nevertheless incorporate competitive negotiation for the cases covered in subparagraphs (b), (c), (d) and (e) of new article 34. Such an approach would be in line with the Working Group's decision that those three methods should be interchangeable with respect to cases in which the procuring entity was unable to formulate complete specifications, while at the same time limiting resort to single source procurement, the least competitive of all the methods (see also note 1 under new article 33 *bis*).

(c) *If two-stage tendering, request for proposals and competitive negotiation are treated as equal options for cases of incomplete specifications, is it necessary to retain the order of preference in paragraph (new 3)?* In view of the fact that the problem of overlap among conditions for use of methods of procurement other than tendering principally concerned conditions for use that related to cases of incomplete specifications and that were found in the provisions governing two-stage tendering, request for proposals and competitive negotiation, the decision to treat those methods as equal options would appear to remove the need which the order of preference was designed to meet. Removal of the order of preference would also solve the problem, referred to in A/CN.9/359, para. 197, that would occur were an enacting State to incorporate more than one of those methods for cases of incomplete specifications. Were an enacting State to incorporate, for example, both two-stage tendering and competitive negotiation, the order of preference would always compel the use of two-stage tendering for cases of incomplete specifications. Removal of the order of preference would allow the procuring entity to select the method it felt to be most appropriate in such cases. As indicated in A/CN.9/359, para. 50, in order to guide States in selecting the method or methods to be incorporated for cases of incomplete specifications, the commentary could indicate which methods were preferable from the standpoint of transparency and competition.

(d) *How should the overlap between competitive negotiation and single-source procurement with respect to research contracts be dealt with?* The conditions for use of both competitive negotiation and single-source procurement refer to research contracts (new article 34(c) and article 35(e)). In view of the order of preference in article 7(3), a State incorporating both competitive negotiation and single-source procurement would, in effect, always be precluded from ever using single source procurement for research contracts. The solution might lie in restricting article 35(e) to cases of urgency. A similar overlap with respect to national defence or national security (new article 34(d) and article 35(f)) would appear to pose less of a problem since a procuring entity would be free to waive application of the order of preference pursuant to article 1(2).

³See A/CN.9/359, para. 52.

⁴See note 2 concerning the decision of the Working Group to consider paragraph (new 3) further at the present session.

⁵See A/CN.9/356, paras. 117 and 146.

⁶See A/CN.9/359, para. 54.

* * *

Article 8. *Qualifications of contractors and suppliers*

(new 1) This article applies to the ascertainment by the procuring entity of the qualifications of contractors and suppliers at any stage of the procurement proceedings.

(1) Subject to the right of contractors and suppliers to protect their intellectual property or trade secrets, the procuring entity may:

(a) require contractors and suppliers participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers:

(new i) possess *the* technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and *the* personnel, to perform the procurement contract;

(i) have legal capacity to enter into the procurement contract;

(ii) are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;¹

(iii) have fulfilled their obligations to pay taxes and social security contributions in this State;

(iv) have not, *and their principals or officers have not*,² been convicted of any criminal offense, *related to* their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract, within a period of [. . . years (the State enacting this Law specifies a period of time)]² preceding the commencement of the procurement proceedings, *or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings*;³

(v) [deleted]⁴

(b) [deleted]⁵

(2) Any requirement established pursuant to paragraph (1)(a) shall be set forth in the prequalification documents, if any, and in the solicitation documents and shall apply equally to all contractors and suppliers. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of contractors and suppliers other than those provided for in paragraph (1)(a).

(2 bis) The procuring entity shall evaluate the qualifications of contractors and suppliers in accordance with the qualification criteria and procedures set forth in the prequalification documents, *if any*,⁶ and the solicitation documents.

(2 ter) Subject to articles 8 ter (1) and 28(7)(e), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of contractors and suppliers that discriminates against or among contractors and suppliers or against categories thereof on the basis of nationality.

(2 quater) *The procuring entity may disqualify a contractor or supplier if it finds at any time that the information submitted concerning the qualifications of the contractor or supplier was false or inaccurate.*⁷

(3) Except where prequalification proceedings have taken place, a contractor or supplier that claims to meet the qualification criteria shall not be precluded from participating in procurement proceedings for the reason that it has not provided proof that it is qualified pursuant to paragraph (1) if the contractor or supplier undertakes to provide such proof prior to the *commencement of the examination of tenders, proposals or offers, as the case may be*,⁸ and if it is reasonable to expect that the contractor or supplier will be able to do so.

¹The Working Group may wish to consider whether it is necessary to retain subparagraph (ii) since subparagraph (new i) authorizes the procuring entity to require contractors and suppliers to produce evidence deemed by the procuring entity necessary to show that contractors and suppliers have sufficient financial resources.

²See A/CN.9/359, para. 58.

³See A/CN.9/359, para. 59.

⁴See A/CN.9/331, para. 50.

⁵See note 6 to this provision in A/CN.9/WG.V/WP.30.

⁶See A/CN.9/359, para. 61.

⁷Paragraph (2 quater) has been added to implement the decision in A/CN.9/359, para. 75, that the procuring entity should be empowered to disqualify contractors and suppliers that submitted false or inaccurate information concerning their qualifications. A similar provision, geared to the specific cases of prequalification and reconfirmation proceedings, has been added to article 8 bis (6).

⁸See A/CN.9/359, para. 63. The Working Group might wish to consider further the question of when the cut-off time should be for contractors and suppliers under this provision to present proof of qualifications. The reference to commencement of examination of tenders, proposals or offers appears to be vague and may give rise to disputes. It might provide less certainty, as well as less time for the presentation of proof of qualifications, than did the reference to the conclusion of the procurement proceedings which appeared in the earlier version.

* * *

Article 8 bis. *Prequalification proceedings*

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers¹ in procurement proceedings conducted pursuant to chapters II or III, contractors and suppliers that are qualified. The provisions of article 8 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each contractor and supplier that requests them in accordance with the procedures specified in the invitation to prequalify and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall include, at a minimum, the information required to be specified in the invitation to tender by article 14(1), except subparagraphs (e), (f) and (g) thereof, as well as the following information:²

(a) instructions for preparing and submitting prequalification applications;

(b) [deleted]³

(c) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(d) any documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications;

(e) the procedures to be used for evaluating the qualifications of contractors and suppliers;

(f) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for contractors and suppliers to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(g) any other requirements that may be² established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.

(3 bis) The procuring entity shall respond to any request by a contractor or supplier for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity, which shall not identify the source of the request, shall be given *within a reasonable time so as*⁴ to enable the contractor or supplier to make a timely submission of its application to prequalify and shall be communicated to all contractors and suppliers to which the procuring entity provided the prequalification documents.

(3 ter) [incorporated in article 9 bis]⁵

(4) *The procuring entity shall make a decision with respect to the qualifications of each contractor or supplier submitting an application to prequalify. That decision shall be based solely on the criteria set forth in the prequalification documents.*⁶

(4 bis) The procuring entity shall promptly notify each contractor and supplier submitting an application to prequalify whether or not it has been prequalified and shall make available to *any member of the general public, upon request*,⁶ the names of all contractors and suppliers that have been prequalified. Only contractors and suppliers that have been prequalified are entitled to participate further in the procurement proceedings.

(5) The procuring entity shall upon request communicate to contractors and suppliers that have not been prequalified the grounds therefore, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(6) *The procuring entity may require a contractor or supplier that has been prequalified to reconfirm its qualifications in accordance with the same criteria utilized to prequalify such contractor or supplier. The procuring entity shall disqualify any contractor and supplier that fails to reconfirm its qualifications if requested to do so and may disqualify a contractor or supplier if it finds at any time that the prequalification or reconfirmation information submitted was false or inaccurate. The procuring entity shall promptly notify each contractor and supplier requested to reconfirm its qualifications as to whether or not the contractor or supplier has succeeded in reconfirming its qualifications.*⁷

¹The reference to offers has been added so as to clearly encompass competitive negotiation.

²See A/CN.9/359, paras. 66 and 67.

³See A/CN.9/343, para. 149.

⁴See A/CN.9/359, para. 68.

⁵See A/CN.9/359, para. 69.

⁶Pursuant to A/CN.9/359, paras. 70 and 71, subparagraph (a) has been added and the remainder of paragraph (4) has been placed in paragraph (4 bis) and modified as agreed upon.

⁷See A/CN.9/359, paras. 75-79.

* * *

Article 8 ter. *Participation by contractors and suppliers*¹

(1) Contractors and suppliers are permitted to participate in procurement proceedings without regard to nationality, except in cases in which,

(a) on the grounds of economy and efficiency, the procuring entity *decides to permit participation only by domestic contractors and suppliers, or*

(b) on grounds specified in the procurement regulations or in other provisions of law, the procuring entity *decides to limit participation in procurement proceedings on the basis of nationality.*²

(new 1 bis) A procuring entity that restricts participation on the basis of nationality pursuant to either paragraph (1) (a) or paragraph (1) (b) shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.³

(1 bis) In procurement proceedings in which participation is limited to domestic contractors and suppliers pursuant to

paragraph (1)(a), the procuring entity shall not be required to employ the procedures set forth in articles 8(2 *ter*), 12(1 *bis*), 14(1)(f *bis*), 14(1)(g), 14(2)(b *bis*), 14(2)(c), 17(2)(i *bis*), 17(2)(k), 17(2)(q), 20(4), and 26(1)(b) of this Law.⁴

(2) [deleted]⁵

(3) *The procuring entity, when first soliciting the participation of contractors or suppliers in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered, or shall declare to them that participation is limited on the basis of nationality, as the case may be.*³

¹The provisions on participation by contractors and suppliers, which formerly appeared in article 11, have been relocated to chapter I pursuant to A/CN.9/359, para. 94.

²Paragraph (1) has been restructured and slightly reformulated pursuant to A/CN.9/359, para. 95. The Working Group may wish to consider whether it is desirable to retain the reference in subparagraph (b) to the procurement regulations as a source of authority for restriction of participation on the basis of nationality. Without any standard or limitation in the Model Law as to what the procurement regulations may provide as to nationality-based restrictions, the provision may be seen as detrimental to the objectives of the Model Law.

³See A/CN.9/359, para. 96. The Working Group may wish to consider further whether the foregoing provision is necessary in view of the fact that the situation to which it relates is most particularly the case of tendering proceedings in which participation is neither restricted to domestic contractors or suppliers, nor otherwise restricted on the basis of nationality. For such cases, it might be provided, in line with paragraph (1), that the tendering proceedings are deemed open to all nationalities unless otherwise provided in the solicitation documents. The notion of requiring a declaration such as that presently called for in paragraph (3) would appear to have little if any relevance to methods of procurement in which the procuring entity seeks out specific contractors and suppliers in order to solicit their participation in the procurement proceedings, which is typically the case in all of the procurement methods other than tendering and two-stage tendering.

⁴As reported in A/CN.9/359, para. 98, it was agreed that paragraph (1 *bis*) should make it clear that, while the procuring entity was permitted to forego the application of certain procedures in wholly domestic procurement, the procuring entity was not precluded from applying in such procurement whichever of those procedures it felt were appropriate. It would appear that the words "shall not be required to employ the procedures" make it sufficiently clear that the procuring entity is not prohibited from applying any of the measures in question.

⁵See A/CN.9/331, para. 58.

* * *

Article 9. [merged with article 8]

* * *

Article 9 *bis*. *Form of communications*¹

(1) *Documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a contractor or supplier or by a contractor or supplier to the procuring entity shall be in written form, including in any form that provides a record of the content of the communication.*

(2) *Notwithstanding subparagraph (a), communications between contractors and suppliers and the procuring entity referred to in articles 8 *bis* (3 *bis*) and (4)(b), 12(2)(a),*

*22(3), 25(2)(a), 26(1)(b *bis*), 28(1), 29(3) and 32(1) may be made by telephone or any other means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.*²

(3) *The procuring entity shall not discriminate against or among contractors or suppliers on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.*

¹Article 9 *bis* contains a reformulated version of article 10 *bis*, which had been presented to the Working Group in the annex to document A/CN.9/WG.V/WP.33. The provision has been relocated as it appeared to the Secretariat to be more appropriate that the Model Law deal with general rules concerning formal requirements for certain communications between the procuring entity and contractors and suppliers prior to dealing with the specific issue of legalization addressed in article 10. The substance of the present article has been reformulated to implement the decision in A/CN.9/359, para. 107 that the Model Law should go beyond what had been done in article 10 *bis* and should contain a general provision enabling enacting States to permit the use of electronic data interchange (EDI) in procurement proceedings in place of traditionally paper-based documentation. Paragraph (1) is intended to permit the use of EDI while taking into account the concerns raised in A/CN.9/343, para. 207, concerning the use of EDI for the submission of tenders, as well as the concerns referred to in A/CN.9/359, para. 107, that a provision permitting the use of EDI should take into account that the procedures in the Model Law generally reflect practices which have been traditionally paper-based and that the availability of EDI was not uniform. This is done by way of the rule that documents, notifications, decisions and communications are to be in writing, with the parallel possibility of EDI transmissions. Paragraph (3) further addresses the above-mentioned concerns by providing that contractors and suppliers to whom EDI is not available are not to be discriminated against in the procurement proceedings by virtue of that fact. Paragraph (1) also permits the use of EDI for the transmission of tenders in non-paper form, something which is apparently beginning to be done in some countries. Such a possibility, while consistent with the decision at the fourteenth session (A/CN.9/359, para. 107) that the use of EDI generally should be permitted, would appear to be inconsistent with the decision at the twelfth session (A/CN.9/343, para. 207) not to permit the use of forms other than writing for the submission of tenders, a decision which was recalled in A/CN.9/359, para. 107. A provision has been added to article 24(4) intended to ensure that an EDI submission of a tender would involve the use of EDI techniques designed to prevent access by the procuring entity or any one else to the contents of the EDI transmission, thereby providing the functional equivalent of the sealed envelope used when the tender is in written form (e.g., by the use of software that prevents the procuring entity from gaining access to the tenders until after the deadline and placement of relevant computer equipment in a secure location beyond the reach of the procuring entity).

At the fourteenth session, the question was raised as to whether the concept of "record" would be universally recognized as an appropriate element in a statutory formula intended to permit the use of EDI functional equivalents as a replacement for paper-based documentation. The Secretariat was requested to review article 10 *bis* in the light of that question and of the Commission's ongoing activities in the EDI field. In the intervening period, the Working Group on International Payments held its twenty-fourth session (Vienna, 27 January-7 February 1992), which was devoted to a discussion of possible issues of a legal framework for the use of EDI and included a discussion of differing approaches that might be used to remove obstacles posed to the use of EDI by writing requirements found in existing law. It was noted that the notion of providing a "record" of information was a key function of a written document that would have to be fulfilled for any electronic equivalent of a written document to be considered as a suitable replacement. In addition, it was pointed out that parties would be free to agree on electronic equivalents for other functions served by paper documents including unalterability, legibility, reproduceability, ability to be authenticated, and acceptability in terms of form to public authorities and courts. The Working Group also took the view that, rather than attempting to deal with existing writing requirements that posed obstacles to the use of EDI by attempting to eliminate writing requirements across the board, it would be preferable to expand the defi-

tion of "writing" so as to encompass EDI techniques that provide functional equivalents to paper-based documentation (see A/CN.9/360, paras. 32-43, concerning the discussion by the Working Group on International Payments on the question of writing requirements). The present reformulation of article 10 *bis* is intended to be in line with that approach discussed by the Working Group on International Payments. The approach currently taken in article 9 *bis* permits the further consolidation of provisions on formal requirements previously scattered throughout the Model Law, beyond what had been done in article 10 *bis*, thereby obviating the need for repeated references to writing requirements and for a separate provision defining "writing". Lastly, it should be noted that the title as it appeared over article 10 *bis* has been modified with a view to reflecting more precisely the content of the present article and so as to avoid suggesting that the present article deals with negotiations between the procuring entity and contractors and suppliers.

²Paragraph (2) contains the totality of the text that formerly appeared in article 10 *bis*. The reference to article 12(2)(a) has been added pursuant to A/CN.9/359, para. 83; the reference to article 8 *bis* (4) has been added at the initiative of the Secretariat. The basis for the elaboration of the reference to telephone communication is found in a remark reported in A/CN.9/359, para. 82.

* * *

Article 10. Rules concerning documentary evidence provided by contractors and suppliers

(1) When the procuring entity requires the legalization of documentary evidence provided by contractors and suppliers to demonstrate their qualifications in procurement proceedings, the procuring entity *may*¹ not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

(2) [deleted]²

(3) [deleted]²

¹The word "may" replaces the word "shall" so as to make it clearer that the procuring entity is not obligated to require legalization of documentary evidence.

²See A/CN.9/343, para. 113.

* * *

Article 10 *bis* [moved to article 9 *bis*]

* * *

Article 10 *ter*. Record of procurement proceedings

(1) The procuring entity shall prepare a record of the procurement proceedings containing the following information:

(a) a brief description of the goods or construction to be procured, or of the procurement need for which the procuring entity requested proposals or offers;¹

(b) the names and addresses of contractors and suppliers that submitted tenders, proposals, offers or quotations;

(c) information relative to the qualifications, or lack thereof, of contractors and suppliers that submitted tenders, proposals, offers or quotations;

(d) the price and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations;

(f) if all tenders were rejected pursuant to article 29, a statement to that effect and the grounds therefore, in accordance with article 29(1);

(*new f bis*) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;²

(f *bis*) the information required by article 10 *quater*, if a tender, proposal, offer or quotation was rejected pursuant to that provision;³

(f *ter*) in tendering proceedings in which the procuring entity sends invitations to tender or to prequalify only to particular contractors or suppliers pursuant to article 12(2)(a), the statement required under article 12(2)(c);⁴

(g) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 7(5) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(h) in procurement proceedings in which the procuring entity, in accordance with article 8 *ter*(1), restricts participation to domestic contractors and suppliers, a statement of the grounds relied upon by the procuring entity for imposing the restriction.⁵

(2) The portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) shall be made available for inspection by any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.⁶

(2 *bis*) The portion of the record referred to in subparagraphs (c) to (*new f bis*) of paragraph (1) shall be made available for inspection by contractors or suppliers that submitted tenders, proposals or quotations, or applied for prequalification, but before a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract, unless disclosure at an earlier stage is ordered by a competent court.⁷ However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices.

(2 *ter*) The portion of the record referred to in subparagraph (f *bis*) of paragraph (1) shall be made available for inspection by the contractor or supplier alleged to have offered the inducement, but not until after a tender, proposal, offer or quotation has been accepted or after

*procurement proceedings have been terminated without resulting in a procurement contract, unless disclosure at an earlier stage is ordered by a competent court.*³

(3) [deleted]⁸

(4) The procuring entity shall not be liable to contractors and suppliers for monetary damages solely as a result of a failure to prepare a record of the procurement proceedings in accordance with the present article.⁹

¹The reference to "offers" has been added here and at other points in article 10 *ter* in accordance with A/CN.9/359, para. 85.

²The contents of the foregoing provision formerly were a part of subparagraph (f).

³The substance of subparagraph (f *bis*), which formerly appeared in subparagraph (f), has been placed in a separate provision in order to facilitate implementation of the decision in A/CN.9/359, para. 91; the companion provision in paragraph (2 *ter*) has been added for the same purpose.

⁴See A/CN.9/359, para. 101. It may be noted that this new element has been placed in a portion of the record for which the Model Law provides no disclosure requirement. The Working Group may wish to consider the appropriateness of this approach.

⁵See A/CN.9/359, para. 86.

⁶The Working Group may wish to consider further the desirability of retaining in their present form the provisions in paragraphs (2) and (3) concerning disclosure of the contents of the record. It might be considered that those provisions unduly complicate the Model Law and might diminish the degree of public accountability and transparency achieved by the Model Law by limiting the extent of disclosure.

⁷See A/CN.9/359, para. 88.

⁸See A/CN.9/359, para. 89.

⁹See A/CN.9/359, para. 90.

* * *

Article 10 *quater*. *Inducements from contractors and suppliers*

(Subject to approval by . . . (each State designates an organ to issue the approval,)) the procuring entity shall reject a tender, proposal, offer or quotation if the contractor or supplier that submitted it offers, gives or agrees to give to any *current or former* officer or employee of the procuring entity a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. The rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings, *disclosure of which shall be limited in accordance with article 10 *ter* (2 *ter*).*¹

¹See A/CN.9/359, para. 91.

* * *

CHAPTER II. TENDERING PROCEEDINGS

Section I

Article 11. [moved to article 8 *ter*]

* * *

Section II. Solicitation of tenders and of applications to prequalify

Article 12. *Solicitation of tenders and of applications to prequalify*

(1) A procuring entity shall solicit tenders, or, where applicable, applications to prequalify, from all interested contractors and suppliers by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in . . . (each State enacting this Model Law specifies the official gazette or other official publication in which the notice of proposed procurement is to be published).

(1 *bis*) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, at a minimum in *one* newspaper of wide international circulation or relevant trade publication or technical journal of wide international circulation.

(2) (a) Notwithstanding the provisions of paragraph (1) and (1 *bis*), the procuring entity may, when necessary for reasons of economy and efficiency, (and subject to approval by . . . (each State may designate an organ to issue the approval,)) solicit tenders, or, where applicable, applications to prequalify, by sending invitations to tender or invitations to prequalify, as the case may be, only to particular contractors or suppliers selected by it. The procuring entity shall select a sufficient number of contractors and suppliers to ensure effective competition, consistent with the efficient conduct of the tendering proceedings.¹

(b) [incorporated in article 9 *bis* (1) and (2)]²

(c) A procuring entity that makes use of the procedure provided for in subparagraph (a) shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied for doing so.³

¹The references to prequalification have been added in order to cure unintended inconsistencies that remained after the term "notice of proposed procurement" was replaced at earlier stages of the development of the Model Law. See also A/CN.9/359, para. 102.

²See A/CN.9/359, paras. 83 and 103.

³See A/CN.9/359, para. 101.

* * *

Article 13. [deleted]¹

¹See A/CN.9/331, para. 62.

* * *

Article 14. *Contents of invitation to tender and invitation to prequalify*

(1) The invitation to tender shall contain at least the following information:

- (a) the name and address of the procuring entity;
- (b) the nature and quantity of the goods to be supplied or the nature and location of the construction to be effected;
- (c) the desired or required time for the supply of the goods or for the completion of the construction;
- (d) the criteria to be used for evaluating the qualifications of contractors and suppliers, in conformity with article 8(1)(a);

(d bis) a declaration, which may not later be altered, that contractors and suppliers may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality, as the case may be;

(e) the means of obtaining the solicitation documents and the place from which they may be obtained;

(f) the price, if any, charged by the procuring entity for the solicitation documents;

(f bis) the currency and means of payment for the solicitation documents;

(g) the language or languages in which the solicitation documents are available;

(h) the place and deadline for the submission of tenders;

(i) [deleted]¹

(j) [deleted]¹

(2) An invitation to prequalify need not contain the information referred to in paragraph (1)(e), (g) and (h), but shall contain the *other* information referred to in paragraph (1), as well as the following information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents;

(b bis) the currency and terms of payment for the prequalification documents;

(c) the language or languages in which the prequalification documents are available; and

(d) the place and deadline for the submission of applications to prequalify.

¹See A/CN.9/343, para. 133.

* * *

Article 15. [merged with article 8]

* * *

Section III

Article 16. [moved to article 8 bis]

* * *

Section IV. [heading deleted]¹

¹In order to simplify the structure of the Model Law, the heading that appeared as section IV, "Solicitation documents", has been deleted.

* * *

Article 17. *Solicitation documents*

(1) The procuring entity shall provide the solicitation documents to contractors and suppliers in accordance with the procedures and requirements specified in the invitation

to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents.

(2) The solicitation documents shall *include, at a minimum*,¹ the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures, in conformity with the provisions of article 8, relative to the evaluation of the qualifications of contractors and suppliers and relative to the reconfirmation of qualifications pursuant to article 28(8 bis);

(c) [merged with subparagraph (b)]

(d) *the requirements as to* documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications;

(e) the nature and required technical and quality characteristics, in conformity with article 20, of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; *any incidental services to be performed*,² and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(e bis) the factors to be used by the procuring entity in determining the successful tender, including any *factors other than price* to be used pursuant to article 28(7)(c) and (d) and the *relative weight of such factors*,³

(f) *to the extent they are already known to the procuring entity*,⁴ the terms and conditions of the procurement contract and the contract form, if any, to be signed by the parties;

(g) if alternatives to the characteristics of the goods, construction, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect;

(h) if contractors and suppliers are permitted to submit tenders for only a portion of the goods or construction to be procured, a description of the portion or portions for which tenders may be submitted;

(i) the manner in which the tender price is to be formulated and expressed, *including a statement as to whether the price is to cover elements other than the cost of the goods or construction themselves, such as transportation and insurance charges, customs duties and taxes*,⁵

(i bis) the currency or currencies in which the tender price is to be formulated and expressed;

(j) [deleted]⁶

(k) the language or languages, in conformity with article 23, in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the nature, *form*, amount and other principal terms and conditions, *and issuing institution or entity* of any tender security to be provided by contractors and suppliers submitting tenders, *and any such requirements for any security for the performance of the procurement contract to be provided by the contractor or supplier that enters into the procurement contract, including securities such as labour and materials bonds*,⁷

(m) the manner, place and deadline for the submission of tenders, in conformity with article 24;

(n) the means by which, pursuant to article 22, contractors and suppliers may seek clarifications of the solicitation documents and a statement as to whether the procuring entity intends to convene a meeting of contractors and suppliers;

(n bis) [deleted]⁸

(o) the period of time during which tenders shall be in effect, in conformity with article 25;

(p) the place, date and time for the opening of tenders, in conformity with article 27;

(p bis) the procedures to be followed for opening and examining tenders;⁹

(q) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 28(8) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(r) [moved to subparagraph (y bis)]

(s) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 36 or give rise to liability on the part of the procuring entity;

(t) the name(s), functional title(s) and address(es) of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from contractors and suppliers in connection with the procurement proceedings, without the intervention of an intermediary;

(u) any commitments to be made by the contractor or supplier outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(v) [deleted]¹⁰

(w) notice of the right provided under article 36 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;¹¹

(x) if the procuring entity reserves the right to reject all tenders pursuant to article 29, a statement to that effect;

(y) any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 32, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval.¹²

(y bis) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.¹³

¹See A/CN.9/359, para. 108; this solution is analogous to that used in article 8 bis (3) (see note 2 under that article).

²See A/CN.9/359, para. 109.

³See A/CN.9/359, para. 110.

⁴See A/CN.9/359, para. 111.

⁵See A/CN.9/359, para. 112.

⁶See A/CN.9/343, para. 168.

⁷See A/CN.9/359, para. 113.

⁸See A/CN.9/343, para. 198.

⁹See A/CN.9/359, para. 114. The foregoing provision formerly appeared in subparagraph (p); the reference to the procedures and criteria for evaluation and comparison of tenders has been deleted as the point is already covered in subparagraph (e bis).

¹⁰See A/CN.9/343, para. 185.

¹¹See A/CN.9/359, para. 116.

¹²See A/CN.9/359, para. 117.

¹³The content of subparagraph (y bis) formerly appeared in subparagraph (r); concerning this move, and the slight drafting change, see A/CN.9/359, para. 115.

* * *

Article 18. [merged with article 17]

* * *

Article 19. *Charge for solicitation documents*

The procuring entity may charge contractors and suppliers a sum for solicitation documents. The sum shall reflect only the cost of printing the solicitation documents and providing them to contractors and suppliers.

* * *

Article 20. *Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents*

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, that create¹ obstacles to participation by contractors or suppliers in the procurement proceedings shall not be included or used in the prequalification documents or in the solicitation documents.

(1 bis) Specifications, plans, drawings, designs, requirements, symbols or terminology shall not be included or used with a view to, or having the effect of, creating obstacles to participation of contractors and suppliers because of nationality.²

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the solicitation documents.

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the solicitation documents.

(c) [deleted]³

(4) The prequalification documents and the solicitation documents shall be formulated in . . . (each State enacting this Model Law specifies its official language or languages) (and in a language customarily used in international trade).

¹See A/CN.9/359, para. 120.

²See A/CN.9/359, para. 122, as well as note 2 under article 20 in A/CN.9/WG.V/WP.30.

³See A/CN.9/331, para. 108.

* * *

Article 21. [deleted]¹

¹See A/CN.9/331, para. 114.

* * *

Article 22. *Clarifications and modifications of solicitation documents*

(1) A contractor or supplier may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a contractor or supplier for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. *The procuring entity shall respond within a reasonable time so as to enable the contractor or supplier to make a timely submission of its tender and shall, without identifying the source of the request, communicate the response to all contractors and suppliers to which the procuring entity has sent the solicitation documents.*¹

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own initiative or in response to a clarification requested by a contractor or supplier, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all contractors and suppliers to which the procuring entity has sent the solicitation documents and shall be binding on those contractors and suppliers.

(3) [incorporated in article 9 bis]²

(4) If the procuring entity convenes a meeting of contractors and suppliers, it shall prepare minutes of the meeting

containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided *promptly* to all contractors and suppliers to which the procuring entity provided the solicitation documents, *so as to enable those contractors and suppliers to take the minutes into account in preparing their tenders.*³

¹See A/CN.9/359, para. 125.

²See A/CN.9/359, para. 127.

³See A/CN.9/359, para. 128.

* * *

Section V. Submission of tenders¹

¹The section heading has been modified.

* * *

Article 23. *Language of tenders*

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language which the procuring entity specifies in the solicitation documents.

* * *

Article 24. *Submission of tenders*

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders. The deadline shall allow *reasonable* time for all contractors and suppliers *to whom the procuring entity provides the solicitation documents* to prepare and submit their tenders and shall take into account the reasonable needs of the procuring entity.¹

(2) If, *pursuant to article 22*, the procuring entity issues a clarification or modification of the solicitation documents, *or, if a meeting of contractors and suppliers is held*, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford contractors and suppliers reasonable time to take the clarification or modification, *or the minutes of the meeting*, into account in their tenders.²

(2 bis) (a) The procuring entity may, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for *one or more* contractors or suppliers to submit their tenders by the deadline due to *any circumstance beyond their control.*³

(b) Notice of any extension of the deadline shall be given promptly to each contractor and supplier to which the procuring entity provided the solicitation documents.⁴

(2 ter) [moved to paragraph (2 bis) (b)]

(3) [moved to paragraph (4 bis)]⁵

(4) Tenders shall be submitted in writing and in sealed envelopes. *In accordance with article 9 bis, the procuring entity may accept tenders in a form other than writing, provided that measures are taken that prevent disclosure to the procuring entity or to any other person of the content of the tender prior to the deadline for the submission of tenders.* The procuring entity shall on request provide to the contractor or supplier a receipt showing the date and time when *its* tender was received.⁶

(4 bis) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the contractor or supplier that submitted it.⁵

¹See A/CN.9/359, para. 131. The Working Group may wish to consider the deletion of the second sentence, which might have the unintended effect of giving rise to disputes as to the adequacy of the period of time allowed for preparation of tenders. The matter might be better dealt with in a commentary.

²See A/CN.9/359, para. 128.

³See A/CN.9/359, para. 133.

⁴The formal requirements for the notice of the extension of the deadline that formerly appeared in paragraph (2 *ter*) have been incorporated in article 9 bis. The remainder of paragraph (2 *ter*) has been moved to paragraph (2 bis) (b).

⁵See A/CN.9/359, para. 135.

⁶In accordance with A/CN.9/359, paras. 107 and 136, paragraph (4) has been modified to accommodate the use of EDI for transmission of tenders (see note 1 under article 9 bis). The combination of the provisions in articles 9 bis and 24(4) are intended to address the concerns that the function of the writing requirement found in paragraph (4), in particular to seal the content of the tender, should be fulfilled by any EDI equivalent used when tenders were transmitted in non-written form, and that cognizance should be taken of the fact that EDI was not universally available so as to avoid discrimination against contractors and suppliers that did not possess EDI capabilities (see in this regard article 9 bis (1) and (3)). See also A/CN.9/359, para. 137. On another point, the Working Group may wish to consider adding the word "single" before the words "sealed envelopes".

* * *

Article 25. *Period of effectiveness of tenders; modification and withdrawal of tenders*

(1) Tenders shall be in effect during the period of time specified in the solicitation documents. The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request contractors or suppliers to extend the period for an additional specified period of time. A contractor or supplier may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness.¹

(b) Contractors and suppliers that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, provide new tender securities, to cover the extended period of effectiveness of their tenders. A contractor or supplier whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) A contractor or supplier may modify or withdraw its tender prior to the deadline for the submission of tenders *without forfeiting its tender security*. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.²

¹The formal requirements for requests for extensions of the validity period of tenders, and for responses thereto, have been incorporated in article 9 bis.

²The formal requirements for modifications and withdrawals of tenders have been incorporated in article 9 bis. See also A/CN.9/359, para. 171.

* * *

Section VI. [heading deleted]¹

¹In order to simplify the structure of the Model Law, the heading that appeared as section VI, "Tender securities", has been deleted.

* * *

Article 26. *Tender securities*

(new 1) *For the purposes of this Law, "tender security" means a security provided to the procuring entity to secure the obligation of a contractor or supplier submitting a tender to enter into a procurement contract if the contract is awarded to the contractor or supplier, including such arrangements as guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange.*¹

(1) *When the procuring entity requires contractors and suppliers submitting tenders to provide a tender security:*

(a) *the requirement shall apply to all such contractors and suppliers;*

(a bis) *the solicitation documents may stipulate that the institution or entity issuing the tender security and the institution or entity, if any, confirming the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;*²

(b) *notwithstanding the provisions of subparagraph (a bis), a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an institution or entity in this State if the tender security and the institution or entity otherwise conform to requirements set forth 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);*³

(b bis) *prior to submitting a tender, a contractor or supplier may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirming institution, if required; the procuring entity shall respond promptly to such a request;*⁴

(c) [moved to subparagraph (a bis)]

(d) *the procuring entity shall specify in the solicitation documents any terms and conditions required to be included in the tender security concerning conduct by the contractor or supplier supplying the tender security that*

would entitle the procuring entity to claim the amount of the security. Those provisions may refer only to:⁵

- (i) *withdrawal or modification of a tender after the deadline for submission of tenders;*
- (ii) [deleted]⁶
- (iii) *failure to sign a procurement contract if required by the procuring entity to do so, or failure to provide a required security for the performance of the contract after a tender has been accepted.*

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security document,⁷ after the earliest to occur of:

- (a) the expiry of the tender security,
- (b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required,
- (c) the termination of the tendering proceedings without the entry into force of a procurement contract,
- (d) the withdrawal of the tender in connection with which the tender security was supplied prior to the deadline for the submission of tenders.

^{*}The text appearing within parentheses would only be incorporated by enacting States with legislation restricting the acceptance of tender securities issued by foreign issuers.

¹Pursuant to A/CN.9/359, para. 140, the definition of "tender security", which formerly appeared in article 2(f), has been incorporated in article 26. Concerning the modifications of that definition, see A/CN.9/359, para. 31. The definition has also been reworded so as to avoid the implication that it is the contractor or supplier that is itself to issue the tender security.

²See A/CN.9/359, para. 142.

³The final words of paragraph (1)(b) have been placed in parentheses to indicate their optional character, and the corresponding explanatory footnote has been added, pursuant to A/CN.9/359, para. 144. See also A/CN.9/359, para. 145.

⁴The foregoing provision has been added pursuant to A/CN.9/359, para. 143, and has been brought under the purview of article 9 bis (1) and (2). The Working Group may wish to consider whether it would be appropriate to add language reserving the right of the procuring entity to reject a tender security despite the fact that the acceptability of the issuer had been confirmed pursuant to paragraph (1)(b bis) in the event that, following the confirmation of acceptability, the issuer became insolvent or that the procuring entity discovered that the issuer was insolvent.

⁵Subparagraph (d) has been reformulated pursuant to A/CN.9/359, para. 146.

⁶See A/CN.9/343, para. 221.

⁷The specification that the return of a tender security was to be to the contractor or supplier that supplied it has been deleted so as to accommodate fulfilment of the return-of-the-security requirement through return of the security to the issuer.

* * *

Section VII. Evaluation and comparison of tenders¹

¹The heading of section VII has been simplified.

* * *

Article 27. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission

of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All contractors and suppliers that have submitted tenders or their representatives shall be permitted by the procuring entity to be present at the opening of tenders.

(3) The name and address of each contractor or supplier whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to contractors and suppliers that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 10 ter (1).

* * *

Article 28. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask contractors and suppliers for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.

(b) Notwithstanding subparagraph (a), the procuring entity shall correct purely arithmetical errors apparent on the face of a tender. *The procuring entity shall give notice of the correction to the contractor or supplier that submitted the tender.*¹

(1 bis) (a) *Subject to subparagraph (b), the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents.*²

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(2) The procuring entity shall *not accept* a tender:³

(a) if the contractor or supplier that submitted the tender is not qualified;⁴

(b) if the contractor or supplier that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b);

(c) if the tender is not responsive.

(d) [deleted]⁵

(3) [incorporated in article 10 quater]

(4) [incorporated in paragraph (1 bis)²

(5) [deleted]⁶

(6) [deleted]⁷

(7) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected pursuant to paragraph (2) or to article 10 *quater* in order to ascertain the successful tender, as defined in subparagraph (c), in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.

(b) [deleted]⁸

(c) *The procuring entity shall specify in the solicitation documents that the successful tender shall be:*

- (i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (e); or
- (ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.

(d) In determining the lowest evaluated tender in accordance with subparagraph (c)(ii), the procuring entity may consider only the following:

- (i) the tender price, subject to any margin of preference applied pursuant to subparagraph (e);
- (ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods or construction;
- (iii) *the effect that acceptance of a tender would have on the balance of payments position and⁹ foreign exchange reserves of [this State], the countertrade arrangements offered by contractors and suppliers, the extent of local content, including manufacture, labour and materials, in goods being offered by contractors and suppliers, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [. . . (the enacting State may expand subparagraph (iii) by including additional factors)];¹⁰ and*
- (iv) national defence and security considerations.

(e) *If authorized by the procurement regulations, (and subject to approval by . . . (each State designates an organ to issue the approval),) in evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for*

domestically produced goods. The margin of preference shall be calculated in accordance with the procurement regulations.¹¹

(8) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency for the purpose of evaluating and comparing tenders.

(8 *bis*) Whether or not it has engaged in prequalification proceedings pursuant to article 8 *bis*, the procuring entity may require the contractor or supplier submitting the tender that has been found to be the successful tender pursuant to article 28(7)(c) to reconfirm its qualifications in accordance with criteria and procedures conforming to the provisions of article 8. The criteria and procedures to be used for such reconfirmation shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(8 *ter*) If the contractor or supplier submitting the successful tender is requested to reconfirm its qualifications in accordance with paragraph (8 *bis*), but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (7), from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 29(1), to reject all remaining tenders.

(9) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to contractors or suppliers or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision of which tender should be accepted, except as provided in article 10 *ter*.

(10) [deleted]¹²

¹See A/CN.9/359, para. 151.

²Pursuant to A/CN.9/359, paras. 35 and 155, the definition of a responsive tender, that formerly appeared in article 2(j), has been incorporated in article 28 by the addition of paragraph (1 *bis*), into which it also appeared to be appropriate to move the substance of paragraph (4). With such a configuration, the concept of responsiveness is defined prior to the use of the term "responsive" in paragraph (2)(c).

³See A/CN.9/359, para. 152.

⁴See A/CN.9/359, para. 153.

⁵See A/CN.9/356, para. 18.

⁶See A/CN.9/331, para. 159.

⁷See A/CN.9/331, para. 164.

⁸See A/CN.9/331, para. 167.

⁹See A/CN.9/359, para. 157.

¹⁰An attempt has been made by the Secretariat to refine subparagraph (iii) so as to achieve greater clarity.

¹¹See A/CN.9/359, para. 160.

¹²See A/CN.9/331, para. 176.

* * *

Article 29. Rejection of all tenders

(1) (Subject to approval by . . . (each State designates an organ to issue the approval), and) if so specified in the solicitation documents, the procuring entity may reject all

tenders at any time prior to the acceptance of a tender.¹ The procuring entity shall upon request communicate to any contractor or supplier that submitted a tender the grounds for its rejection of all tenders, but is not required to justify those grounds.

(1 *bis*) [deleted]²

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders.

(3) Notice of the rejection of all tenders shall be given promptly to all contractors and suppliers that submitted tenders.

¹See A/CN.9/359, para. 164, concerning the deletion of the reference to the case of failed reconfirmation proceedings.

²See A/CN.9/356, para. 46.

* * *

Article 30. *Negotiations with contractors and suppliers*

No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a tender submitted by the contractor or supplier.

* * *

Section VIII. [moved to chapter III, section I]

Article 31. [moved to articles new 33 *bis* and 33 *bis*]

* * *

Section IX. [heading deleted]¹

¹In order to simplify the structure of the Model Law, the heading that appeared as section IX, "Acceptance of tender and entry into force of procurement contract", has been deleted.

* * *

Article 32. *Acceptance of tender and entry into force of procurement contract**

(1) Subject to articles 28(8 *ter*) and 29, the tender that has been ascertained to be the successful tender pursuant to article 28(7)(*c*) shall be accepted. Notice of acceptance of the tender shall be given promptly to the contractor or supplier submitting the tender.

(2) (a) Except as provided in paragraphs (3)(*b*) and (3 *bis*), a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) is dispatched to the contractor or supplier that submitted the tender, provided that it is dispatched while the tender is in force and effect.

(*b*) The notice under paragraph (1) is "dispatched" when it is properly addressed or otherwise directed and transmitted to the contractor or supplier, or conveyed to an appropriate authority for transmission to the contractor or supplier, by a mode authorized by paragraph (6)(*a*).¹

(3) (a) Notwithstanding the provisions of paragraph (2), the solicitation documents may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (*the requesting ministry*)** and the contractor or supplier shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) is dispatched to the contractor or supplier.

(*b*) Where a written procurement contract is required to be signed pursuant to *subparagraph* (a), subject to paragraph (3 *bis*), the procurement contract enters into force when the contract is signed by the contractor or supplier and by the procuring entity. Between the time when the notice referred to in paragraph (1) is dispatched to the contractor or supplier and the entry into force of the procurement contract, neither the procuring entity nor the contractor or supplier shall take any action which interferes with the entry into force of the procurement contract or with its performance.

(3 *bis*) Where the procurement contract is required to be approved by a higher authority, the decision on whether to grant the approval shall be made within a reasonable time after the notice referred to in paragraph (1) is dispatched to the contractor or supplier. The procurement contract shall not enter into force or, as the case may be, be executed before the approval is given.²

(3 *ter*) Where an approval referred to in paragraph (3 *bis*) is required, the solicitation documents shall specify the amount of time following the dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 25(1) or the period of effectiveness of tender securities that may be required pursuant to article 26(1).

(4) If the contractor or supplier whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 28(7) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 29(1), to reject all remaining tenders. The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender.

(5) Upon the entry into force of the procurement contract and, *if required*,³ the provision by the contractor or supplier of a security for the performance of the contract, notice of the procurement contract shall be given to other contractors and suppliers, specifying the name and address of the contractor or supplier that has entered into the contract and the price of the contract.

(6) (a) [incorporated in article 9 bis]

(b) [moved to paragraph (2)(b)].

*Portions of the present article referring to the requirement of a signature of a procurement contract and the text within parentheses referring to the requirement of a final approval for entry into force of the procurement contract would only be incorporated in States in which such requirements are traditionally imposed. [Note added pursuant to A/CN.9/359, para. 169.]

**The term "requesting ministry" would be incorporated by States in which the signed procurement contract, if required, is customarily signed by governmental entities for whom procurement is carried out, rather than by the governmental agency such as a central tendering board that conducts the procurement proceedings. [Note added pursuant to A/CN.9/359, para. 169.]

¹With the incorporation into article 9 bis of the formal requirements formerly set forth in paragraph (6)(a), it appeared appropriate to join the substance of paragraph (6)(b) with paragraph (2).

²The Working Group may wish to consider the deletion of the requirement that the decision should be made within a reasonable time after the dispatch of the notice. Such a requirement might be considered as unnecessarily restrictive, as well as superfluous, since, in the case of excessive delay, the validity period of the tender would lapse. The Working Group may also wish to consider the deletion of the words "or, as the case may be, be executed" in the second sentence. It would appear that such a modification would be useful in view of the practice in a number of countries not to seek final approval before signature of the procurement contract — practice which the current formulation fails to provide room for. The words "or Government" have been deleted as the reference to approval by a higher authority appeared sufficient.

³See A/CN.9/359, para. 173.

* * *

Article 33. [incorporated in article 10 ter]

CHAPTER III. PROCUREMENT BY MEANS OTHER THAN TENDERING PROCEEDINGS

Section I. Two-stage-tendering proceedings

New article 33 bis. *Conditions for use of two-stage tendering*

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may employ the procedures provided for in article 33 bis where:

(a) *the procuring entity is unable to formulate detailed specifications for the goods or construction and, in order to obtain the most satisfactory solution to its procurement needs,*

(i) *it seeks proposals as to various possible means of meeting its needs; or,*

(ii) *due to the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with contractors or suppliers;¹*

(b) [incorporated in subparagraph (a)]

¹In A/CN.9/359, para. 198, the Working Group decided that two-stage tendering, request for proposals and competitive negotiation should be treated as equal options as regards cases in which the procuring entity was unable to formulate complete specifications. An aspect of that approach, referred to in para. 196, was that each of those methods would share a common condition for use related to the case of incomplete specifications.

That common condition now appears in subparagraph (a), as well as in new article 34(a) and (b), article 33 ter (a) and new article 34(a). It is intended to encompass the various factors behind incompleteness of specifications that were referred to in the former versions of those provisions. A number of questions arise from the decision to treat two-stage tendering, request for proposals and competitive negotiation as interchangeable with respect to cases of incomplete specifications, from the sharing by those three methods of a common condition for use, and from the application in that light of the order of preference in article 7 (new 3). For a discussion of those questions, see note 2 under article 7.

* * *

Article 33 bis. *Procedures for two-stage tendering*

(1) [moved to new article 33 bis]

(2) The provisions of chapter II of this Law shall apply to two-stage-tendering proceedings except to the extent those provisions are derogated from in the present section.

(3) The solicitation documents shall call upon contractors and suppliers to submit, in the first stage of the two-stage-tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods or construction as well as to contractual terms and conditions of their supply.

(4) The procuring entity may engage in negotiations with any contractor or supplier whose tender has not been rejected pursuant to articles 10 quater, 28(2), or 29 concerning any aspect of its tender.

(5) In the second stage of the two-stage-tendering proceedings, the procuring entity shall invite contractors and suppliers whose tenders have not been rejected to submit final tenders with prices *with respect to a single set of specifications*. In formulating those specifications, the procuring entity may delete or modify any aspect, *originally set forth in the solicitation documents*, of the technical or quality characteristics of the goods or construction to be procured, and any criterion *originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender*, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to contractors and suppliers in the invitation to submit final tenders. A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the contractor or supplier may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 28(7)(c).

(6) [incorporated in article 10 ter (1)(g)]

* * *

Section II. Request-for-proposals proceedings

Article 33 ter. *Conditions for use of request for proposals*

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) a procuring entity may en-

gage in procurement by means of requests for proposals, which shall be addressed to as many contractors or suppliers as practicable, but to at least three, if possible, provided that the following conditions are satisfied:

(a) *the procuring entity is unable to formulate detailed specifications for the goods or construction and, in order to obtain the most satisfactory solution to its procurement needs,*

- (i) *it seeks proposals as to various possible means of meeting its needs; or,*
- (ii) *due to the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with contractors or suppliers;*¹

(b) *the selection of the successful contractor or supplier is to be based on both the effectiveness of the proposal and on the price of the proposal;*² and

(c) *the procuring entity has established the factors for evaluating the proposals and has determined the relative weight to be accorded to each such factor and the manner in which they are to be applied in the evaluation of the proposals.*

(2) [moved to article 33 *quater* (new 1)]

¹Concerning the replacement of subparagraph (a) by a common condition to be shared also by two-stage tendering and competitive negotiation, see note 1 under new article 33 *bis*, as well as note 3 under article 7.

²The Working Group may wish to consider whether it is necessary to retain subparagraphs (b) and (c). What is contained in subparagraph (b) appears to be implicit in subparagraph (a); subparagraph (c) concerns procedures to be followed when engaging in request-for-proposals proceedings, a subject which is covered in article 33 *quater*.

* * *

Article 33 *quater*. *Procedures for request-for-proposals*

(new 1) The procuring entity shall publish in a widely circulated trade journal a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; *the notice* shall not confer any rights on contractors or suppliers, including any right to have a proposal evaluated.¹

(1) The factors referred to in article 33 *ter* (1)(c) shall concern:

- (a) *the relative managerial and technical competence of the contractor or supplier;*
- (b) *the effectiveness of the proposal submitted by the contractor or supplier; and*
- (c) *the price submitted by the contractor or supplier for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.*

(2) A request for proposals issued by a procuring entity shall include at least the following information:

- (a) *the name and address of the procuring entity;*
- (b) *a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected;*

(c) *the factors for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such factor, and the manner in which they will be applied in the evaluation of the proposal; and*

(d) *the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.*

(3) Any modification or clarification of the request for proposals, *including modification of the factors for evaluating proposals referred to in article 33 *ter* (1)(c),*² shall be communicated to all contractors and suppliers participating in the request-for-proposals proceedings.

(4) The procuring entity shall *treat* proposals in such a manner so as to avoid the disclosure of their contents to competing contractors and suppliers.³

(5) The procuring entity may engage in negotiations with contractors or suppliers with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) *any negotiations between the procuring entity and a contractor or supplier shall be confidential;*

(b) *subject to article 10 *ter*, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;*

(c) *the opportunity to participate in negotiations is extended to all contractors and suppliers that have submitted proposals and whose proposals have not been rejected;*

(d) [deleted]⁴

(6) Following completion of negotiations, the procuring entity shall request all contractors or suppliers remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(7) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) *only the factors referred to in paragraph (1), which shall be set forth in the request for proposals and in any modification thereof, shall be considered;*

(b) *the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;*⁵

(c) *the price of a proposal shall only be considered by the procuring entity after completion of the technical evaluation;*⁵

(d) *the procuring entity may refuse to evaluate proposals submitted by contractors or suppliers it considers unreliable or incompetent.*

(8) *The award made by the procuring entity shall be in accord with the factors for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those factors indicated in the request for proposals.*⁶

¹The foregoing provision has been moved from article 33 *ter* (2) pursuant to A/CN.9/359, para. 180. The Working Group may wish to consider not restricting publication of the notice to trade journals since in some cases such specialized journals might not exist. This could be done simply by deleting the word "trade".

²See A/CN.9/359, para. 186.

³See A/CN.9/359, para. 187.

⁴See A/CN.9/359, para. 188.

⁵The Working Group decided in A/CN.9/359, para. 190, that the procedures set forth in subparagraphs (b) and (c) should be presented as optional or illustrative. In light of that decision, it might be preferable to delete those subparagraphs from the Model Law and to present them in a commentary.

⁶See A/CN.9/359, para. 191.

* * *

Section III. Competitive-negotiation proceedings

New article 34. *Conditions for use of competitive negotiation*

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation in the following circumstances:

(a) *the procuring entity is unable to formulate detailed specifications for the goods or construction and, in order to obtain the most satisfactory solution to its procurement needs,*

- (i) *it seeks proposals as to various possible means of meeting its needs; or,*
- (ii) *due to the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with contractors or suppliers;¹*

(b) *when there is an urgent need for the goods or construction and engaging in tendering proceedings would therefore be impossible or imprudent, provided that the circumstances giving rise to the urgency were not foreseeable by, or a result of dilatory conduct on the part of, the procuring entity;*

(c) *when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;²*

(d) *when the procuring entity applies this Law, pursuant to article 1(2), to procurement involving national defence or national security and determines that competitive negotiation is the most appropriate method of procurement; or*

(e) *when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 10 quater, 28(2) or 29, and when engaging in new tendering proceedings would be unlikely to result in a procurement contract;*

(f) *[deleted]³*

¹Concerning the replacement of subparagraph (a) by a common condition to be shared also by two-stage tendering and request for proposals, see note 1 under new article 33 bis, as well as note 3 under article 7.

²See note 2 under article 7 concerning the overlap between the conditions for use of competitive negotiation and for single-source procurement with respect to research contracts.

³See A/CN.9/356, paras. 116 and 117.

* * *

Article 34. *Procedures for competitive negotiation*

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of contractors and suppliers to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a contractor or supplier shall be communicated on an equal basis to all other contractors and suppliers engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a contractor or supplier shall be confidential, and, except as provided in article 10 *ter*, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(3 bis) Following completion of negotiations, the procuring entity shall request all contractors or suppliers remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.¹

(4) [incorporated in article 10 *ter*].

¹See A/CN.9/359, para. 202.

* * *

Section IV. Request-for-quotations proceedings

New article 34 bis. *Conditions for use of request for quotations*

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of a request for quotations for the procurement of *readily available goods that are not specially produced to the particular specifications of the procuring entity¹* and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1).

¹See A/CN.9/359, para. 204.

* * *

Article 34 bis. *Procedures for request for quotations*

(1) [moved to new article 34 bis]

(2) [moved to new article 34 bis]

(3) The procuring entity shall request quotations from as many contractors or suppliers as practicable, but from at

least three, if possible. Each contractor or supplier from whom a quotation is requested shall be informed whether any elements other than the *charges for the goods themselves, such as transportation and insurance charges, customs duties and taxes*, are to be included in the price.¹

(3 *bis*) Each contractor or supplier is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a quotation submitted by the contractor or supplier.

(4) The procurement contract shall be awarded to the contractor or supplier that gave the lowest priced quotation *responsive to the needs of the procuring entity and that is considered reliable by the procuring entity*.²

(5) [incorporated in article 10 *ter*]

¹See A/CN.9/359, paras. 207 and 208.

²The foregoing provision has been reformulated so as to clarify the notion of responsiveness of the quotation.

* * *

Section V. Single-source procurement

Article 35. *Single-source procurement*

(new 1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single contractor or supplier when:

(a) [deleted];¹

(b) the goods or construction are available only from a particular contractor or supplier, or a particular contractor or supplier has exclusive rights in respect of the goods or construction, and no reasonable alternative or substitute exists;

(c) due to a catastrophic event, there is an urgent need for the goods or construction, making it impossible or imprudent to use other methods of procurement because of the amount of time involved in using those methods;²

(d) the procuring entity, *having procured goods, equipment or technology from a contractor or supplier*, determines that additional supplies must be procured from *that* contractor or supplier for reasons of standardization or *because of* the need for compatibility with existing goods, equipment or technology, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the *limited*³ size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the *unsuitability* of alternatives to the goods in question;

(e) the procuring entity seeks to enter into a contract with the contractor or supplier for the purpose of research, experiment, study or development *leading to the procurement of a prototype*, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs;⁴

(f) the procuring entity applies this Law, pursuant to article 1(2), to procurement involving national defence or national security and determines that single source procurement is the most appropriate method of procurement; *or*

(g) procurement from a particular contractor or supplier is necessary in order to promote a policy specified in article 28(7)(d)(iii) and approval is obtained following public notice and adequate opportunity to comment, provided that procurement from no other contractor or supplier is capable of promoting that policy;

(h) [deleted];⁵

(i) [deleted].⁶

(new 1 *bis*) [deleted]⁷

(1) [incorporated in article 10 *ter*]

(2) [incorporated in article 10 *ter*]

¹See A/CN.9/356, para. 136.

²See A/CN.9/356, para. 212, concerning the deletion of *the* reference to unforeseeability and to lack of dilatory conduct on the part of the procuring entity. The Working Group may wish to further consider the possibility of deleting the restriction to a catastrophic event since the meaning of that term is not clear.

³See A/CN.9/359, para. 213.

⁴See A/CN.9/359, para. 213, and note 2 under article 7 concerning the need to distinguish between urgency as a ground for the use of competitive negotiation (article new 34(*b*)) and urgency as a condition for the use of single source procurement.

⁵See A/CN.9/356, para. 144.

⁶See A/CN.9/356, para. 145.

⁷See A/CN.9/356, para. 146.

* * *

CHAPTER IV. REVIEW*

**States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, due to constitutional considerations, States might not see fit, to one degree or another, to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures. [Note added pursuant to A/CN.9/359, para. 246.]*

* * *

Article 36. *Right to review*

(1) *Subject to paragraph (2)*, any contractor or supplier that has an interest in obtaining a procurement contract resulting or anticipated to result from procurement proceedings covered by this Law and that claims to suffer, to risk suffering or to have suffered loss due to an act or decision of, or procedure followed by, the procuring entity, that is in breach of a duty imposed by this Law may seek review of the act, decision or procedure in accordance with articles 37 through [41].¹

(2) *The following shall not be subject to the review provided for in paragraph (1):*

(a) *Acts or decisions of, or procedures followed by the procuring entity with respect to the selection of a method of procurement pursuant to article 7;*

(b) *the limitation of procurement proceedings in accordance with article 8 *ter* to domestic contractors or suppliers or on the basis of nationality;*

(c) *the limitation of solicitation of tenders on the ground of economy and efficiency pursuant to article 12(2)(a);*

(d) *a decision by the procuring entity under article 29(1) to reject all tenders;*

(e) *a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 33 quater (new 1).*

¹Article 36 has been reformulated and restructured pursuant to A/CN.9/359, paras. 216 and 217. The Working Group may wish to take this occasion to consider further which aspects of the Model Law should not be subject to the review provisions.

* * *

Article 37. *Review by procuring entity (or by approving authority)*

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure.) A reference in this Law to the head of the procuring entity (or the head of the approving authority) includes any person designated by the head of the procuring entity (or by head of the approving authority, as the case may be).¹

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 10 days of when the *contractor or supplier* submitting it became aware of the circumstances giving rise to the complaint or of when that *contractor or supplier* should have become aware of those circumstances, *whichever is earlier*.²

(3) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the *contractor or supplier*³ that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 20 working days after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.³

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4), the person submitting the complaint (or the

procuring entity) is entitled immediately thereafter to institute proceedings under article [38 or 40]. Upon the institution of such proceedings the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [38 or 40].

¹In accordance with A/CN.9/359, para. 219, the various references in the review provisions to the approving authority have been placed within parentheses in order to align those references with the optional character of the approval requirement in the Model Law.

²See A/CN.9/359, para. 220.

³See A/CN.9/359, para. 222.

* * *

Article 38. *Administrative review**

(1) A contractor or supplier entitled under article 36 to seek review may submit a complaint to [insert name of administrative body]:¹

(a) if the complaint cannot be submitted or entertained under article 37 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 10 days after the earlier of the time when the contractor or supplier submitting it became aware of the circumstances giving rise to the complaint or the time when that contractor or supplier should have become aware of those circumstances;

(b) pursuant to paragraph (5) of article 37, provided that the complaint is submitted within 10 days after the expiry of the period referred to in article 37(4); or

(c) if the *contractor or supplier*² claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 37, provided that the complaint is submitted within 10 days after the issuance of the decision.

(1 *bis*) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(2) The [insert name of administrative body] may [grant] [recommend]** one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, *other than any act or decision bringing the procurement contract into force*;³

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, *other than any decision bringing the procurement contract into force*;³

(f) [deleted]⁴

(g) require the payment of compensation for

Option I

any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings

Option II

loss suffered by the person submitting the complaint as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;⁵

(h) order that the procurement proceedings be terminated.

(3) The [insert name of administrative body] shall issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(4) The decision shall be final unless an action is commenced under article 40.

*States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 38 and provide only for judicial review (article 40).

**Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

¹The writing requirement has been incorporated in article 9 bis.

²See A/CN.9/359, para. 227.

³See A/CN.9/359, para. 229.

⁴See A/CN.9/356, para. 174.

⁵See A/CN.9/359, para. 231.

* * *

Article 39. *Certain rules applicable to review proceedings under article 37 [and article 38]*

(1) Promptly after the submission of a complaint under article 37 [or article 38], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all contractors and suppliers participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such contractor or supplier whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings.¹

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within [5] days to the contractor or supplier submitting the complaint, to the procuring entity and to any other contractor or supplier or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the

public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.²

¹The Working Group may wish to consider whether to add a provision to the effect that a contractor or supplier that failed to participate in the review proceedings would be barred from subsequently raising the same type of claim.

²See A/CN.9/359, para. 236.

* * *

Article 40. *Judicial review*

The [insert name(s) of court(s)] has jurisdiction over actions commenced pursuant to article 36 to review an act or decision of, or a procedure followed by, the procuring entity, including over petitions for judicial review of decisions reached by review bodies under article 37 [and 38].¹

¹See A/CN.9/359, para. 238.

* * *

Article 41. *Suspension of procurement proceedings¹*

(1) *The timely submission of a complaint under article 37 [or article 38] suspends the procurement proceedings for a period of 5 working days, provided that the complaint includes a declaration affirming that, to the best of its knowledge, the contractor and supplier will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other contractors and suppliers.*

(2) *When the procurement contract enters into force upon issuance of a notice of acceptance, the timely submission of a complaint under article 38 shall suspend performance of the procurement contract for a period of 5 working days, provided the complaint meets the requirements set forth in paragraph (1).²*

(3) *The head of the procuring entity (or of the approving authority), [the [insert name of administrative body]] may extend the suspension provided for in paragraph (1), [and the [insert name of administrative body]] may extend the suspension provided for in paragraph (2),] in order to preserve the rights of the contractor or supplier submitting the complaint or commencing the action pending the disposition of the review proceedings.³*

(4) *The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.*

¹Article 41 has been reformulated pursuant to A/CN.9/359, paras. 242 to 245.

²In A/CN.9/359, para. 243, it was decided that, in cases in which the issuance of the notice of acceptance itself triggered entry into force of the procurement, a suspension should be available. Paragraph (2) implements this decision, but only with respect to complaints filed under article 38, in view of the fact that, under article 37(3), neither the procuring entity nor the approving authority may entertain a complaint once the procurement contract has entered into force. The Working Group may wish to consider whether the dissymmetry as to the availability of suspension that therefore results between States that have administrative review and those that do not should be addressed and alleviated in some manner.

³The Working Group may wish to consider whether the Model Law should place any overall limitation on the duration of the suspension.

* * *

Article 42. [deleted]¹

¹See A/CN.9/356, para. 192.

**C. Draft Guide to Enactment of UNCITRAL Model Law on
Procurement: note by the Secretariat
(A/CN.9/375) [Original: English]**

1. In preparing the draft UNCITRAL Model Law on Procurement, the Working Group on the New International Economic Order noted that it would be useful to provide in a commentary additional information concerning the Model Law. At the fourteenth and fifteenth sessions, the Working Group identified three possible functions of a commentary, namely, giving guidance to legislatures considering enactment of the Model Law, to procuring entities applying the Model Law, and to courts interpreting the Model Law. It was noted that the content of a commentary would differ depending upon its predominant function. It was agreed that, at least at the initial stage, priority should be given to the function of giving guidance to legislatures (see A/CN.9/359, para. 249, and A/CN.9/371, para. 254) and that a small and informal *ad hoc* working party of the Working Group would be convened prior to the twenty-sixth session to review a draft of the guide that the Secretariat would prepare. The meeting of the *ad hoc* working

party took place in Vienna from 30 November to 4 December 1992. The annex to the present note contains the draft Guide, as revised after the meeting of the *ad hoc* working party.

2. It may be noted that the draft Guide is geared to the text of the draft Model Law as established by the Working Group upon the conclusion of its fifteenth session and set forth in the annex of the report of that session (A/CN.9/371). Once the Commission has completed its review and adoption of the Model Law, it is the intention of the Secretariat to finalize the Guide to take account of the deliberations and decisions in the Commission. For the convenience of the reader, it may be preferable to publish the text of the Model Law together with the Guide. This has not been done in the present document due to its length and the availability to the Commission of the text of the draft Model Law in the annex to document A/CN.9/371.

Annex

**DRAFT GUIDE TO ENACTMENT OF UNCITRAL MODEL LAW
ON PROCUREMENT**

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INTRODUCTION

History and purpose of UNCITRAL Model Law on Procurement

1. The United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on Procurement (hereinafter referred to as the "Model Law") at its twenty-sixth session, held in Vienna in 1993. The Model Law is intended to serve as a model to countries for the evaluation and modernization of their procurement laws and practices and for the establishment of procurement legislation where none presently exists. The decision by UNCITRAL to formulate model legislation on procurement was taken in response to the fact that in a number of countries the existing legislation governing procurement is inadequate or outdated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.

2. Sound laws and practices for public sector procurement are necessary in all countries. This need is particularly felt in many developing countries, as well as in countries whose economies are in transition. In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible.

3. The objectives of the Model Law, which include maximizing competition, according fair treatment to suppliers and contractors bidding to do Government work, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement and for curbing abuses. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State may create an environment in which the public is assured that the public purchaser is likely to spend public funds with responsibility and accountability and thus to obtain fair value, and an environment in which parties offering to sell to the Government are confident of obtaining fair treatment. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy. Furthermore, inadequate procurement legislation at the national level also creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement hamper the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate state of national procurement legislation in many countries.

4. UNCITRAL is an organ of the United Nations General Assembly established to promote the harmonization and unification of international trade law, so as to remove unnecessary obstacles to the international flow of goods caused by divergences in the law affecting trade. Over the past quarter of a century, UNCITRAL, whose membership consists of States from all regions and of all levels of economic development, has implemented its mandate by formulating international conventions (the United Nations Conventions on Contracts for the International Sale of Goods, on Carriage of Goods by Sea ("Hamburg Rules"), on Liability of Terminal Operators in International Trade, and on International Bills of Exchange and International Promissory Notes), model laws (Model Law in International Commercial

Arbitration and Model Law on International Credit Transfers), the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, and legal guides (on construction contracts and countertrade transactions).

Purpose of this Guide

5. Inherent in the decision of UNCITRAL to formulate its work in the form of a model law is a recognition that there are some aspects of procurement that may have to be handled differently from State to State and that enacting States will have to evaluate the Model Law taking into account their circumstances. Accordingly the Commission decided that it would be helpful to present background information for States using the Model Law to measure the adequacy of existing procurement law or to prepare new legislation.

6. In the first place the Guide explains to the reader the options expressly provided to enacting States in the Model Law with respect to issues that were expected in particular to be treated differently from State to State. Options have been included on issues such as the definition of the term "procuring entity", which involves the scope of application of the Model Law; imposition of the requirement of a higher approval for certain key decisions and actions in the procurement proceedings; methods of procurement other than tendering for exceptional cases; and the form of and remedies available under review procedures.

7. Secondly, taking into account that the Model Law is a "framework" providing only a minimum skeleton of essential provisions and envisaging the issuance of procurement regulations, the Guide identifies and discusses possible areas to be addressed by regulation rather than by statute.

8. Thirdly, the Guide presents basic information about the procedures set forth in the Model Law and why the drafters considered them to be essential elements of a modern procurement law. This background information is presented in view of the likelihood that the Model law will be used in a number of States with limited familiarity with the type of procurement procedures in the Model Law.

A "framework" law to be supplemented by procurement regulations

9. The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. However, it is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement the procedures in an enacting State. Accordingly, the Model Law envisages the issuance by enacting States of "procurement regulations" to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State—without compromising the objectives of the Model Law. The Guide is also intended to assist the enacting State in identifying areas in which the Model Law may be supplemented by procurement regulations.

10. It should be noted that the procurement proceedings in the Model Law, beyond raising matters of procedure to be addressed in the implementing procurement regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial procedure law.

Procurement methods in the Model Law

11. The Model Law presents several procurement methods so as to enable the procuring entity to deal with the varying circumstances likely to be encountered by procuring entities. This enables an enacting State to aim for as broad an application of the Model Law as possible. As the rule for normal circumstances, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and objectivity in procurement. For the exceptional circumstances in which tendering is not appropriate or feasible, the Model Law offers methods other than tendering. For cases in which the procuring entity is unable to formulate specifications to the degree of precision or finality required for tendering proceedings, as well as for a number of other special circumstances, the Model Law offers three options for incorporation into national law. These include two-stage tendering, request for proposals, and competitive negotiation; those methods provide the procuring entity with an opportunity to negotiate with suppliers and contractors with a view to settling upon technical specifications and contractual terms. For cases of low-value procurement of standardized goods, the Model Law offers the request-for-quotations method, which involves a simplified, accelerated procedure commensurate to the relatively low value involved. Lastly, for exceptional circumstances such as urgency and the availability of goods from only one supplier, the Model Law offers single-source procurement.

Administration of procurement

12. The Model Law sets forth only the procedures to be followed in selecting suppliers and contractors with whom to contract. The Model Law assumes that an enacting State has or will establish the proper institutional and bureaucratic structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law.

13. The administrative system needed to implement procurement procedures is illustrated by the requirement in the Model Law that certain important actions and decisions by the procuring entity (e.g., use of a procurement method other than tendering) should be subject to prior approval by a higher authority. The advantage of a prior-approval system is that it is designed to detect errors and problems before certain actions and final decisions are taken. In addition, it may provide an added measure of uniformity in a national procurement system, particularly when the enacting State has an otherwise decentralized procurement system in which a variety of entities conduct procurement proceedings. However, the approval requirement in the Model Law is an option. This is because an approval requirement is not traditionally applied in all countries, in particular where control over the conduct of procuring entities is exercised primarily through audit.

14. The references in the Model Law to approval requirements leave it up to the enacting State to designate the organ or organs responsible for issuing the various approvals. The authority exercised as well as the organ exercising the approval function may differ. An approval function may be vested in an organ or authority that is wholly autonomous of the procuring entity (e.g. a ministry of finance or of commerce, or a central procurement board) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. In the case of procuring entities that are autonomous of the governmental or administrative structure of the State, such as some State-owned commercial enterprises, countries may find it preferable for the approval function to be exercised by an organ or authority that is part of the governmental or administrative apparatus in order to ensure

that the public policies that are sought to be advanced by the Model Law are given due effect. In any case, it is important that the organ or authority be sufficiently independent of the persons or department involved in the procurement proceedings, to be able to exercise its functions impartially and effectively. It may be preferable for the approval function to be exercised by a committee of persons, rather than by one single person.

15. In addition to designating the organ or authority to perform the approval function referred to in the preceding paragraph, an enacting State may find it desirable to provide for functions directed to the overall supervision of and control over procurement to which the Model Law applies. An enacting State may vest all of those functions in a single organ or authority (e.g., a ministry of finance or of commerce, or a central procurement board), or they may be allocated among two or more organs or authorities. The functions might include, for example, some or all of those mentioned here:

(a) *Supervising overall implementation of procurement law and regulations.* This may include, for example, issuance of procurement regulations, monitoring implementation of the procurement law and regulations, making recommendations for their improvement, and issuing interpretations of those laws. In some cases, e.g., in the case of high-value procurement contracts, the organ might be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the contract can enter into existence.

(b) *Rationalization and standardization of procurement and procurement practices.* This may include, for example, coordinating procurement by procuring entities, and preparing standardized procurement documents, specifications and conditions of contract.

(c) *Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader Government policies.* This may include, for example, examining the impact of procurement on the national economy, rendering advice on the effect of particular procurement on prices and other economic factors, and verifying that a particular procurement falls within the programmes and policies of the Government. The organ or authority may be charged with issuance of approvals for particular procurement prior to the commencement of the procurement proceedings.

(d) *Training of procurement officers.* The organ or authority could also be responsible for training the procurement officers and other civil servants involved in operating the procurement system.

It may be noted that a State enacting the Model Law does not thereby commit itself to any particular administrative structure; neither does the adoption of such legislation necessarily commit the enacting State to increased Government expenditures.

16. The organ or authority to exercise administrative and oversight functions in a particular enacting State, and the precise functions that the organ or authority is to exercise, will depend, for example, on the governmental, administrative and legal systems in the State, which vary widely from country to country. The system of administrative control over procurement should be structured with the objectives of economy and efficiency in mind, since systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement proceedings could in some cases stifle their ability to act effectively.

Procurement of services

17. The Model Law as adopted by UNCITRAL at its twenty-sixth session is designed to be applicable to the procurement of goods and construction, with only services covered that are incidental to the procurement contract. Having completed the elaboration of model legislation for the procurement of goods and construction, UNCITRAL has turned its attention to the formulation of model legislative provisions for the procurement of services. The procurement of services is an area in which methods of procurement have traditionally been used that are often less competitive with respect to price than methods used for the procurement of goods and construction. This is because emphasis has usually been placed on quality and technical factors rather than on price in awarding contracts for procurement of services. For example, it has often been the practice to select the service provider that receives the highest qualification evaluation from among those bidding on a contract and then to negotiate the price with that one service provider. As a result of such practices, the public purchaser may in many cases place itself at risk of paying more than is necessary to obtain quality services.

18. It may be expected that the provisions on the procurement of services to be formulated by UNCITRAL, which may take the form of additions and adjustments to the present Model Law designed to expand the scope to cover services, would be designed to foster the objectives of good procurement set forth in the preamble to the Model Law. One approach might be to provide for a price competition among service providers that meet a high qualification threshold for a given project.

Assistance from UNCITRAL secretariat

19. In line with its training and assistance activities relating to international trade law conventions and model laws, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the UNCITRAL Model Law on Procurement, as it would for Governments considering legislation based on other UNCITRAL model laws, or considering adherence to one of the international trade law conventions prepared by UNCITRAL.

20. Further information concerning the Model Law on Procurement, as well as the Guide, and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

International Trade Law Branch
Office of Legal Affairs, United Nations
Vienna International Centre P.O. Box 500
A-1400, Vienna, Austria
Phone: (43-1) 21131-4060
Fax: (43-1) 237 485
Telex: 135612 uno a

PREAMBLE

The reason for including in the Model Law a statement of objectives is to provide guidance in the interpretation and application of the Model Law. Such a statement of objectives does not itself create substantive rights or obligations for procuring entities or for contractors or suppliers. In States in which it is not the practice to include preambles, it is recommended that the statement of objectives be incorporated in the body of the provisions of the Law.

CHAPTER I. GENERAL PROVISIONS

*Article 1**Scope of application*

1. The purpose of article 1 is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide in principle for the coverage of all types of procurement, but at the same time to recognize that an enacting State may wish to exempt certain types of procurement from coverage. The provision limits exclusions of the Model Law to cases provided for either by the Law itself or by regulation. This is done so that exclusions would not be made in a secretive or informal manner. In order to expand as far as possible the application of the Model Law, article 1(2) provides for complete or partial application of the Model Law even to excluded sectors.

2. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of the procurement regulations, since such exclusions of the Model Law by means of administrative rather than legislative action may be seen as negatively affecting the objectives of the Model Law. Furthermore, the broad variety of procedures available under the Model Law to deal with the different types of situations that may arise may make it less necessary to consider non-application of the procedures provided in the Model Law.

*Article 2**Definitions*

1. The Model Law is intended to cover primarily procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from State to State due to differences in the allocation of legislative competence among different levels of Government. Accordingly, subparagraph (b)(i), defining the term "procuring entity", presents options as to the levels of Government to be covered in the enacting State. Option I brings within the scope of the Model Law all governmental departments, agencies, organs and other units within the enacting State, pertaining to the central Government as well as to provincial, local or other governmental subdivisions of the enacting State. This Option would be adopted by non-federal States, and by federal States, that could legislate for their subdivisions. Option II would be adopted by States that enact the Model Law only with respect to organs of the national Government.

2. In subparagraph (b)(ii) the enacting State may extend application of the Model Law to certain entities or enterprises that are not considered part of the Government of the enacting State if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law. In deciding which, if any, entities to cover, the enacting State may consider factors such as the following:

(a) whether the Government provides substantial public funds to the entity, provides a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract;

(b) whether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity;

(c) whether the Government grants to the entity an exclusive licence, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

(d) whether the entity is accountable to the Government or to the public treasury in respect of the profitability of the entity;

(e) whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity;

(f) whether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally mandated public purpose and whether the type of public law applicable typically to Government contracts applies to procurement contracts entered into by the entity;

(g) whether the entity is integrated within a centralized economic plan.

Article 3

International obligations of (this State) relating to procurement [and intergovernmental agreements within (this State)]

1. An enacting State may be subject to international agreements or obligations with respect to procurement. For example, a number of States are parties to the GATT Agreement on Government Procurement, and members of the European Communities (EC) are bound by directives on procurement adopted by the Council of the EEC. Similarly, the members of regional economic groupings in other parts of the world may be subject to procurement directives applied by the regional grouping. In addition, many international lending institutions and national development funding agencies have established guidelines or rules governing procurement with funds provided by them. In their loan or funding agreements with those institutions and agencies, borrowing or recipient countries undertake that proceedings for procurement with those funds will conform to the guidelines or rules. The purpose of subparagraphs (a) and (b) is to provide that the requirements of the international agreement, or other international obligation at the intergovernmental level, are to be applied; but in all other respects the procurement is to be governed by the Model Law.

2. Optional subparagraph (c) permits a federal State enacting the Model Law to give precedence over the Model Law to intergovernmental agreements concerning matters covered by the Model Law concluded between the national Government and one or more of subdivisions of the State, or between any two or more such subdivisions. Such a clause might be used in an enacting State in which the national Government does not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

Article 4

Procurement regulations

1. As noted in paragraph 7 of the Introduction, the Model Law is a "framework law", setting forth basic legal rules governing procurement that are intended to be supplemented by detailed regulations promulgated by the appropriate organ or authority of the enacting State. The "framework law" technique enables an enacting State to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances within the overall framework established by the Law. Thus, various provisions of the Model Law expressly provide for supplementation by procurement regulations. Furthermore, the enacting State may wish to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the regulations should be consistent with the Model Law.

2. Examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: application of the Model Law to excluded sectors (article 1(2)); the prequalification proceedings (article 7(3)(e)); limitation

of the quantity of procurement carried out in cases of urgency using a procurement method other than tendering (to what is required to deal with the urgent circumstances), details concerning the procedures for soliciting tenders or applications to prequalify (article 18); and requirements relating to the preparation and submission of tenders (article 21(y)). In some cases failure to issue procurement regulations when the regulations are referred to in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: the limitation of participation in procurement proceedings on the ground of nationality (article 8(1)); use of the request-for-quotations method of procurement, since that method may be used only below threshold levels set in the procurement regulations (article 15); and authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 29(4)(d)).

Article 5

Public accessibility of legal texts

1. This article is intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts. Inclusion of this article may be considered important not only in States in which such a requirement would not already be found in its existing administrative law, but even in States in which such a requirement was already found in the existing applicable law. In the latter case, the legislature may consider that a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers and contractors on the requirement of adequate public disclosure of legal texts concerned with procurement procedures.

2. In many countries there exist official publications in which laws, regulations and administrative rulings and directives are routinely published. The texts referred to in the present article could be published in those publications. Where there do not exist publications for one or more of those categories of texts, the texts should be promptly made accessible to the public, including foreign contractors and suppliers, in another appropriate manner.

Article 6

Qualifications of suppliers and contractors

1. The purpose of article 6 is to create a procedural climate conducive to participation by qualified suppliers and contractors in procurement proceedings. It does so by strictly specifying the criteria and procedures that the procuring entity may use to assess the qualifications of suppliers and contractors. The aim of the procedures in article 6 is to help ensure that all suppliers and contractors are treated on the same basis and to avoid arbitrariness in the evaluation of qualifications.

2. Paragraph (2)(e) refers to disqualification of suppliers and contractors pursuant to administrative suspension or disbarment proceedings. Such administrative proceedings—in which alleged wrongdoers should be given some procedural rights such as an opportunity to disprove the charges—are commonly used to suspend or disbar suppliers and contractors found guilty of wrongdoing such as faulty accounting, default in contractual performance, or fraud.

Article 7

Prequalification proceedings

1. Prequalification proceedings are intended to eliminate, early in the procurement proceedings, suppliers and contractors that are not suitably qualified to perform the contract and thus to narrow

down the number of tenders, proposals or offers that the procuring entity must evaluate and compare. Such a procedure may be particularly useful for the purchase of complex or high-value goods or construction, and may even be advisable for purchases that are of a relatively low value but involve very specialized goods or construction. The reason for this is that the evaluation and comparison of tenders, proposals and offers in those cases is much more complicated, costly and time-consuming. In addition, competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the tender may be high, if the competitive field is too large and where they run the risk of having to compete with unrealistic tenders submitted by unqualified or disreputable suppliers and contractors.

2. The prequalification procedures set forth in article 7 are made subject to a number of important safeguards. These safeguards include the subjugation of prequalification procedures to the limitations contained in article 6, in particular as to assessment of qualifications, and the procedures found in paragraphs (2) through (7) of article 7. This set of procedural safeguards is included to ensure that prequalification procedures are conducted only on non-discriminatory terms and conditions that are fully disclosed to participating suppliers and contractors, and that otherwise ensure a minimum level of transparency and facilitate the exercise by a supplier or contractor that has not been prequalified of its right to review.

3. The purpose of article 7(8) is to provide for reconfirmation, at a later stage of the procurement proceedings of the qualifications, of suppliers and contractors that had been prequalified. Such "post-qualification proceedings" are intended to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of pre-qualification remains valid and accurate. The procedural requirements for post-qualification are designed to safeguard both the interests of suppliers and contractors in receiving fair treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors.

Article 8

Participation by suppliers and contractors

1. Making provision for international procurement proceedings has important advantages. The greater the extent to which foreign suppliers and contractors are free to participate, the greater will be the competition in procurement proceedings and the better the price and quality available to the public purchaser. Furthermore, exposing local suppliers and contractors to international competition may also benefit the long-term development of national industrial capacity, both for supplying national needs and the export market. Accordingly, article 8 provides that suppliers and contractors should, subject to limited exceptions, be permitted to participate in procurement proceedings without regard to nationality. Such exceptions are not to be taken informally or secretly. Rather, they must be based on either provisions in other bodies of law (e.g., economic embargo imposed by the United Nations Security Council; international obligations of the enacting State, such as regional economic groupings that grant procurement preferences to members of the grouping) or on provisions in the procurement regulations.

2. In the "margin of preference" in favour of local suppliers and contractors provided for in article 29(4)(d), the Model Law provides the enacting State with a mechanism for balancing the objectives of internationality in procurement and fostering national industrial capacity. The margin of preference permits the procuring entity to select the lowest-priced tender of a local supplier or contractor when the difference in price between that tender and the overall lowest price tender falls within the range of the margin

of preference. The margin of preference provides an incentive to local suppliers and contractors to achieve price competitiveness nearly at the level of foreign competition. It favours national industry without totally insulating it from foreign competition. The total exclusion of foreign competition for certain sectors of local industry that are not internationally competitive will, by continually isolating them from international competition, tend to perpetuate the lack of economy, efficiency and competitiveness of those sectors of local industry. In addition it would tend to drive up the cost of procurement for the public purchaser and may actually inhibit the long term development and international competitiveness of local industry.

3. It may be noted that article 17(b) of the Model Law has been included to deal with situations in which it is unlikely that foreign suppliers and contractors would have an interest in participating because of the low value or amount of the goods or construction in question. This provision permits the procuring entity to forego in such cases the procedures designed to solicit international participation, while at the same time not excluding foreign participation that might arise. A blanket exclusion of foreign participation in low-value contracts might needlessly deprive the procuring entity of the best value for its expenditure.

Article 9

Form of communications

1. Article 9 is intended to provide certainty as to the required form of communications between the procuring entity and suppliers and contractors provided for under the Model Law. The essential requirement as to the form of such communications, subject to other provisions of the Model Law, is that they must be in a form that provides a record of the contents of the communication. This approach is designed not to tie communication to the use of paper. This takes account of the fact that communications are increasingly carried out through means such as electronic data interchange ("EDI").

2. In order to permit the procuring entity and suppliers and contractors to avoid unnecessary delays, paragraph (2) permits certain specified types of communications to be made on a preliminary basis through means, in particular telephone, that do not leave a record of the content of the communication, provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the content of the communication.

Article 10

Rules concerning documentary evidence provided by suppliers and contractors

In order to facilitate participation by foreign suppliers and contractors, article 10 bars the imposition of any requirements as to the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than those provided for in the laws of the enacting State relating to the legalization of documents of the type in question. The article is not intended to require that all documents provided by contractors and suppliers are to be legalized. Rather, it recognizes that States have laws concerning the legalization of documents and establishes the principle that no additional formalities specific to procurement proceedings should be imposed.

Article 11

Record of procurement proceedings

1. One of the most important ways to promote transparency and accountability is to include provisions requiring that the procuring

entity maintain a record of the procurement proceedings. A record summarizes key information concerning the procurement proceedings. It facilitates the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds.

2. A question in enacting record requirements is to specify the extent and the recipients of the disclosure. Setting the parameters of disclosure involves balancing factors such as: the general desirability, from the standpoint of the accountability of procuring entities, of broad disclosure; the need to provide suppliers and contractors with information necessary to permit them to assess their performance in the proceedings and to determine whether there are grounds for seeking review; and the need to protect the confidential trade information of suppliers and contractors. In view of these considerations, article 11 provides two levels of disclosure. It mandates disclosure to any member of the general public of the information referred to in article 11(a), (b) and (i)—basic information geared to the accountability of the procuring entity to the general public. Disclosure of more detailed information concerning the conduct of the procurement proceedings is mandated for suppliers and contractors, since that information is necessary to enable them to monitor their relative performance in the procurement proceedings and to monitor the conduct of the procuring entity.

3. As alluded to above, among the necessary objectives of disclosure provisions is to avoid disclosure confidential trade information of suppliers and contractors. That is true in particular with respect to what is disclosed concerning the evaluation and comparison of tenders, proposals, offers and quotations, as excessive disclosure of such information may be prejudicial to the legitimate commercial interests of suppliers and contractors. Accordingly, the information referred to in paragraph (1)(e) involves only a summary of the evaluation and comparison of tenders, proposals, offers or quotations, while paragraph (3)(b) limits the disclosure of detailed information beyond the level of that summary.

4. The purpose of requiring disclosure to suppliers and contractors at the time when the decision is made to accept a particular tender, proposal or offer is to give efficacy to the right to review under article 38. Delaying disclosure until entry into force of the procurement contract might deprive aggrieved suppliers and contractors of a meaningful remedy since, in many countries, the procurement proceedings would be deemed concluded upon the entry into force of the procurement contract.

5. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the applicability to certain parts of the record of other statutes in the enacting State that confer on the public at large a general right to obtain access to Government records. Disclosure of the information in the record to legislative or parliamentary oversight bodies may be mandated pursuant to the law applicable in the enacting State.

Article 12

Inducements from suppliers and contractors

1. Article 12 contains an important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity. A procurement law cannot be expected to completely eradicate such abusive practices. How-

ever, the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. In addition, the enacting State should have in place an effective system of sanctions against corruption by Government officials and suppliers and contractors in the procurement process.

2. To guard against abusive application of article 12, rejection is made subject to approval, a record requirement and a duty of prompt disclosure to the alleged wrongdoer. The latter is designed to permit exercise of the right to review.

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 13

Methods of procurement

1. Article 13 establishes the use of tendering proceedings as the method of procurement to be used normally. This is because tendering proceedings generally maximize economy and efficiency in procurement. However, the Model Law also provides a number of other methods of procurement for exceptional circumstances in which tendering proceedings would not be feasible or, even if feasible, would not be the procurement method most likely to provide the best value.

2. Article 13(2) sets forth the requirement that a decision to use a method of procurement other than tendering should be supported in the record by a statement of the grounds and circumstances underlying the decision. This requirement is included because the decision to use a method of procurement potentially less competitive than tendering should not be made secretly or informally.

Article 14

Conditions for use of two-stage tendering, request for proposals or competitive negotiation

1. For the circumstances specified in article 14(1), the Model Law provides the enacting State with a choice among three different methods of procurement other than tendering—two-stage tendering, request for proposals, and competitive negotiation. Notable among these circumstances is the case in which the procuring entity is unable to formulate specifications for the goods or construction to be procured to the level of finality required for tendering proceedings, in which all participating suppliers and contractors compete on the basis of a final set of specifications. Such a situation may arise in two types of cases. The first is when the procuring entity has not determined the exact manner in which to meet a particular need and therefore seeks proposals as to various possible solutions (e.g., it has not decided upon the material to be used for building a bridge). The second case is the procurement of high technology items such as large passenger aircraft or sophisticated computer equipment. In such limited cases, because of the technical sophistication and complexity of the goods, it may be considered undesirable, from the standpoint of obtaining the best value, for the procuring entity to procure the goods or construction on the basis of specifications it has drawn up in the absence of negotiations with suppliers and contractors as to the exact capabilities and possible variations of what is being offered.

2. The three methods of procurement referred to in article 14 have been included because of variations in practice as to the method used in circumstances of the type in question. No hierarchy has been assigned to the three methods, which are presented as options. They employ different procedures for selecting a sup-

plier or contractor. In the first stage of a two-stage tendering proceeding, the procuring entity solicits proposals from suppliers and contractors as to various possible ways of solving the procurement need and consults with the suppliers and contractors concerning the details and possible modifications of those proposals. Upon the completion of that first-stage process, the procuring entity decides what exactly it wants to procure and formulates a set of final specifications that form the basis, in the second stage, of an ordinary tendering proceeding. By contrast, at no stage of the second type of method referred to in article 14, request-for-proposals, does a procuring entity conduct a tendering proceeding. Rather, in request-for-proposals proceedings the selection of a winning proposal from among proposals offering varied solutions is based on the application of weighted criteria that assess the effectiveness of proposals in meeting the needs of the procuring entity and their cost. The third method, competitive negotiation, is much more flexible and less structured than the other two, since the procuring entity is essentially permitted to conduct negotiations as it sees fit, with very little in the way of procedural requirements beyond the "best and final offer" procedure mandated in article 35.

3. An enacting State need not necessarily incorporate each of the three methods for the common circumstance referred to in article 14 or even incorporate more than one of them. It may indeed be undesirable to do so in view of the uncertainty likely to be encountered by procuring entities in trying to discern the most appropriate method from among two or three similar methods. In deciding which of the three methods to incorporate, a decisive criterion for the enacting State may be that, from the standpoint of transparency, competition and objectivity in the selection process, two-stage tendering and request for proposals are likely to offer more than competitive negotiation, with its high degree of flexibility and possibly higher risk of corruption. At least one of the three methods should be incorporated, since the cases in question might otherwise only be dealt with through the least competitive of the procurement methods, single-source procurement.

4. Subparagraphs (b) and (c) of article 16 (single-source procurement), referring, respectively, to cases of non-catastrophic and catastrophic urgency, are identical to subparagraphs (a) and (b) of article 14(2), which permit the use of competitive negotiation in such cases of urgency. The purpose of this overlap is to permit the procuring entity to decide which of the two methods best suits the circumstances at hand. For both procurement methods, the urgency cases contemplated are intended to be truly exceptional, and not merely cases of convenience. In the application of the Model Law to procurement involving national defence or national security and in cases of research contracts for the procurement of a prototype, the procuring entity is, for similar reasons, given a choice between the methods of procurement provided for in article 14 and single-source procurement. Thus, an enacting State may, even if it does not incorporate competitive negotiation for the circumstances referred to in paragraph (1), incorporate competitive negotiation for the circumstances referred to in paragraph (2).

Article 15

Conditions for use of request for quotations

Inclusion of request for quotations is intended to provide a method of procurement appropriate for low-value purchases of standardized goods. In such cases, engaging in tendering proceedings, which can be costly and time-consuming, may not be justified. Article 15(2), however, strictly limits the use of this method to procurement of a value below the threshold set in the procurement regulations. It also forbids division of a procurement in order to circumvent the threshold. In incorporating article 15, it should be made clear that use of request for quotations is not

mandatory for procurement below the threshold value. It may indeed be advisable in certain cases that fall below the threshold to use tendering or one of the other methods of procurement. This may be the case, for example, when an initial low-value procurement would have the long-term consequence of committing the procuring entity to a particular type of technological system.

Article 16

Conditions for use of single-source procurement

1. In view of the non-competitive character of single-source procurement, article 16 strictly limits its use to the exceptional circumstances set forth in article 16.

2. Article 16(g) has been included in order to permit the use of single-source procurement in cases of serious economic emergency in which such procurement would avert serious harm to the economy of the State or of a particular region. A case of this type may be, for example, where a particular enterprise employing most of the labor force in a particular region is threatened with closure unless it obtains a procurement contract. Article 16(g) contains safeguards to ensure that it does not give rise to more than a very exceptional use of single-source procurement.

CHAPTER III. TENDERING PROCEEDINGS

Section 1. Solicitation of tenders and of applications to prequalify

Article 17

Domestic tendering

As pointed out in paragraphs 5 and 6 of the comments to article 8, article 17 has been included in order to specify the exceptional cases in which measures designed to solicit foreign participation in the tendering proceedings do not have to be employed.

Article 18

Procedures for soliciting tenders or applications to prequalify

1. In order to promote transparency and competition, article 18 sets forth the publicity procedures to be followed for soliciting tenders and applications to prequalify from an audience wide enough to provide an adequate level of competition. Including these procedures in the procurement law enables interested suppliers and contractors to determine, simply by reading the procurement law, which publications they need to follow in order to stay abreast of procurement opportunities in the enacting State. In view of the objective of the Model Law of fostering participation in procurement proceedings without regard to nationality and maximizing competition, article 18(2) requires publication of the invitations also in a publication of international circulation. One possible medium of such publication is the business edition of *Development Business*, published by the United Nations Department of Public Information and the United Nations University.

2. The publicity requirements in the Model Law are only minimum requirements. The procurement regulations may require procuring entities to publicize the invitation to tender or the invitation to prequalify by additional means that would promote widespread awareness by suppliers and contractors of the procurement proceedings. These might include, for example, posting the invitation on official notice boards, and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity.

3. Article 18(3) has been included in order to enable the procuring entity in exceptional cases, for reasons of economy and efficiency, to solicit participation only from a limited number of suppliers or contractors (referred to hereinafter as "restricted tendering"). In some cases, restricted tendering can be a more efficient means of procurement than open tendering proceedings while still providing competition. Such cases may include: where the time and cost of the examination and evaluation a large number of tenders would be disproportional to the value of the goods or construction to be procured; where the goods or construction are available only from a few contractors or suppliers; and in the case of high-value goods or construction, for which the cost of preparing tenders is high and the statistical chance of being the successful tenderer would be low due to the potentially large number of tenderers, thus possibly deterring competent suppliers and contractors from participating.

4. In order to curb abusive resort to restricted tendering, article 18(3) contains safeguards. These include the requirement that resort to restricted tendering be subject to prior approval, that the number of suppliers or contractors invited be sufficient to ensure effective competition, and that the grounds and circumstances for resorting to restrictive tendering be stated in the record.

Article 19

Contents of invitation to tender and invitation to prequalify

In order to promote efficiency and transparency, article 19 requires that invitations to tender as well as invitations to prequalify contain the information required for suppliers and contractors to be able to ascertain whether the goods or construction being procured are of a type that they can provide and, if so, how they can participate in the tendering proceedings. The specified information requirements are only the required minimum so as not to preclude the procuring entity from including additional information that it considers appropriate.

Article 20

Provision of solicitation documents

Solicitation documents are intended to provide suppliers and contractors with the information they need to prepare their tenders and to inform suppliers and contractors of the rules and procedures according to which the tendering proceedings will be conducted. Article 20 has been included in order to ensure that all suppliers and contractors that have expressed an interest in participating in the procurement proceedings and that comply with the procedures set forth by the procuring entity are provided with solicitation documents. The purpose of including a provision concerning the price to be charged for the solicitation documents is to enable the procuring entity to recover its costs of printing and providing those documents, but to avoid excessively high charges that could inhibit qualified suppliers and contractors from participating in the tendering proceedings.

Article 21

Contents of solicitation documents

1. Article 21 contains a listing of the information required to be included in the solicitation documents. An indication in the procurement law of those requirements is useful to ensure that the solicitation documents include the information necessary to provide a basis for enabling suppliers and contractors to submit tenders that meet the needs of the procuring entity and that the pro-

curing entity can compare in an objective and fair manner. Many of the items listed in article 21 are regulated or dealt with in other provisions of the Model Law. The enumeration in this article of all items that are required to be in the solicitation documents, including all items the inclusion of which is expressly provided for elsewhere in the Model Law, is useful because it enables procuring entities to use the article as a "check-list" in preparing the solicitation documents.

2. One category of items listed in article 21 concerns instructions for preparing and submitting tenders (subparagraphs (a), (i) through (p), and (s); issues such as the form, and manner of signature, of tenders and the manner of formulation of the tender price). The purpose of including these provisions is to limit the possibility that qualified suppliers and contractors would be placed at a disadvantage or even rejected due to lack of clarity as to how the tenders should be prepared.

3. The Model Law recognizes that for the procurement of goods or construction that are separable into two or more distinct elements (e.g., the procurement of different types of laboratory apparatus; the procurement of a hydroelectric plant consisting of the construction of a dam and the supply of a generator), a procuring entity may wish to permit suppliers and contractors to submit tenders either for the entirety of the goods or construction or for one or more portions thereof. That approach might enable the procuring entity to maximize economy by procuring either from a single supplier or contractor or from a combination of them, depending on which approach the tenders revealed to be more cost effective. Permitting partial tenders may also facilitate participation by smaller suppliers and contractors, that may have the capacity to submit tenders only for certain portions. Article 18(h) is included to make the tender evaluation stage as objective, transparent and efficient as possible, since the procuring entity should not be permitted to divide the entirety of the goods or construction to be procured into separate contracts merely as it sees fit after tenders are submitted.

Article 22

Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents

1. The purpose of including article 22 is to make it clear that the prequalification and solicitation documents should be formulated in a clear, complete and objective manner, particularly with respect to the description of the goods or construction to be procured. Solicitation documents with those characteristics enable suppliers and contractors to formulate tenders that meet the needs of the procuring entity, to forecast the risks and costs of their participation in the tendering proceedings and of the performance of the contract to be concluded, and thus to offer their most advantageous prices and other terms and conditions. Properly prepared solicitation documents enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity. Furthermore, application of the rule that specifications should be written so as not to favour particular contractors or suppliers will help to limit use of methods of procurement less competitive than tendering.

2. Paragraph (4) is intended to help make the solicitation documents understandable to foreign suppliers and contractors. The reference to a language customarily used in international trade need not be adopted by an enacting State whose official language is one customarily used in international trade.

3. In States in which solicitation documents are issued in more than one language, it would be advisable to include in the procurement law, or in the procurement regulations, a rule against issuing "bilingual" solicitation documents, i.e., solicitation documents in which both languages together form a single publication. The different language versions should rather be independent of each other. This would enable suppliers and contractors to submit tenders on the basis of the information in one language version of the solicitation documents. If the two language versions form part of a single document, suppliers and contractors would be placed in the position of having to ascertain that the two language versions were in substance identical prior to subscribing to them. The provision is an important safeguard in view of the probability that the solicitation documents may contain information or documents that would somehow be incorporated in the future procurement contract.

Article 23

Clarifications and modifications of solicitation documents

1. The purpose of article 23 is to establish procedures for clarification and modification of the solicitation documents in a manner that will foster efficient, fair and successful conduct of tendering proceedings. The right of the procuring entity to modify the solicitation documents is fundamental and necessary in order to enable the procuring entity to obtain goods or construction that meet its needs. Article 23 provides that clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated by the procuring entity to all suppliers and contractors to whom the procuring entity provided solicitation documents. It would not be sufficient to simply permit suppliers and contractors to have access to clarifications upon request since they would have no independent way of finding out that a clarification had been made.
2. The rule governing clarifications is meant to ensure that the procuring entity responds to a timely request for clarification in time for the clarification to be taken into account in the preparation and submission of tenders. Prompt communication of clarifications and modifications also enables suppliers and contractors to exercise their right under article 26(3) to modify or withdraw their tenders prior to the deadline for submission of tenders. Similarly, minutes of meetings of suppliers and contractors convened by the procuring entity must be communicated to suppliers and contractors promptly so that those minutes too may be taken into account in the preparation of tenders.

Section II. Submission of tenders

Article 24

Language of tenders

Article 24 provides that tenders may be formulated in any language in which the solicitation documents have been formulated or in any other language specified in the solicitation documents. This rule has been included in order to facilitate participation by foreign suppliers and contractors.

Article 25

Submission of tenders

1. An important element in fostering participation and competition is the granting to suppliers and contractors of a sufficient period of time to prepare their tenders. Article 25 recognizes that the length of that period of time may vary from case to case, depending upon a variety of factors such as the complexity of the

goods or construction to be procured, the extent of subcontracting anticipated, and the time needed for transmitting tenders. Thus, it is up to the procuring entity to fix the deadline by which tenders must be submitted. An enacting State may wish to establish in the procurement regulations minimum periods of time that the procuring entity must allow for the submission of tenders.

2. In order to promote competition and fairness, paragraph (2) requires the procuring entity to extend the deadline in the exceptional case of late issuance of clarifications or modifications of the solicitation documents, or of minutes of a meeting of suppliers and contractors. Paragraph (3) permits, but does not compel, the procuring entity to extend the deadline for submission of tenders in other cases, i.e., when one or more suppliers or contractors are unable to submit their tenders on time due to any circumstances beyond their control. This is designed to protect the level of competition when a potentially important element of that competition would otherwise be blocked from participation.

3. The requirement in paragraph (5) that tenders are to be submitted in writing represents an exception to the general rule set forth in article 9(1) that communications between the procuring entity and suppliers and contractors may be in any form that provides a record of the content of the communication. The rationale behind retaining the writing requirement is to limit the possibility that suppliers and contractors without adequate EDI capability would be discriminated against. Another reason is the perception that EDI techniques are not capable of providing the level of security achieved by the traditional requirement that tenders be in writing and in sealed envelopes.

4. The restriction in article 25(5) notwithstanding, as the application of EDI techniques continues to develop and to gain acceptance, enacting States may wish to consider including a formulation in paragraph (5) that would permit the use of EDI for the submission of tenders. Such an approach would necessitate elaboration of special rules and techniques to guard the confidentiality of tenders and to prevent "opening" of the tenders prior to the deadline for submission of tenders, and to deal with other issues such as the form that the tender security would take in the context of a paperless submission. In such an event, it would also be recommended to provide for the submission and evaluation in a given tendering proceeding of a mix of written and electronic tenders.

5. The rule in paragraph (6) prohibiting the consideration of late tenders is intended to promote economy and efficiency in procurement and the integrity of and confidence in the procurement process. Permitting the consideration of late tenders after the commencement of the opening might enable tenderers to learn of the contents of other tenders before submitting their own tenders. This could lead to higher prices and could facilitate collusion between suppliers or contractors. It would also be unfair to the other tenderers. In addition, it could interfere with the orderly and efficient process of opening tenders.

Article 26

Period of effectiveness of tenders; modification and withdrawal of tenders

1. Article 26 has been included to make it clear that the procuring entity should stipulate in the solicitation documents the period of time that tenders should remain in effect.
2. It is of obvious importance that the length of the period of effectiveness of tenders should be stipulated in the solicitation documents, taking into account the circumstances peculiar to the particular tendering proceeding. It would not be a viable solution to fix in a procurement law a generally applicable long period of

effectiveness hoping to cover the needs of most if not all tendering proceedings. This would be inefficient since for many cases the period would be longer than necessary. Excessively long periods of effectiveness may result in higher tender prices since suppliers and contractors would have to include in their prices an increment to compensate for the costs and risks to which they would be exposed during such a period (e.g., the risks of higher manufacturing or construction costs).

3. Paragraph (2)(b) has been included to enable the procuring entity to deal with delays in the tendering proceedings by requesting extensions of the tender validity period. The procedure is not compulsory, so as to protect suppliers and contractors from being bound to their tenders for unexpectedly long durations—a risk that would discourage suppliers and contractors from participating or drive up their tender prices. In order to prolong also the protection afforded by tender securities, it is provided that a supplier or contractor failing to obtain a security to cover the extended validity period of the tender is considered as having refused to extend the validity period of its tender.

4. Paragraph (3) is an essential companion of the provisions in article 23 concerning clarifications and modifications of the solicitation documents. This is because it permits suppliers and contractors to respond to clarifications and modifications of solicitation documents, or to other circumstances, either by modifying their tenders, if necessary, or by withdrawing them if they so choose. Such a rule facilitates participation, while protecting the interests of the procuring entity by permitting forfeiture of the tender security for modification or withdrawal following the deadline for submission of tenders.

Article 27

Tender securities

1. The procuring entity may suffer losses if suppliers or contractors withdraw tenders or if a procurement contract with the supplier or contractor whose tender had been accepted is not concluded due to the fault of that supplier or contractor (e.g., the costs of new procurement proceedings and losses due to delays in procurement). Article 27 authorizes the procuring entity to require suppliers and contractors participating in the tendering proceedings to post a tender security so as to cover at least a portion of such losses and to discourage the supplier or contractor from defaulting. Procuring entities are not required to impose tender security requirements in all tendering proceedings. Tender securities are usually important when the procurement is of high-value goods or construction. In the procurement of low-value items, though it may be of importance to require a tender security in some cases, the risks faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security—which will normally be reflected in the contract price—will be less justified.

2. Safeguards have been included to ensure that a tender security requirement is only imposed fairly and for the intended purpose. That purpose is to secure the obligation of suppliers and contractors to enter into a procurement contract on the basis of the tenders they have submitted and to post a security for performance of the procurement contract, if required to do so.

3. Paragraph (1)(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were restricted to providing securities issued by institutions in the enacting State. However, there is optional language at the end of paragraph (1)(c) providing flexibility on this point for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law.

4. The reference to confirmation of the tender security is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. The inclusion of the reference in the Model Law, however, is not intended to encourage such a practice in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in tendering proceedings (e.g., difficulties in obtaining the local confirmation prior to the deadline for submission of tenders and added costs for foreign suppliers and contractors).

6.* Paragraph (2) has been included in order to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security. While the retention by the beneficiary of a guarantee instrument beyond the expiry date of the guarantee should not be regarded as extending the validity period of the guarantee, the requirement that the security be returned is of particular importance in the case of a security in the form of a deposit of cash or other transferable medium of value. The clarification is also useful since there remain some national laws in which, contrary to what is generally expected, a demand for payment is timely, even though made after the expiry of the security, as long as the contingency covered by the security occurred prior to the expiry.

Section III. Evaluation and comparison of tenders

Article 28

Opening of tenders

1. The rule in paragraph (1) is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders. Such gaps may create opportunities for misconduct (e.g., disclosure of the contents of tenders prior to the designated opening time) and deprive suppliers and contractors of the assurance of the opportunity to minimize that risk by submitting a tender at the last minute, immediately prior to the opening of tenders.

2. Paragraph (2) sets forth the rule that the procuring entity must permit all suppliers and contractors that have submitted tenders or their representatives to be present at the opening of tenders. Permitting suppliers and contractors or their representatives to be present at the opening of tenders contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers and contractors that have submitted tenders, as well as the prices of their tenders, are announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers and contractors that were not present or represented at the opening of tenders.

Article 29

Examination, evaluation and comparison of tenders

1. The purpose of paragraph (1) is to enable the procuring entity to seek from suppliers and contractors clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders, while making it clear that this should not involve changes in the substance of tenders. Paragraph (1)(b), which refers to the correction of purely arithmetical errors, is not

*Paragraph number 5 of the Draft Guide is missing due to an error in numbering and no substance was omitted.

intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or to other errors not apparent on the face of the tender. Incorporation of the related notice requirement is important since, in paragraph (3)(b), provision is made for the mandatory rejection of the tender if the correction is not accepted.

2. Paragraph (2) sets forth the rule to be followed in determining whether tenders are responsive and permits a tender to be regarded as responsive if it contains minor deviations. Permitting the procuring entity to consider tenders with minor deviations promotes participation and competition in tendering proceedings. Quantification of such minor deviations is required so that tenders may be compared objectively in a way that reflects positively on tenders that do comply to a full degree.

3. Although ascertaining the successful tender on the basis of the tender price alone provides the greatest objectivity and automaticity, in some tendering proceedings the procuring entity may wish to select a tender not purely on the basis of the price factor. Accordingly, the Model Law enables the procuring entity to select the "lowest evaluated tender", i.e. one that is selected on the basis of criteria in addition to price. Paragraph (4)(c)(ii) and (iii) list such criteria as envisaged in the Model Law. The criteria in paragraph (4)(c)(iii) related to economic development objectives have been included because, in some countries, particularly developing countries and countries whose economies are in transition, it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives. It is envisaged in the Model Law that some enacting States may wish to list additional such criteria. However, caution is advisable in expanding the list of non-price criteria set forth in paragraph (4)(c)(iii) in view of the risk that such other criteria may pose to the objectives of good procurement. Criteria of this type are sometimes less objective and more discretionary than those referred to in paragraph (4)(c)(i) and (ii), and therefore their use in evaluating and comparing tenders could impair competition and economy in procurement, and reduce confidence in the procurement process.

4. Requiring that the criteria be objective and quantifiable to the extent practicable, and that they be given a relative weight in the evaluation procedure or be expressed in monetary terms, is aimed at enabling tenders to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. The enacting State may wish to spell out in the procurement regulations how such factors are to be formulated and applied. One possible method is to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the solicitation documents and to combine those quantifications with the tender price. The tender resulting in the lowest evaluated price is regarded as the successful tender. Another method may be to assign relative weightings (e.g., "coefficients" or "merit points") to the various aspects of each tender in relation to the criteria set forth in the solicitation documents. The tender with the most favourable aggregate weighting is the lowest evaluated tender.

5. Paragraph (4)(d) permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rules for calculation to be set forth in the procurement regulations. (See paragraph 4 of the comments to article 8 concerning the advantages of using a margin of preference as a technique for achieving national economic objectives while still preserving competition.) It should be noted, however, that States that are parties to the GATT Agreement on Government Procurement and member States of regional economic integration groupings such as the EC may be restricted in their ability to accord such preferential treatment. In order to promote transparency, resort to the margin of preference may be made only if authorized by the procurement regulations and approved by the approving authority.

6. The Model Law envisages that the procurement regulations will set forth rules concerning the calculation and application of a margin of preference. Such rules could also establish criteria for qualifying as a "domestic" contractor or supplier and for qualifying as "domestically produced" goods (e.g., that they contain a minimum domestic content or value added) and fix the amount of the margin of preference, which might be different for goods and for construction. As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the tender prices of all tenders import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting tender prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.

7. The rule in paragraph (5) on conversion of tender prices to a single currency for the purposes of comparison and evaluation of tenders is included to promote accuracy and objectivity in the decision of the procuring entity (see article 21(r)).

8. Paragraph (6) has been included in order to enable procuring entities to require the supplier or contractor submitting the successful tender to reconfirm its qualifications. This may be of particular utility in procurement proceedings of a long duration, in which the procuring entity may therefore wish to verify whether qualification information submitted at an earlier stage remains valid. Use of reconfirmation is left discretionary since the need for it depends on the circumstances of each tendering proceeding. In order to make the reconfirmation procedure effective and transparent, paragraph (7) mandates the rejection of a tender upon failure of the supplier or contractor to reconfirm and establishes the procedures to be followed by the procuring entity to select a successful tender in such a case.

Article 30

Rejection of all tenders

1. The purpose of article 30 is to enable the procuring entity to reject all tenders. Inclusion of this provision is important because a procuring entity may need to do so for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the tendering proceedings, where the procuring entity's need for the goods or construction ceases, or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding. Public law in some countries may restrict the exercise of this right, e.g., by prohibiting action constituting an abuse of right or a violation of fundamental principles of justice.

2. The requirement in paragraph (3) that notice of the rejection of all tenders be given to suppliers and contractors that submitted tenders, together with the requirement in paragraph (1) that the grounds for the rejection be communicated upon request to those suppliers and contractors, is designed to foster transparency and accountability. Paragraph (1) does not require the procuring entity to justify the grounds that it cites for rejection of all tenders. This approach is based on the premise that the procuring entity should be free to abandon the procurement proceeding on economic, social or political grounds which it need not justify. The protection of this power is further buttressed by the fact that the decision of the procuring entity to reject all tenders is not subject, in accordance with article 38(2)(d), to the right to review provided by the Model Law; it is also supported by paragraph (2), which provides that the procuring entity is to incur no liability towards contractors and suppliers, such as compensation for their costs of preparing and submitting tenders, solely by virtue of its invoking paragraph (1). The potentially harsh effects of article 30 are mitigated by permitting the procuring entity to reject all tenders only if the right to do so has been reserved in the solicitation documents.

*Article 31**Negotiations with suppliers and contractors*

Article 31 contains a clear prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender submitted by the supplier or contractor. This rule has been included because such negotiations might result in an "auction", in which a tender offered by one supplier or contractor is used to apply pressure on another supplier or contractor to offer a lower price or an otherwise more favourable tender. Many suppliers and contractors refrain from participating in tendering proceedings where such techniques are used.

*Article 32**Acceptance of tender and entry into force of procurement contract*

1. The purpose of paragraph (1) is to state clearly the rule that the tender ascertained to be the successful tender pursuant to article 29(4)(b) is to be accepted and that notice of the acceptance is to be given promptly to the supplier or contractor that submitted the tender. Absent a provision on entry into force of the procurement contract, the entry into force of the procurement contract would be governed by general legal rules, which in many cases have evolved to deal with the formation of simple contractual relationships and which may not clearly indicate the relevant time in relation to the formation of a contract as a result of tendering proceedings.

2. The Model Law provides for different methods of entry into force of the procurement contract, in recognition that enacting States may differ as to the preferred method and that, even within a single enacting State, different entry-into-force methods may be employed in different circumstances. Depending upon its preferences and traditions, an enacting State may wish to incorporate one or more of these methods.

3. Under one method (set forth in paragraph (4)), absent a contrary indication in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the supplier or contractor that submitted the successful tender. This approach may be satisfactory when the contract as described in the solicitation documents covers all relevant terms. The second method (set forth in paragraph (2)), ties the entry into force of the procurement contract to the signature by the supplier or contractor submitting the successful tender of a written procurement contract conforming to the tender. This approach may be desirable where there exist minor outstanding contractual terms to be settled by the parties, although the major contract terms are to have been already settled in the solicitation documents. Paragraph (2) contains an optional reference to "the requesting ministry" as a signatory to the procurement contract in order to take into account that in some States the procurement contract is signed on behalf of the Government by the ministry for whose use the goods or construction were destined, but which did not itself conduct the procurement proceedings nor act as the procuring entity within the meaning of the Model Law. In States with such a procurement practice, procurement proceedings may be conducted by a central entity such as a central procurement or tendering board.

4. A third method of entry into force (set forth in paragraph (3)), provides for entry into force upon approval of the procurement contract by a higher authority. In States in which this provision is enacted, further details may be provided in the procurement regulations as to the type of circumstances in which the approval would be required (e.g., only for procurement contracts above a specified value). The requirement that the solicitation documents disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the estimated time should not be deemed to extend the

validity period of the successful tender or of any tender security are designed to establish a balance between the rights and obligations of suppliers and contractors. They are designed in particular to exclude the possibility that a selected supplier or contractor would remain committed to the procuring entity for a potentially indefinite period of time with no assurance of the eventual entry into force of the procurement contract.

5. The rationale behind linking entry into force of the procurement contract to dispatch rather than to receipt of the notice of acceptance is that the former approach is more appropriate to the particular circumstances of tendering proceedings. In order to bind the supplier or contractor to a procurement contract or to obligate it to sign a written procurement contract, the procuring entity has to give notice of acceptance while the tender is in force. Under the "receipt" approach, if the notice was properly transmitted, but the transmission was delayed, lost or misdirected owing to no fault of the procuring entity, so that the notice was not received before the expiry of the period of effectiveness of its tender, the procuring entity would lose its right to bind the supplier or contractor. Under the "dispatch" approach, that right of the procuring entity is preserved. In the event of a delay, loss or misdirection of the notice, the supplier or contractor might not learn before the expiration of the validity period of its tender that the tender had been accepted; but in most cases that consequence would be less severe than the loss of the right of the procuring entity to bind the supplier or contractor.

6. In order to promote the objectives of good procurement, paragraph (5) makes it clear that, in the event that the supplier or contractor whose tender the procuring entity has selected fails to sign a procurement contract in accordance with paragraph (2), the selection of another tender from among the remaining tenders should be in accordance with the provisions normally applicable to the selection of tenders, subject to the right of the procuring entity to reject all tenders.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Articles 33 to 37 present procedures to be used for the methods of procurement other than tendering. As indicated in the comments to article 14, there is an overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation. The decision as to which of those methods to incorporate will determine which of articles 33 (procedures for two-stage tendering), 34 (procedures for request for proposals) and 35 (procedures for competitive negotiation) will be incorporated. With respect to request for proposals, competitive negotiation, request for quotations and single-source procurement, chapter IV does not provide as full a procedural framework as chapter III does with respect to tendering proceedings. This is mainly because those methods of procurement involve more flexibility than does tendering. Some of the questions that for tendering are answered in the Model Law (e.g., entry into force of the procurement contract) may be answered for those other methods of procurement in other bodies of its applicable law. An enacting State may consider it useful to incorporate into the procurement law some of those solutions from other bodies of applicable law, as well as to supplement chapter IV with rules in the procurement regulations. It should also be noted that chapters I and V would also be generally applicable to the methods of procurement other than tendering.

*Article 33**Two-stage tendering*

The rationale behind the two-stage procedure used in this method of procurement is to combine two elements: the flexibility

afforded to the procuring entity in the first stage by the ability to negotiate with suppliers and contractors in order to arrive at a final set of specifications for the goods or construction to be procured, and, in the second stage, the high degree of objectivity and competition characteristic of tendering proceedings. The procedures used in two-stage tendering are distinct from those used in request for proposals. In the latter method of procurement, the procuring entity sets forth in the request for proposals the broad parameters of its procurement needs and the criteria according to which the suitability of proposals will be assessed, requests proposals from suppliers or contractors, and negotiates with those submitting proposals in order to arrive at the most suitable proposal. The two methods also differ in that in two-stage tendering, since it is subject to article 18, solicitation of participation would generally be on a broad basis.

Article 34

Request for proposals

1. While request for proposals is a method in which the procuring entity typically solicits proposals from a select, relatively small group of suppliers or contractors, article 34 contains provisions designed to ensure that a sufficient number of suppliers or contractors have an opportunity to express their interest in participating in the proceedings and that a sufficient number of suppliers or contractors actually do participate so as to foster adequate competition. In that regard, paragraph (1) requires the procuring entity to solicit proposals from as many suppliers or contractors as practicable, but from a minimum of three if possible. The companion provision in paragraph (2) is designed to potentially widen participation by requiring the procuring entity, unless this is not desirable on the grounds of economy and efficiency, to publish in a publication of international circulation a notice seeking expressions of interest in participating in the request-for-proposals proceedings. In order to protect the procurement proceedings from the delays that might result if the procuring entity were obligated to admit all suppliers or contractors that responded to such a notice, publication of the notice does not confer any rights on suppliers or contractors.

2. The procurement regulations may set forth further rules for the procuring entity in this type of a notice procedure. For example, the practice in some countries is that a request for proposals is sent as a general rule to all suppliers and contractors that respond to the notice, unless the procuring entity decides that it wishes to send the request for proposals only to a limited number of suppliers and contractors. The rationale behind such an approach is that those suppliers and contractors that expressed an interest should be given an opportunity to submit proposals. A countervailing consideration is that such a procedure might create an extra burden for the procuring entity at a time when it is already busy.

3. The remainder of article 34 sets forth the essential elements of request-for-proposals proceedings related to the evaluation and comparison of proposals and the selection of the winning proposal. They are designed to maximize transparency and fairness in competition, and objectivity in the comparison and evaluation of proposals.

4. The relative managerial and technical competence of the supplier or contractor is included as a possible evaluation factor since the procuring entity might feel more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal. This provision should be distinguished from the authority granted to the procuring entity in paragraph (9)(d) not to pursue the proposals of suppliers or contractors deemed unreliable or incompetent. The latter provision permits the procuring entity to avoid evaluating proposals submitted by suppliers or contractors considered unreliable or incompetent.

5. The "best and final offer" procedure required by paragraph (8) is intended to maximize competition and transparency by providing for a culminating date by which suppliers or contractors are to make their best and final offers. This procedure puts an end to the negotiations and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict the undesirable situation in which the procuring entity uses the price offer made by one supplier or contractor to pressure another supplier or contractor to lower its price.

Article 35

Competitive negotiation

1. Article 35 is a skeleton provision. Subject to the rules set forth in the Model Law and in the procurement regulations, and subject to any rules of other bodies of applicable law, the procuring entity may organize and conduct the negotiations as it sees fit. Those rules that are set forth in the present article are intended to allow that freedom to the procuring entity while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process.

2. The enacting State may wish to require in the procurement regulations that the procuring entity take steps such as the following: that it establish basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; that it prepare various documents to serve as a basis for the negotiations, including documents setting forth the desired technical characteristics of the goods or construction to be procured, and the desired contractual terms and conditions; and that it require the suppliers and contractors with whom it negotiates to itemize their prices so as to enable the procuring entity to compare what is being offered by one contractor or supplier during the negotiations with what is being offered by the others.

3. The procurement regulations may indicate that, particularly in the case of complex goods or construction, the procuring entity and each supplier and contractor with which it negotiates should stipulate, where permitted by the applicable law, that no contractual obligations exist between the parties regarding the procurement until such time as a written contract has been entered into between them. Such a stipulation may be useful in particular in legal systems where there is a possibility of "pre-contract" liability, i.e., that a "pre-contract" document embodying all the essential terms of a future contract may be regarded as an enforceable contract. The means and time at which a contract enters into existence will be governed by the applicable law, which procuring entities will generally want to be the law of the State of the procuring entity. Where the applicable law is the United Nations Convention on Contracts for the International Sale of Goods, matters such as the formation of contract will be subject to the internationally uniform rules contained in the Convention.

Article 36

Request for quotations

It is important to include in a procurement law minimum procedural requirements for request for quotations of the type set forth in the Model Law. They are designed to foster an adequate level and quality of competition.

Article 37

Single-source procurement

The Model Law does not contain procedures to be followed specifically in single-source procurement. This is because single-source procurement is subject to very exceptional conditions of use and involves a sole supplier or contractor.

CHAPTER V. REVIEW

1. An effective means to review acts and decisions of the procuring entity and procedures followed by the procuring entity is essential to ensure the proper functioning of the procurement system and to promote confidence in that system. This chapter sets forth provisions establishing a right to review and setting forth provisions governing its exercise.

2. It is recognized that there exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. Certain important aspects of proceedings for review, such as the forum where review may be sought and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of State administration in every country. Many legal systems provide for review of acts of administrative organs and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity (hereinafter referred to as "hierarchical administrative review"). In legal systems that provide for hierarchical administrative review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the State administration. In the context of procurement, for example, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g., a central procurement board); in other States the review function is performed by the body that exercises financial control and oversight over operations of the Government and of the public administration. Some States provide for review by the Head of State in certain cases.

3. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialized independent administrative bodies whose competence is sometimes referred to as "quasi-judicial". Those bodies are not, however, considered in those States to be courts within the judicial system.

4. Many national legal systems provide for judicial review of acts of administrative organs and public entities. In several of those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

5. In view of the above, and in order to avoid impinging upon fundamental conceptual and structural aspects of legal systems and systems of State administration, the provisions in chapter V are of a more skeletal nature than other sections of the Model Law. As indicated in the asterisk footnote at the head of chapter V, some States may wish to incorporate the articles on review without change or with only minimal changes, while other States might not see fit, to one degree or another, to incorporate those articles. In the latter cases, the articles on review may be used to measure the adequacy of existing review procedures.

6. In order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems throughout the world, only basic features of the right of review and its exercise are dealt with. Procurement regulations to be formulated by an enacting State might include more detailed

rules concerning matters that are not dealt with by the Model Law on Procurement or by other legal rules in the State. In some cases, alternative approaches to the treatment of particular issues have been presented.

7. Chapter V does not deal with the possibility of dispute resolution through arbitration, in particular since the types of situations contemplated are not situations that may typically lend themselves to arbitration and since the capacity of procuring entities to submit to arbitration would be determined by the applicable law.

Article 38

Right to review

1. The purpose of article 38 is to establish the basic right to obtain review. Under paragraph (1), the right to review appertains only to suppliers and contractors, and not to members of the general public as such. However, it would not necessarily exclude suppliers and contractors that have not participated, in particular suppliers and contractors who claim have been unlawfully precluded from participating in procurement proceedings. Subcontractors have been intentionally omitted from the ambit of the right to review provided for in the Model Law. This limitation is designed to avoid an excessive degree of disruption that might impact negatively on the economy and efficiency of public purchasing. The article does not deal with the nature or degree of interest or detriment that is required to be claimed for a supplier or contractor to be able to seek review, or with other issues relating to the capacity of the supplier or contractor to seek review. Such issues are left to be resolved in accordance with the relevant legal rules in the enacting State.

2. The reference in paragraph (1) to article 43 has been placed within square brackets because the article number will depend on whether or not the enacting State provides for hierarchical administrative review (see paragraph 1 of the comments to article 40).

3. Not all of the provisions of the Model Law impose obligations which, if unfulfilled by the procuring entity, give rise under the Model Law to a right to review. Paragraph (2) provides that certain types of actions and decisions by the procuring entity which involve an exercise of discretion are not subject to the right of review provided for in paragraph (1). The exemption of certain acts and decisions is based on a distinction between, on the one hand, requirements and duties imposed on the procuring entity that are directed to its relationship with suppliers and contractors and that are intended to constitute legal obligations towards suppliers and contractors, and, on the other hand, other requirements that are regarded as being only "internal" to the administration, that are aimed at the general public interest, or that for other reasons are not intended to constitute legal obligations of the procuring entity towards suppliers and contractors. The right to review is generally restricted to cases where the first type of requirement is violated by the procuring entity.

Article 39

Review by procuring entity (or by approving authority)

1. The purpose of providing for first-instance review by the head of the procuring entity or of the approving authority is essentially to enable that officer to correct defective acts, decisions or procedures. Such an approach can avoid unnecessarily burdening higher levels of review and the judiciary with cases that might have been resolved by the parties at an earlier, less disruptive stage. References to the approving authority in paragraph (1), as well as elsewhere in article 39 and the other articles on review have been placed in parentheses since they may not be relevant to all enacting States (see paragraphs 13 to 16 of the introduction).

2. The policy rationale behind requiring initiation of review before the procuring entity or the approving authority only if the procurement contract has not yet entered into force is that, once the procurement contract has entered into force, there are limited corrective measures that the head of the procuring entity or of the approving authority could usefully require. Hierarchical administrative review or judicial review would be available for complaints arising after the entry into force of the procurement contract.

3. The purpose of the time limit in paragraph (2) is to ensure that grievances are filed and resolved so as to avoid unnecessary delays and disruption in the procurement proceedings at a later stage. Paragraph (2) does not define the notion of "days" (i.e., whether calendar or working days) since most States have enacted interpretation acts that would provide a definition.

4. Paragraph (3) is a companion provision to paragraph (1), providing that, for the reasons referred to in paragraph 2 of the comments to the present article, the head of the procuring entity or of the approving authority need not entertain a complaint, or continue to entertain a complaint, once the procurement contract has entered into force.

5. Paragraph (4)(b) leaves it to the head of the procuring entity or of the approving authority to determine what corrective measures would be appropriate in each case (subject to any rules on that matter contained in the procurement regulations; see also paragraph 7 of the comments to the present article). Possible corrective measures might include the following: requiring the procuring entity to revise the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rule of law; if a decision has been made to accept a particular tender and it is shown that another tender should be accepted, requiring the procuring entity not to issue the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other tender; or terminating the procurement proceedings and ordering new proceedings to be commenced.

6. An enacting State should take the following action with respect to the references within square brackets in paragraphs (5) and (6) to article "40 or 43". If the enacting State provides judicial review but not hierarchical administrative review (see paragraph 1 of the comments to article 40), the reference should be only to the article appearing in this Model Law as article 43. If the enacting State provides both forms of review but requires the supplier or contractor submitting the complaint to exhaust the right to hierarchical administrative review before seeking judicial review, the reference should be only to article 40. If the enacting State provides both forms of review but does not require the right to hierarchical administrative review to be exhausted before seeking judicial review, the reference should be to "article 40 or 43."

7. Certain additional rules applicable to review proceedings under this article are set forth in article 41. Additionally, the enacting State may include in the procurement regulations detailed rules concerning the procedural requirements to be met by a supplier or contractor in order to initiate the review proceedings. For example, such regulations could clarify whether a succinct statement made by telex, with evidence to be submitted later, would be regarded as sufficient. Furthermore, the procurement regulations may include detailed rules concerning the conduct of review proceedings under this article (e.g., concerning the right of suppliers and contractors participating in the procurement proceedings, other than the one submitting the complaint, to participate in the review proceedings (see article 41); the submission of evidence; the conduct of the review proceedings; and the corrective measures that the head of the procuring entity or of the approving authority may require the procuring entity to take).

8. Review proceedings under this article should be designed to provide an expeditious disposition of the complaint. If the complaint cannot be disposed of expeditiously, the proceedings should not unduly delay the institution of proceedings for hierarchical administrative review or judicial review. Paragraphs (4) and (5) have been included to that end.

Article 40

Administrative review

1. States where hierarchical administrative review against administrative actions, decisions and procedures is not a feature of the legal system might choose to omit this article and provide only for judicial review (article 43).

2. In some legal systems that provide for both hierarchical administrative review and judicial review, proceedings for judicial review may be instituted while administrative review proceedings are still pending, or *vice versa*, and rules are provided as to whether or not, or the extent to which, the judicial review proceedings supplant the administrative review proceedings. If the legal system of an enacting State that provides both means of review does not have such rules, the State may wish to establish them by law or by regulation.

3. An enacting State that wishes to provide for hierarchical administrative review but that does not already have a mechanism for such review in procurement matters should vest the review function in a relevant administrative body. The function may be vested in an appropriate existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State (e.g., a central procurement board), a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters, such as a "procurement review board". It is important that the body exercising the review function be independent of the procuring entity. In addition, if the administrative body is one that, under the Model Law as enacted in the State, is to approve certain actions or decisions of, or procedures followed by, the procuring entity, care should be taken to ensure that the section of the body that is to exercise the review function is independent of the section that is to exercise the approval function.

4. While paragraph (1)(a) establishes time limits for the commencement of administrative review actions with reference to the point of time when the complainant became aware of the circumstances in question, the Model Law leaves to the applicable law the question of any absolute limitation period for the commencement of review.

5. The suppliers and contractors entitled to institute proceedings under paragraph (1)(d) are not restricted to suppliers or contractors who participated in the proceedings before the head of the procuring entity or of the approving authority (see article 40(2)), but include any other suppliers or contractors claiming to be adversely affected by a decision of the head of the procuring entity or of the approving authority.

6. The requirement in paragraph (2) is included so as to enable the procuring entity or the approving authority to carry out its obligation under article 41(1) to notify all suppliers and contractors of the filing of a petition for review.

7. With respect to paragraph (3), the means by which the supplier or contractor submitting the complaint establishes its entitle-

ment to a remedy depends upon the substantive and procedural law applicable in the review proceedings.

8. Differences exist among national legal systems with respect to the nature of the remedies that bodies exercising hierarchical administrative review are competent to grant. In enacting the Model Law, a State may include all of the remedies listed in paragraph (3), or only those remedies that an administrative body would normally be competent to grant in the legal system of that State. If in a particular legal system an administrative body can grant certain remedies that are not already set forth in paragraph (3), those remedies may be added to the paragraph. The paragraph should list all of the remedies that the administrative body may grant. The approach of the present article, which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the approving authority may require (article 39(4)(b)). The policy underlying the approach in article 39(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority. Hierarchical administrative authorities exercising review functions are, in some legal systems, subject to more formalistic and restrictive rules with respect to the remedies that they can grant, and the approach taken in article 40(3) seeks to avoid impinging on those rules.

9. Optional language is included in the *chapeau* of paragraph (3) in order to accommodate those States where review bodies do not have the power to grant the remedies listed in paragraph (3) but can make recommendations.

10. With respect to the types of losses in respect of which compensation may be required, paragraph (3)(f) sets forth two alternatives for the consideration of the enacting State. Under option I, compensation may be required in respect of any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of the unlawful act, decision or procedure. Those costs do not include profit from the procurement contract that was lost because of non-acceptance of a tender or offer of the supplier or contractor submitting the complaint. The types of losses that are compensable under the second possibility are broader than those under the first possibility, and might include lost profit in appropriate cases.

11. If the procurement proceedings are terminated pursuant to paragraph (2)(g), the procuring entity may institute new procurement proceedings.

12. There may be cases in which it would be appropriate for a procurement contract that has entered into force to be annulled. This might be the case, for example, where a large contract was awarded to a particular supplier or contractor as a result of fraud. However, as annulment of procurement contracts is particularly disruptive of the procurement process and generally not in the public interest, it has not been provided for in the Model Law itself. Nevertheless, the lack of provisions on annulment in the Model Law does not preclude the availability of annulment under other bodies of law. Instances in which annulment would be appropriate are likely to be adequately dealt with by the applicable contract, administrative or criminal law.

13. If detailed rules concerning proceedings for hierarchical administrative review do not already exist in the enacting State, the State may provide such rules by law or in the procurement regulations. Rules may be provided, for example, concerning: the time limit for instituting the hierarchical administrative review proceedings; the right of suppliers and contractors, other than the

one instituting the review proceedings, to participate in the review proceedings (see article 40(2)); the burden of proof; the submission of evidence; and the conduct of the review proceedings.

14. The overall period of 30 days imposed by paragraph (4) may have to be adjusted in countries in which administrative proceedings take the form of quasi-judicial proceedings involving hearings or other lengthy procedures. In such countries the difficulties raised by the limitation can be treated in the light of the optional character of article 40.

Article 41

Certain rules applicable to review proceedings under article 39 [and article 40]

1. This article applies only to review proceedings before the head of the procuring entity or of the approving authority, and before a hierarchical administrative body, but not to judicial review proceedings. There exist in many States rules concerning the matters addressed in this article.

2. References within square brackets in the heading and text of this article to article 40 and to the administrative body should be omitted by an enacting State that does not provide for hierarchical administrative review.

3. The purpose of paragraphs (1) and (2) of this article is to make suppliers and contractors aware that a complaint has been submitted concerning procurement proceedings in which they have participated or are participating and to enable them to take steps to protect their interests. Those steps may include intervention in the review proceedings under paragraph (2), and other steps that may be provided for under applicable legal rules. The possibility of broader participation in the review proceedings is provided since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

4. While paragraph (2) establishes a fairly broad right of suppliers and contractors to participate in review proceedings that they have not themselves generated, the Model Law does not provide detailed guidance as to the extent of the participation to be allowed to such third-parties (e.g., whether the participation of such third parties would be at a full level, including the right to submit statements). Enacting States may have to ascertain whether there is a need in their jurisdictions for establishing rules to govern such issues.

5. In paragraph (3), the words "any other supplier or contractor or governmental authority that has participated in the review proceedings" refer to suppliers and contractors participating pursuant to paragraph (2) and to governmental authorities such as approving authorities.

Article 42

Suspension of procurement proceedings

1. An automatic suspension approach (i.e., suspension of the procurement proceedings triggered by the mere filing of a complaint) is followed in the procurement laws of some countries as an exception to a general rule in judicial or administrative proceedings that the burden is on the party seeking relief. The purpose of suspension is to enable the rights of the supplier or contractor instituting review proceedings to be preserved pending the disposition of those proceedings. Without a suspension, a supplier or contractor submitting a complaint may not have sufficient time to seek and obtain interim relief. In particular, it will usually be important for the supplier or contractor to avoid the entry into

force of the procurement contract pending disposition of the review proceedings and, if an entitlement to interim relief would have to be established, there might not be sufficient time to do so and still avoid entry into force of the contract (e.g., where the procurement proceedings are in their final stages). With a suspension approach, it will be more likely to result in the settlement of complaints at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement.

2. In order to limit the unnecessary triggering of a suspension, the suspension in article 41 is not, strictly speaking, automatic, but is subject to the fulfilment of the fairly simple conditions set forth in paragraph (1). The requirements set forth in paragraph (1) as to the declaration to be made by a supplier or contractor in applying for a suspension are not intended to involve an adversarial or evidentiary process as this would run counter to the objective of a swift triggering of a suspension upon timely filing of a complaint. Rather, what is involved is an *ex parte* process based on the affirmation by the complainant of the existence of certain circumstances, circumstances of the type that must be alleged in many legal systems in order to obtain preliminary relief. The requirement that the complaint not be frivolous is included since, even in the context of *ex parte* proceedings, the reviewing body should be enabled to look on the face of the complaint to reject frivolous complaints.

3. In order to mitigate the potentially disruptive effect of a suspension, only a short initial suspension of seven days may be triggered through the fairly simple procedure envisaged in article 42. This short initial suspension is intended to permit the procuring entity or other reviewing body to assess the merits of the complaint and to determine whether a prolongation of the initial suspension under paragraph (3) would be warranted. The potential for disruption is further limited by the overall 30-day cap provided for in paragraph (3). Furthermore, paragraph (4) provides for the waiver of the suspension in exceptional circumstances when the procuring entity certifies that urgent public interest

considerations require the procurement to proceed without delay, for example when the procurement involves goods needed urgently at the site of a natural disaster.

4. Paragraph (2) provides for the suspension for a period of seven days of a procurement contract that has already entered into force in the event that a complaint is submitted in accordance with article 40 and meets the requirements of paragraph (1). This suspension also is subject to waiver under paragraph (4) and to extension up to a 30-day total period under paragraph (3).

5. Since, beyond what is contained in article 43, the Model Law does not deal with judicial review, article 42 does not purport to address the question of court-ordered suspension, which may be available under the applicable law.

Article 43

Judicial review

The purpose of this article is not to limit or to displace the right to judicial review that might be available under other applicable law. Rather, it is merely to establish that right and to confer jurisdiction on the specified court or courts over petitions for review commenced pursuant to article 38. This includes appeals against decisions of review bodies pursuant to articles 39 and 40, as well as against failures by those review bodies to act. The procedural and other aspects of the judicial proceedings, including the remedies that may be granted, will be governed by the law applicable to the proceedings. The law applicable to the judicial proceedings will govern the question of whether, in the case of an appeal of a review decision made pursuant to article 39 or 40, the court is to examine *de novo* the aspect of the procurement proceedings complained of, or is only to examine the legality or propriety of the decision reached in the review proceeding. Such an approach has been adopted so as to avoid impinging on national laws and procedures relating to judicial proceedings.

D. Model Law on Procurement: compilation of comments by Governments

(A/CN.9/376 and Add.1 and 2)

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INTRODUCTION

1. The Commission, at its twenty-fifth session in 1992, requested the Working Group on the New International Economic Order to present to it at its twenty-sixth session in 1993 a draft of the Model Law on Procurement.¹ The Working Group, at its fifteenth session (New York, 22 June to 2 July 1992) adopted a text of the draft Model Law and presented it to the Commission for its consideration (A/CN.9/371, para. 253).

2. The text of the draft Model Law as adopted by the Working Group was sent to all Governments and to interested international organizations for comment. The comments received as of 5 May 1993 from 11 Governments are reproduced below.

COMPILATION OF COMMENTS

Argentina

[Original: Spanish]

Article 1. Scope of application

"*Adjudicación*" or "*adjudicación de contratos*" (award or award of contracts) is used as a synonym for the selection of the contracting party, although it has meanings that vary. "*Adjudicación*" is merely one step in the "tendering" process which, in turn, is just one of the systems thought suitable for the selection of the contracting party.

Article 2. Definitions

For technical drafting reasons, it would be better to put the definitions in the first article of the draft law, particularly since article 1, concerning the scope of application, uses terms that have not yet been defined.

The terms defined prompt the following comments:

(a) Procurement (*contratación pública*). First of all, it should be pointed out that no reference is made to the purpose of the contract, which is the feature normally used to differentiate public or administrative contracts.

The term "*adquisición*", used in the definition of "procurement", is normally used in Spanish to convey "obtain-

ing by purchase" and not, for example, by rental. We therefore suggest the use of "*obtención*" ("obtaining") in place of "*adquisición*".

We do not see why "services" should be restricted to those "incidental to the supply of the goods or to the construction". It seems preferable to have a broader definition, including all services, without restriction, as well as all other contributions to satisfy needs of a general nature.

Finally, it should be pointed out that the restriction in question limits the scope of the standard envisaged for administrative contracts—basically contracts for public construction and for rental of objects and construction—omitting others, such as the licensing of public service or rental of services.

In view of the above, we suggest the following definition: "'procurement' (*contratación pública*) means the obtaining by any legal means, including by purchase, licensing, rental, lease or hire-purchase, of goods, construction and services designed to promote collective interests or to satisfy public needs".

(b) Procuring entity. The Spanish term refers to decentralized entities with legal personality. It would be better to replace it with the broader expression "*órgano adjudicador*", using "organ" in its legally-accepted form of "set of competences". To remove any doubt the definitions could also include a definition of "*órgano adjudicador*". We suggest the following: "organ having competence to sign public contracts".

(c) Goods. We think it inadvisable to limit the term to physical objects, since non-physical objects may also be the subject of public contracts. A contract may also relate to obtaining energy other than electricity, the only form covered by the definition. We therefore suggest the following amended definition: "'goods' includes any physical object or non-physical object (including energy), that may be given a pecuniary value".

(d) Construction. The definition in the draft seems to restrict the meaning of the concept to construction, although there are many other activities that may be covered by administrative contracts for public works, for the concession of public works or for the rental of the work. We propose a broader definition: "'Construction' means work with a certain and specific purpose, whose execution has been stipulated in a procurement contract".

(e) Supplier or contractor. The definition refers exclusively to one of the stages in administrative contracts (award). It would be preferable to define a supplier or contractor as "the natural person or legal entity who, in accordance with current legal provisions, takes part in a selection process connected with the execution of a

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, para. 153.

procurement contract or signs a procurement contract with the procuring organ”.

(f) Procurement contract. Once again it should be mentioned that the process is one of selection of the contracting party and not one of award (*adjudicación*). Award is only one step in the procedure.

(g) Tender security. Here and elsewhere in the draft, “*licitación*” (“tendering”) is used synonymously with “*oferta*” (“offer”). It would be preferable to replace “*licitación*” with “*oferta*”, particularly if we consider that “*licitación*” refers to one of the existing procedures for the selection of the joint contracting party with the State.

Article 6. Qualifications of suppliers and contractors

The following could be added to paragraph (c), regarding incompatibility: “. . . they or, in the case of a legal entity, its management or executive staff, or shareholders with a holding of more than five per cent of the capital, are not, and have not been in the two years prior to the opening of the selection procedure relating to procurement, public agents, whether in the State of origin of the supplier or contractor, or in the implementation of the contract”.

Chapter II

We propose that the expression “*Metodos de adjudicación*” be replaced with “*Procedimientos de selección*” (“Selection procedures”). This is because the award (*adjudicación*) is the act that concludes the process of selecting the joint contracting party of the State, and not the procedure in question.

It would be helpful to consider the contract negotiations that are conducted with the intervention of “purchasing agents”. These are private firms at an international level used to conduct contract negotiations, ensuring international prices, “standard” quality, etc. They receive a percentage in return and modern international procurement makes extensive use of the system.

Article 14. Conditions for use of two-stage tendering

In (1)(a)(ii) it is helpful to replace the words “*índole técnica de los bienes o de las obras*” with the words “*índole científica, técnica o artística de los bienes o de las obras*” (“scientific, technical or artistic character of the goods or construction”). This indicates, without prejudice, that such cases may also give rise to the application of the conditions for use of single-source procurement, as set out in article 16.

Article 20. Provision of solicitation documents

We suggest deleting the last part of this provision: “*El precio que la entidad adjudicadora podrá cobrar a los proveedores o contratistas por el pliego de condiciones no podrá exceder del costo de su impresión y de su distribución a los proveedores o contratistas*” (“The price that the procuring entity may charge for the solicitation documents shall reflect the cost of printing them and providing them to suppliers and contractors”). It is worth mentioning that, in practice in Argentina, the cost of the solicitation documents has also been a factor, in economically important procurement, in ensuring that tenderers who are really interested take part in the tendering procedure.

Article 27. Tender securities

For the reasons explained under article 2 (subparagraph (g)) above, we suggest replacing the words “*garantías de licitación*” (“tender securities”) with the words “*garantías de oferta*” (“offer securities”).

Article 32. Acceptance of tender and entry into force of procurement contract

In spite of the view expressed by the Working Group, we think it preferable to replace “*Desde [el momento en] que se expida*” (“Between the time when . . . is dispatched”) and “*al expedirse*” (“when . . . is dispatched”), in (2)(b) and (4) respectively, with “*Desde el momento en que se reciba*” (“Between the time . . . is received”) and “*al recibirse*” (“when . . . is received”), with regard to the notice referred to in paragraph (1) of this article.

Articles 16 and 37. Single-source procurement

It would be helpful to lay down (as in article 8 concerning the exclusion of foreign contractors) that the relevant authority should decide expressly in writing that procurement is to take place in this manner. Such a decision should indicate due and sufficient grounds to demonstrate perfectly that, in the case in point, the conditions set out in article 16(a) to (g) of the draft apply. This is the only way to prevent the abuse of repeated recourse to this form of procurement, which would tarnish the Model Law’s objective of promoting competition, publicity and transparency in the selection procedures.

Chapter V—Review

In general terms, we think it would be better to leave this matter to be dealt with according to the legal provisions prevailing in each country, above all since—as mentioned in the footnote to this chapter—problems of a constitutional nature could arise.

Without prejudice to what is stated, it seems important to include a prohibition of the incorporation into the solicitation documents governing international procurement of clauses—excessively short time-limits for challenges or high challenge securities—limiting the defences available to the tenderer. In any event, if the solicitation documents contain a review system different from that which usually prevails in the country concerned, the system set out in the solicitation documents should be less severe than the general system. This would provide for proper respect for the rights of the tenderer and, indirectly, through the arguments and reasons the tenderer may adduce, there would be greater benefit for the State by virtue of the choice of the most suitable tender.

The proposed structure gives rise to the following comments:

Article 39. Review by procuring entity (or by approving authority)

Despite the views of the Working Group, we think the 10-day period for submission of a complaint is sufficient. It must be borne in mind that, even if the contractor is of foreign origin, he ought logically to establish domicile in the country and ensure the same legal representation. The 20-day period seems rather excessive, considering the need to secure the different stages of the public call for tenders.

Article 42. Suspension of procurement proceedings

We share the view that the submission of a complaint should automatically suspend the proceedings. In our opinion:

There should be no time limit on the period during which the call for tenders or the contract may be suspended (seven days with possibility of extension to 30 days). Either nothing should be said about it, with the result that the period of suspension would thus depend on the relevant authority, or it should be specified that the suspension must continue until there is final settlement of the complaint submitted by the tenderer.

With regard to paragraph (4) of this article, it could be added that, in such instances, the Government should grant sufficient funds for the damages that might be suffered by an excluded tenderer, if it is then determined that the case made by him was valid.

It should be said that the draft only regulates the contract award stage, omitting all reference to implementation.

It would be advisable to include at least some basic guidelines with reference to the contract implementation stage since, at that stage too, although to a lesser extent, there may be situations that are at variance with the transparency that ought to prevail in all procurement operations.

Australia

[Original: English]

In seeking to formulate a position on the draft Model Law, we have obtained views, not only of the relevant Commonwealth agencies, but also of the State and Territory Governments.

General observations

We should first say that much of what is in the draft Model Law is consistent with our procurement practices and in some respects would overlap existing legislation such as that dealing with review of administrative decisions. We do have some concerns, however, about some aspects of the Model Law. Central to many of these is the question of whether there is a need for such a Model Law in Australia. We have not formed a final view on this, but this does not detract from our commitment to the principles and objectives of trade law harmonization generally.

Under the coordination of the Commonwealth Department of Administrative Services (DAS), there has been since 1988, when the Federal Government approved a programme of purchasing reform, a reduction in detailed central regulation of Commonwealth purchasing through the Finance Regulations of the Commonwealth Audit Act 1901. Commonwealth procurement arrangements have been designed for efficient, effective performance of the procurement function, leaving decisions about purchasing-related procedures, such as those about procurement method, to agencies and managers responsible for the function.

Against this background we have some concerns about the "prescriptive" nature of the draft Model Law on Procurement. Relative to the current flexibility allowed for by our procurement arrangements, the draft Model Law if

implemented would have a significant impact on our procurement procedures. We are not sure that this impact would be counter balanced by the international harmonization which the instrument seeks to achieve. It does not appear to contemplate procurement by "common use contract arrangements". It has also been commented that the draft Model Law appears to place an inordinate degree of emphasis on a tendering process leading to acceptance of a tender by a particular procuring authority. There are a variety of tests and criteria relevant to the choice of the appropriate procurement method for each requirements. A standing offer arrangement (or common use contract approach) can enable an effective, efficient and economical means of purchasing commonly-used goods and services.

We believe that a policy framework for government procurement, whether implemented through legislation or administrative arrangements, should provide a clear and unambiguous statement that the prime objective of purchasing in government is to support government programmes by achieving value for money in the acquisition of programme inputs. Further, there should be an acknowledgement that the management of purchasing arrangements needs to be integrated with other activities to achieve the logistical objective of conveying materials to where they are needed, and at the right time.

The prescriptive character of the draft Model Law is one that was pointed out by more than one of those we have consulted. There was a particular concern that chapters II to IV could be seen as representing an approach inconsistent with recent Commonwealth purchasing reforms which have implemented a devolution in procurement authority aimed at increased flexibility.

Chapter V, dealing with rights and obligations, is substantively procedural. Inclusion of such procedural detail may be seen as markedly reducing the options for discretionary decision-making which are often considered necessary in procurement.

The draft Model Law places great emphasis on accepting the lowest price tender. This could be seen as diminishing the status of the value for money concept. Symptomatic of this emphasis is the requirement to open tenders in the presence of tenderers and call out the prices. While article 29(4)(c) recognises that valuation of the lowest tender will take into consideration factors other than price, it may be too prescriptive about what a procuring entity may consider.

We also note that the proposed requirement in the draft Model Law, of the post-tender negotiation being prohibited, would be inconsistent with established Australian practice.

One of our correspondents holds the view that the draft Model Law exemplifies philosophies, principles and practices of public sector procurement in the 1960s—procedure rather than outcome driven. Studies during the 1980s revealed that Government purchasing people followed these procedures to the letter rather than trying to achieve:

- Best value for money
- Open and effective competition
- A high standard of public accountability

Recent legislation in regard to public sector procurement has therefore been less prescriptive. For example, there may be no requirement to call tenders for the purchase of

any goods. In place of this there may be a requirement to plan major purchases and determine the most effective procurement strategy.

Under the draft Model Law, aspects of the procurement process not previously open to challenge would be opened to judicial review unless specific provision were made to exclude such review. Article 43 of the draft, when read with article 38, does attempt some limitation of judicial review, but more may be necessary. We would need to examine the situation more closely before opening up the process to judicial review since such review greatly reduces the control contracting parties have over any dispute processes, which some may see as an area properly addressed in individual contracts.

Any legislation governing procurement should provide a sufficiently flexible process, while simultaneously ensuring accountability. At this stage we are not sure that the draft Model Law has the right balance of these competing ends.

*Specific comments on individual articles in the draft
Model Law on Procurement*

Preamble

Paragraph (a)

Economy and efficiency may be compromised in some circumstances where suppliers and contractors extensively utilize the review and appeal remedies available under chapter V of the draft Model Law.

Paragraph (d)

The concept of the level playing field envisaged in paragraph (d) is admirable. But it could result in a lower than desirable standard being the norm if discrimination on the grounds of nationality is interpreted to mean that the inferior environmental practice of a particular nation's company is not allowed to be considered in an evaluation of competing offers. For how it might be possible to set such standards see also specific comments in relation to article 6(2)(d) below.

Article 1. Scope of application

This seems acceptable; it allows for the enacting State to specify what thresholds are to apply for various types of procurement. Article 1(2)(c) allows for this to be done by regulations.

The regulations could allow for the exclusion of procurement relating to items required for emergencies affecting public health and safety, however, perhaps consideration should be given to including such procurements in the body of the draft Model Law.

The draft Model Law appears to contain a blanket exemption for "procurement involving national security or national defence" in article 1(2)(a). What the exemption means and how broadly it will be interpreted is open to construction, particularly since article 29(4)(c)(iv) contemplates that national defence and security considerations may be relevant to a procurement covered by the draft Model Law.

Article 2. Definitions

"procurement"

The draft Model Law prescribes procedures for procurement as being applicable for both goods and construction.

Modern purchasing strategies treat goods quite differently from construction, however. One fundamental difference is that goods are usually manufactured to the manufacturer's design, whereas construction is usually constructed to the purchaser's design.

The definition should perhaps be extended to cover procurement of "services". In some areas of procurement, such as information technology, it is often difficult to distinguish between goods and services. Service contracts are a major component of government procurements. To so extend the definition would also overcome the problem of attempting to interpret the meaning of the word "incidental" in article 2(a).

"procuring entity"

Paragraphs 25 and 26 of page 264 of the 1991 *UNCITRAL Yearbook* (paragraph 25 and 26 of document A/CN.9/343) say:

"25. A view was expressed that subparagraph (a)(i) should cover not only organs of the Government of the State enacting the Model Law, but also organs of governments of subdivisions of the State (eg, governmental organs of units of a federation and of local units). In response, it was noted that, in some federal systems, the national government could not legislate in respect of procurement for units of the federation or for local government units. *However, units of the federation could adopt the Model Law themselves.* [emphasis added]

"26. The Working Group considered various possible ways to cover in subparagraph (a)(i) organs of all levels of government and also to take account of the needs of federal States that could not legislate for governments of their subdivisions, but no satisfactory solution was found. Ultimately, the Working Group agreed to provide two alternative versions of subparagraph (a)(i). One version would cover all governmental organs, including governmental organs of subdivisions of a federation. It would be adopted by non-federal States and by federal States that could legislate for their subdivisions. The other version would cover only organs of the national Government; it would be adopted by federal States that could not legislate for their subdivisions."

Regarding article 2(b)(i): if we assume that option I of article 2(b)(i) is intended to cover all governmental organs, including governmental organs of subdivisions of a federation, then the definition would appear to be appropriate.

Option II may currently present a difficulty if the reference is to the national "government", since sub-federal governments will be subdivisions of the State of, for example, Australia, but not of the Australian "government". The options should perhaps read "any department, agency, organ or other unit of (name of State) or of any subdivision of (name of State) that engages in procurement, except . . .".

In relation to article 2(b)(ii): there is a growing tendency for governments to purchase through brokers or contract out their purchasing operations. Both of these options are potentially outside the scope of the draft Model Law. Article 2(b)(ii) allows for the inclusion of specific entities, but since the agents which might be used would not be known in advance, perhaps there should be a clarification that procurement by a procuring entity includes procurement through brokers or third parties.

Other

Perhaps consideration should be given to including definitions for the words "tender", "quotation", and "negotiation". The body of the draft Model Law uses both the words "tender" and "quotation". In general usage both are offers to supply, the difference being the procedures employed and monetary threshold.

Article 5. Public accessibility of legal texts

This is commendable. The Commonwealth of Australia has an advanced and comprehensive system of tribunal review of administrative decision making, access to and freedom of government information, and judicial review of the lawfulness of administrative decisions.

Article 6. Qualifications of suppliers and contractors

No comments at this stage. Article 6(2)(c) does seem, however, to potentially limit the meaning of the term "financial resources" in article 6(2)(a).

The phrase "false or inaccurate" in article 6(6) should be amended to the word "inaccurate". Otherwise confusion could emerge as to whether one adds meaning to the other.

It might be said that article 6(3) is too restrictive and that it should be broadened to allow procuring entities the right to obtain assurances from tenderers if doubts arise after tenders close.

We refer to the comments above in relation to paragraph (d) of the preamble and add that as article 6(2)(d) deals with social security obligations it would be equally possible for the inclusion of provisions to set some international standards or benchmarks on environmental workplace health and safety, and award wages and conditions.

Article 7. Pre-qualification proceedings

In relation to article 7(7), unsuccessful bidders could usefully be given reasons when an offer has been rejected. Explaining to bidders the reasons for their non-selection against the evaluation criteria may result in prospective bidders submitting better proposals in the future. While we recognise that the provision allows such reasons, the provisions of article 7(7) that procuring entities are not required to specify evidence or give reasons when suppliers are unsuccessful at the pre-qualification stage differs from the practice in Australia.

Article 9. Form of communication

This seems to be an attempt to deal with EDI communications. It does not, however, deal with the requirement at article 25(5) that tenders be in a sealed envelope, and possibly even that they be in writing. It also does not provide for EDI authentication as well as signature under article 32.

One of our correspondents has expressed the view that consideration perhaps should be given to drafting article 9 such that there is no contemplation that suppliers and contractors have unfettered rights to communicate verbally. Such a practice would be inappropriate if abused.

Article 12. Inducements from suppliers and contractors

If "services" procurement is included in the draft Model Law, article 12 would require rewording on "offer for employment" to cover "outsourcing" of activities by entities.

Article 15. Conditions for use of request for quotations

Article 15(1) demonstrates the need for a clear definition of "quotation" in article 2.

Article 17. Domestic tendering

We note that the discretion in article 17(b) is not excluded from the review procedures provided for in chapter V. Article 17 recognizes the requirements of efficient procedures for small contracts. We note that review in chapter V is excluded in respect of decisions under article 18, presumably in recognition of the efficiency requirements.

Article 20. Provision of solicitation documents

The phrase "the cost of printing them and providing them to suppliers and contractors" may not be sufficiently broad to cover the actual cost. A more inclusive term might be "the cost of their production and supply". Perhaps a decision has been taken by the Working Group that the lower amount be used, however.

As currently drafted the provision could be open to the interpretation that the decision by the procuring entity to charge would be discretionary because of the existence of the word "may". But once that decision is made the charge "shall reflect only the cost of printing and providing them to suppliers and contractors", that is, there is no discretion to charge below that formula.

In light of the above two concerns perhaps the provision should be re-phrased to allow a procuring entity to charge for the provision of solicitation documents at a rate that "does not exceed the cost of their production and supply".

We note that the provision is silent on whether the procuring entity may impose different charges on different tenderers.

Article 21. Contents of solicitation documents

The opening words of article 21 use the words "include at a minimum" while the words "contain at least" are used in article 19(1). A consistent formula should be used.

Article 21(q) should be expressed to make it clear that this procedure is necessary only when the public opening of tenders is required.

Article 22. Rules concerning description of goods or construction in pre-qualification documents and solicitation documents; language of pre-qualification documents and solicitation documents

The comment has been made to us that the preferred approach now is to prescribe the function or task to be performed rather than prescribe the technical data. Where the solicitation documents prescribe the function or task to be performed, the onus is on the supplier to provide goods which perform that function or task. Perhaps this concern could be met by replacing the first sentence in article 22(2) with the following: "To the extent possible, any specifications, plans, drawings, designs, and requirements shall be based on the relevant objective technical, quality and functional characteristics." A similar amendment could be made to article 22(3)(a).

Article 25. *Submission of tenders*

Article 25(1) should also specify a location for the lodgement of tenders.

Article 25(5), requiring tenders to be submitted in a sealed envelope, would appear to be out of step with the modern practice for the procuring entity to receive tender responses by fax and electronic data interchange (EDI).

Article 25(6) emphatically states that late tenders shall not be opened and shall be returned to the supplier. Where there is evidence that a tender is late because of mishandling by the purchasing authority or by an official postal or telecommunications service, procedures could allow for the admittance of a tender in special circumstances.

There may not be sufficient information on the envelope to allow for the unopened tender to be returned to the tenderer. The practice is to open the late tenders, notify the tenderer they are late and request reasons why it should be considered. These reasons and the content of the offer may be grounds to reject all tenders and recall offers. Such a provision would necessarily involve discretionary decision-making allowing for recourse to remedies under the review provisions in chapter V.

Article 28. *Opening of tenders*

The time of opening of the tenders referred to in article 28(1) should perhaps be at a time which is as soon as practicable after the deadline for submission of tenders.

Regarding article 28(2) and 28(3), the practice contemplated by these paragraphs places the emphasis on the price as being the main factor on which the contract is let, and thereby could be seen as giving the suppliers the wrong message. Modern practices try to achieve maximum value for money and price is only one of the factors considered. There are many examples where the cheapest price has resulted in the most expensive outcome. The procedure of announcing the tender price seems to be rather simplistic in view of the above and in view of the size and range of possible projects that the draft Model Law could cover. This could be a provision in which it might be desirable to introduce a discretion whereby the procuring entity could nominate a feature, if any, other than price to be announced at the time of opening of tenders. The exercise of such a discretion would be reviewable under chapter V.

The opening of tenders in the presence of tenderers is often not the Australian practice. The "public" opening of tenders places too much emphasis on the lowest price especially if the offer is inconsistent with or does not meet the specified requirements and conflicts with the policy of examination of all factors to determine "value for money". This "value for money" concept is consistent with article 29 provisions. The public opening of tenders might also contravene confidentiality considerations.

Further, the disclosure in article 28 is inconsistent with the provisions of article 11. In article 11 disclosure is made after acceptance of an offer when details are provided to tenderers but excluded are price and further information if this information is considered not in the public interest or would inhibit fair competition.

Article 29. *Examination, evaluation and comparison of tenders*

As mentioned above price may be only one of the factors considered in the evaluation of tenders and purchase op-

tions. The State Supply Board in one of our sub-federal States requires, for example, that each of the items to be costed over their expected useful life, taking into account the following factors in addition to those listed in article 29(4)(c)(ii):

- production capacity
- residual value of equipment
- life of equipment
- rate of borrowing (i.e. the discount rate)

The technique used here is referred to as Life Cycle Costing. The result is the expression of each option on the same basis for rational comparison. These are Net Present Value (NPV) or Equivalent Annual Value (EAV).

Other factors taken into account in letting tenders include:

- quality assurance provided by tenderer
- environmental factors
- employment of union labour (Construction contracts)

Article 29(1)(b) imposes an extensive obligation on the procuring entity. This is because the words "purely arithmetical errors apparent on the face of a tender" are open to a wide interpretation which could make the mandatory duty on the procuring entity envisaged in article 29(1)(b) extremely difficult to discharge, particularly in the circumstances, for example, of large construction tenders. There would be little doubt that the duty would be one in respect of which a supplier or contractor claiming to have suffered loss would be entitled to seek review under article 38 as that provision is currently worded. Article 39(4)(b) could presume the head of the procuring entity as having power to indicate the corrective measures to be taken including conceivably the power to award, or suggest, damages. The complainant has further rights under article 40 whereby, under the article 40(f), there is power to require payment for loss. These remedies may be disproportionate in view of the nature of the original breach. They could therefore be seen as inequitable in view of the arithmetical error having been made by the complainant in the first instance. To correct this, the word "shall" in the first sentence of article 29(1)(b) should be changed to "may". Consideration should also be given to including amended article 29(1)(b) in the exception provision of article 38(2).

Article 30. *Rejection of all tenders*

Does "but is not required to justify these grounds" absolve the procuring entity from review obligations under chapter V? If so, article 30 should perhaps be cited in article 38(2). Review rights should be excluded from any decisions made under article 30 on the grounds of equity and proportionality. This seems to be implicitly recognised, at least in respect of liability, in article 30(2) which specifically precludes any liability attaching to the procuring entity towards suppliers and contractors that have submitted tenders.

Article 31. *Negotiations with suppliers and contractors*

One of our States advises that it is usual for negotiation to take place between the procuring entity and a supplier or contractor and this may be necessary in many instances for

economic development, domestic investment, and employment opportunity. Post-tender negotiation is permitted in that State within strict guidelines.

Article 32. Acceptance of tender and entry into force of procurement contract

Regarding article 32(1) to 32(3): it may be questioned whether the notice of acceptance of a tender should be given before all approvals have been obtained.

Article 36. Request for quotations

It has been said that the use of the term "one price quotation" is confusing and it could be inferred that alternatives in terms of brands and other matters would not be permitted.

Review

At the Annual Session we expect we will have some comments on review, including the possibility of an aggrieved party effectively halting a project while the review is being undertaken. While we are still considering the issue, the observation has been made that the extent of the review and appeal provisions are such that they might be used in a capricious or vexatious fashion to frustrate or delay public works projects.

Article 38. Right to review

The concept of "breach of duty" could have extensive effects regarding liability, on the basis of any one of various causes of action, of the procuring entity. Perhaps this risk could be mitigated with a reference to exercise of a discretion in decision-making.

Article 38(2) should be amended to include the above comments made in relation to specific articles.

We are not always sure how this article will operate largely because of uncertainty about what is the relevant breach of duty. For example, does it allow review of the judgment reached by the procuring entity under article 34(9)(d)? Presumably there could only be review if the procuring entity did *not* consider the supplier unreliable or incompetent, but nevertheless refused to evaluate its proposals. Likewise we are uncertain of the extent to which decisions under article 36(3) and some other provisions are reviewable.

Article 40. Administrative review

We are uncertain as to the extent of consequential damages allowed under option II of article 40(f), because the extent of the necessary connection between the loss and the procurement proceedings is not immediately apparent.

Bolivia

[Original: Spanish]

The Draft Model Law on Procurement contains useful new elements in relation to current legislation in Bolivia. Thus, subject to scrutiny with Bolivia's domestic regulations, the provisions of the draft Model Law may be usefully taken into consideration in the enactment of new statutory provisions on procurement.

We consider, however, that the Model Law has one basic limitation, in that it will have to be referred to the Legislature for approval. The legislative bodies of the member States will thus have full powers to examine and—if deemed appropriate—amend the draft Model Law at the various stages of the legislative process, which, in the case of Bolivia, are provided for in the country's Constitution.

For this reason, the Model Law that is ultimately formulated by UNCITRAL will not be a binding instrument. Its value will thus be rather as reference material in any drafting of statutory provisions on procurement. Limitations in the consideration of a multilateral agreement on procurement are to be expected, since it is only as a non-binding document that it could be approved by the Legislature without having to be amended.

In view of the foregoing, the Government of Bolivia considers that the following suggestions should be taken into account in the examination of the draft Model Law:

1. There should be a stipulated monetary amount beyond which States would have to act in accordance with the stipulations contained in the Model Law. The following text should therefore be included as article 1(2)(b): "Procurement for amounts that are subject to procedures applicable to minor acquisitions in accordance with the respective domestic regulations."

2. With regard to article 29(4)(d), it is necessary to include a specific reference to the possible existence of regulations authorizing a margin of preference for the benefit of domestic tenderers. In the case of Bolivia, a 10 per cent margin is allowed on the total points awarded. The text of the first three lines should therefore be amended to read as follows: "If authorized by the domestic procurement regulations, in evaluating and comparing tenders, a procuring entity . . ."

3. With regard to chapter IV—Procedures for procurement methods other than tendering—it should be pointed out that, under Bolivian law, the only method provided for in respect of international procurement is public tendering. Such proceedings are conducted through specialized agencies engaged by the Executive through the Ministry of Finance. These agencies act as authorized representatives of the public entities in the procurement process. Also, article 209 of Supreme Decree No. 21660 lists six circumstances in which procurement proceedings do not have to take place through specialized agencies. Thus, those provisions contained in chapter IV of the draft Model Law that are not contrary to Bolivian legislation may be adopted.

Colombia

[Original: Spanish]

Legislation on procurement in Colombia, both that currently in force and that which it is intended to enshrine in a new draft law now before the Congress, establishes special principles that differ markedly in their philosophy from those embodied in the draft Model Law that has been submitted for our consideration, although these differences are clearly narrowed in the new draft law on procurement.

To explain this statement, it suffices to recall that our legislation provides for preferential treatment for domestic offers, through principles such as technological unpackaging and the assignment of preference, all conditions being equal, to the offer of domestic origin.

Notwithstanding the above, some of these restrictions have been eliminated from the draft that is now passing through Congress, but the stipulation of preference to nationals remains as a minimum when, under equal conditions, they submit offers competing with foreigners.

Similarly, procedures provided for in the draft, such as "prequalification", or two-stage tendering, conflict with guiding principles embodied in administrative procurement and in the civil service in general, which are required, *inter alia*, to be economical and speedy. In our draft, "prequalification" has been replaced by a simple step of registration with the Chamber of Commerce.

Our comments relating to the contents of the articles of the draft are as follows:

Article 2(d): We consider that the listing of activities looked upon as "construction" is very specious and that there is a risk of overlooking or leaving out some types of construction work that might also be included.

Article 6(2): We think it is dangerous for the procuring entity to be able, at any stage in the procurement proceedings, to require such information as "it may deem useful" from tenderers, since this requirement limits the right to protection of intellectual property and trade secrets.

Article 7: This article provides for prequalification of suppliers or contractors. We consider that this specific procedure prior to qualification is unnecessary, especially if it is taken into account that, under Colombian legislation, there is a separate procedure, namely, the Register of Suppliers and Contractors, which must be kept up to date as regards existence, legal representation, qualifications, capacity, etc. Also, to add to the procedure for qualification of offers one of prequalification is quite impractical and would give rise to delays, in comparison with our system, which is more flexible and simpler.

Article 7(8): Furthermore, it seems not very practical and efficient that, once the qualifications of a supplier or contractor already prequalified have been confirmed, they should be required to reconfirm their qualifications "in accordance with the same criteria utilized to prequalify" them.

Article 8(1): This provision does not explain very well whether the procuring entity can decide to limit participation in the procedure for reasons other than nationality.

Article 10: It is advisable to standardize the rule for "legalization" in this provision.

Article 11: This article does not make clear why it limits the right of inspection as it does. In addition, one of the basic principles embodied in Colombian legislation is that of confidentiality in respect of proposals and qualification prior to procurement, and this principle is at variance with the provisions in article 11 of the draft.

Article 16: With regard to the provision contained in subparagraph (a), there are no exclusive rights for a contractor under Colombian law.

Article 21: This article provides that the solicitation documents must include the contract that would be signed once the tender has been accepted. This would limit the negotiating capacity of the parties. It is recommended that a minute or draft contract, without the essential elements such as value, time periods and other special conditions, but not the contract itself, should be included.

Article 32: This article provides that the contract will enter into force before the tender is approved, and this runs counter to principles of law.

Egypt

[Original: Arabic]

Regarding article 2(b), which defines the procuring entity, we are in favour of option II for subparagraph (i), which reads: "any department, agency, organ or other unit, or any subdivision thereof, of the ('Government' . . .) that engages in procurement . . .", as the subparagraph has been drafted in more general terms than option I, thereby covering all the State agencies, their divisions, subdivisions and subordinated organs, including the private sector companies as these are subordinates of the State.

The first phrase of article 6(2) which reads "Subject to the right of suppliers and contractors to protect their intellectual property or trade secrets" should be excluded, since such rights are usually established in the interest of inventors or authors themselves, with the exclusion of suppliers and contractors that engage in such activities as implementation or promotion of goods and services, the subject-matter of contract.

Article 6(6) concerning the cases where "The procuring entity may disqualify a supplier or contractor" should be amended by adding that the procuring entity (department) may do so if it finds that at a previous time a contract has been concluded with a supplier that committed an "extensive" breach of contractual obligations, as well as where it finds that a supplier or contractor has previously been sentenced in a felony—a situation which is in accordance with the provisions of Egyptian legislation.

A new item should be added in article 6(1) concerning the qualifications of suppliers and contractors, which would state that the procuring entity (department), in order to ensure the seriousness of suppliers and contractors in applying to tender, may require the submission of a temporary deposit in accordance with the laws of each State.

Article 6(5), which provides that the procuring entity shall establish no criterion . . . that discriminates against or among suppliers and contractors or against categories thereof on the basis of nationality, should be amended by adding a reference as follows: " , taking into consideration the provision of article 8(1), concerning the right of the procuring entity (department), on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality".

The wording of article 12 on "Inducements from suppliers and contractors", which authorizes the procuring entity (department) to reject tenders, should be amended by adding a reference to cases in which an officer or employee of the procuring entity abstains from doing a certain job that ought to be done, whereby the procuring entity (department) shall be entitled to reject the tender submitted by the supplier or contractor that gave the officer or employee of the procuring entity an inducement to abstain from doing a certain job.

A new sentence should be added to the article referring to the right of the procuring entity (department) to reject a tender submitted by a supplier or contractor if the latter gives an inducement to an officer of the procuring entity,

even where the supplier had no knowledge of the non-competence of the officer in question with respect to the job required, which is in accordance with the Egyptian Law.

We therefore suggest that article 12 should be redrafted as follows:

"The procuring entity may reject a tender, proposal, offer or quotation if the supplier or contractor offers or promises or agrees to give to any current or former officer or employee of the procuring entity, regardless of the competence or non-competence of the officer or employee, a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement to carry out or to abstain from carrying out an action that ought to be done, or to violate the duties of his office."

Article 42 of the draft Model Law, concerning the suspension of procurement proceedings as a result of the timely submission of a complaint, should be amended in view of the fact that the suspension of procurement proceedings, whether before or after the entry into force of a contract, as a consequence of the submission of a complaint will not be compatible with the importance of the contracts concluded by the department, which require expeditious implementation as they are associated with the public interest of the State, especially where a contract is related to the operation of a public facility. In that connection, the rule which is adopted by the Egyptian Law is that the orderly and steady operation of public facilities precludes both the interruption of contract implementation and procurement proceedings. It is also an established rule that a contractor that has a contract with the procuring entity (department) may not abstain from fulfilling its obligations on the pretext of failure on the part of the procuring entity (department) to fulfil its contractual obligations, unless the fulfilment of obligations by the contractor is made impossible by such a failure—since, according to the rules, the implementation of decisions on administrative disputes, including contracts, may only be suspended under exceptional circumstances, if the court decides to take such action, or if the fulfilment of the contractor's obligations is made impossible as a consequence of slackness on the part of the procuring entity (department) in carrying out its obligations. We therefore suggest that article 42 should be amended as follows:

"The submission of a complaint under article 39 may only suspend the procurement proceedings if it is established that such a suspension will not be incompatible with the good and orderly conduct of work by the procuring entity and that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will be accepted and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors."

We also suggest that paragraph (2) of the same article should be removed for the same reasons as mentioned above.

We further suggest, with regard to wording, that the term "not frivolous" in article 42(1) should be changed and that the words "a serious one" should be used.

Article 43 on "Judicial review" should be amended, because such a term might imply a different meaning from that which is intended by the legislation of certain States whose legal systems include a means of petition for review. This is an exceptional means of objection to decisions, which entitles the competent court to review prior judgments, even after they have become final and effective, where new factors and circumstances that were not known before have made their appearance and imply as a consequence a change in decisions made by the courts. The provision in the draft Model Law on Procurement, however, is intended to determine, in each State, the court having jurisdiction over objections presented in respect of administrative decisions concerning State contracts.

Malaysia

[Original: English]

1. The draft Model Law on Procurement generally sets out the basic legal rules regulating the procedures for procurement. These rules regulate, *inter alia*, the procedures for selecting the contractor or supplier from which the goods, construction or incidental services are to be procured, methods of procurement and their conditions for use, tendering proceedings and the rights of recourse by participants in procurement proceedings who are aggrieved by actions or decisions of the procuring entity that are contrary to the applicable rules and procedures. The Model Law has been drafted so as to be applicable both to domestic and to international procurement.

2. The scope of application of the Model Law is confined to the procurement of goods and construction and not to services, except services that were incidental to the goods or construction being procured. The types of procuring entities regulated by the Model Law are the governmental departments or agencies and such other entities to be determined by each State implementing the said Law. It is to be noted that although the Model Law sought to cover all types of procurement of goods and construction in order to achieve the greatest degree of uniformity in the law relating to procurement, certain types of procurement have been excluded, for example, procurement in cases where national defence or national security is involved. However, the procuring entity would be able to apply the Model Law to procurement that fell within an exclusion if the entity wished to do so. In order to promote transparency, the application of the Model Law in such cases would be brought to the attention of the contractors and suppliers in the tender solicitation documents.

3. It is important to note that the Model Law, in its preamble, has identified several procurement policy objectives. An examination of the provisions of the Model Law clearly showed that they are structured so as to achieve those objectives.

4. The Model Law sets forth clearly the mutuality of obligations between the procuring entity and participating suppliers and contractors. In many instances, suppliers and contractors have a right to require compliance with the law by the procuring entity. In this regard, chapter V of the

Model Law provides a right of recourse for suppliers and contractors in the event of a failure of the procuring entity to comply with the procurement law. On the other hand the procuring entity has the right to reject all tenders at any time prior to the acceptance of a tender, and the supplier and contractor in such cases cannot recover from the procuring entity the costs of preparing and submitting the tenders (article 30).

5. To meet its objective of achieving transparency, the Model Law has provided clearly the rules and procedures to be followed by the procuring entity and by the suppliers and contractors participating in the procurement proceedings. Under article 6, for example, the procuring entity is required to set forth in the prequalification documents the qualification requirements that would be applied to the suppliers and contractors. The procuring entity is also required, under article 11, to prepare a record of the procurement proceedings which should include all the matters as stipulated thereunder. The Model Law has also set out clearly the procedures to be followed by the procuring entity for soliciting tenders and the required contents of solicitation documents.

6. In order to promote economy and efficiency in procurement, the Model Law has incorporated procedures that promote competition among suppliers and contractors and provide a favorable climate for participation in the procurement process. The preferred procurement method under the Model Law is tendering. The provisions regarding tendering proceedings are clearly set forth in chapter III of the Model Law. Although other methods of procurement such as request for proposals, competitive negotiation, request for quotations and single-source procurement are available, these methods may only be utilized in specified circumstances. The Model Law has laid out certain criteria to guide the procuring entity in the choice of the most appropriate method to be used in a particular case. Once the procuring entity has decided to use a particular method, it should conform to the rules in the Model Law relating to that method.

7. With regard to meeting its objective to encourage participation in procurement proceedings by suppliers and contractors of all nationalities, where appropriate, the Model Law has provided in article 8 that suppliers and contractors are permitted to participate in procurement proceedings without regard to nationality. The procuring entity would only be able to limit participation in procurement proceedings on the basis of nationality on grounds that are specified in the procurement regulations or according to provisions of Law.

8. The Model Law has provided in chapter V a right of recourse for participants in procurement proceedings aggrieved by actions or decisions by the procuring entity contrary to the Law. The provisions are necessary in order to promote confidence in and the integrity of the procurement process. It is to be noted that the question of the forum where such recourse could be sought would be dependent upon the legal and administrative structure of States. Therefore the Model Law has provided generally formulated alternatives, from which a State can choose those that it wishes to implement. Thus, States in which

hierarchical administrative review of administrative actions, decision and procedures is not a feature of the legal system may omit article 40 regarding administrative review and provide only the judicial review as provided in article 43.

9. Based on the above paragraphs, it is noted that, in order for Malaysia to adopt the Model Law on Procurement, its procurement policy objectives should be consistent with the objectives set out in the Model Law. This is in view of the fact that the provisions of the Model Law are structured so as to achieve those objectives. The provisions of the Model Law, as already noted above, are "transparent" as the rules and procedures to be followed by the procuring entity and by the participants are made known to the suppliers and contractors participating in the procurement proceedings. Participation in the procurement proceedings, unless clearly provided otherwise in the procurement laws and regulations, should not be limited to a certain nationality only. Further, to promote economy in procurement, all interested suppliers and contractors should be allowed to compete to supply goods or construction, and the Model Law has identified tendering as the preferred method of procurement.

10. Even if Malaysia chose not to adopt the Model Law, it may be used as an instrument to assist Malaysia in restructuring or improving its procurement laws and procedures. It is to be noted, however, that if the Model Law were to be adopted by other countries, it would promote greater international confidence in procurement, which would benefit international trade.

Poland

[Original: English]

Article 2: The list is not complete. The procurement of services should be taken into account (as for example of the expertise or analysis).

Article 8: The participation in procurement proceedings can be limited only on the basis of the citizenship and not on the basis of the nationality (in the sense of belonging to ethnic community or nation).

Spain

[Original: Spanish]

The following remarks have been made after study of the "Draft Model Law on Procurement" prepared by the United Nations Commission on International Trade Law.

1. The "draft" analysed is clearly derived in its principles from the European Community rules on procurement and seems to be conceived as a tool for laying a uniform foundation for procurement, to serve as a model for all those States (fundamentally, of Eastern Europe and Africa) which, for one reason or another, lack appropriate legal regulations and experience in this matter. In view of the importance of procurement to all economies that are in the phase of development or reconstruction, the draft aspires to

be from the outset an appropriate tool—through incorporation in State legislation—for achieving a standard of guarantees that would permit the participation of enterprises from all countries in the familiar field of procurement, with the greatest possible level of legal security.

That having been stated, it is desirable to make two specific remarks: the first of them to recall that the draft Model Law is not in the nature of a contract and does not aspire to be converted into an international treaty; when it has been approved, it will not be binding on the States from the formal legal point of view. It is, as its name indicates, only a model capable of inspiring State legislation. Therefore it has, from this point of view, no effect on the Spanish Administration or—under international law—on the Spanish State.

Secondly, it can be noted that the above-mentioned “standard” of guarantees contained in the draft is therefore rather less rigorous than that incorporated in Community law and Spanish legislation (both the prevailing law on State contracts and the draft law on procurements by the public authorities), so that, in addition to the fact that the draft has no formal binding force, its content adds nothing to existing Spanish law from the substantive point of view.

2. With regard to the concrete text of the draft, the following observations are made:

2.1. Article 2 excludes from its scope of application management contracts for public services, limiting its rules to contracts for works, supply, and, to the extent that they are accessory to the latter, buying and selling and leasing. In view of the importance of contracts for the management of public services—and unless there are specific motives that would justify their exclusion, which are not known to us, since the background information is not available—such contracts could well be included in the draft. The partial relinquishment of public authority (and in the widest sense, to a certain extent, of sovereignty) that could be involved in contracts by which the management of a service is entrusted to a third party is offset by the adequate safeguards provided for in the draft regarding requirements applicable to the contractor—including nationality requirements (cf. article 8.1).

2.2. The drafting of article 17 [in the Spanish text] could be improved by making a clearer division between paragraphs (a) and (b) and the part of the principal clause covering both, which is now incorporated in subparagraph (b).

2.3. The obligation contained in article 18(2) to publish invitations to tender in a journal of wide international circulation seems to be excessively onerous for the States—and even for the contractors, if the cost of publication is to be borne by them. It should suffice to publish such invitations to tender in the appropriate official gazettes or publications, and it cannot be regarded as an excessive or disproportionate burden that interested parties should have to consult the latter.

3. For the rest, no substantive remarks need to be made on the draft as a whole. As pointed out earlier, it is inspired by the principles on procurement that are characteristic of Community law—and these are in turn common to the principles followed by the countries, both within and outside the Community, that are more highly developed in this field.

Trinidad and Tobago

[Original: English]

Article 6. Qualifications of suppliers and contractors

Amend paragraph (7) to read as follows:

“Except where prequalification proceedings have taken place, a supplier or contractor that claims to meet the qualification criteria shall not be precluded from participating in procurement proceedings for the reason that it has not provided proof that it is qualified pursuant to paragraph (2) of this article if the supplier or contractor undertakes to provide such proof *within seven (7) days of a request from the procuring entity*, and if it is reasonable to expect that the supplier or contractor will be able to do so.”

Article 7. Prequalification proceedings

Amend the first sentence of paragraph (4) to read as follows:

“The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity *within seven (7) days*.”

Amend the seventh sentence of paragraph (7) to read as follows:

“The procuring entity shall upon request communicate to suppliers and contractors that have not been prequalified *the ranking and points under each criteria*.”

Article 11. Record of procurement proceedings

Amend the first line of paragraph (3) to read as follows:

“The portion of the record referred to in subparagraphs (c), (e), (f) and (g) of . . .”

Article 21. Contents of solicitation documents

Amend subparagraph (x) by inserting after the word “and” and before the word “approval” in line 4, the words “where applicable”.

Article 25. Submission of tenders

Amend paragraph (5), by adding at the end thereof the words “after tenders are opened”.

Article 28. Opening of tenders

Amend paragraph (2) by adding at the end thereof the following new sentence:

“In addition, other members of the public may be permitted subject to the availability of spaces (seats).”

Article 29. Examination, evaluation and comparison of tenders

Amend paragraph (1)(b) to read as follows:

“Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall *give notice* of purely arithmetical errors apparent on the face of a tender. The procuring entity shall give notice *thereof* to the supplier or contractor that submitted the tender.”

Replace paragraph (3)(b) by the following new text:

"If the supplier or contractor that submitted the tender amends the tender price for any reason whatsoever".

Add at the end of paragraph (5) the words "which currency shall be stated by the procuring entity".

Article 34. Request for proposals

Delete from paragraph (4)(c) the words "expressed in monetary terms to the extent practicable".

Turkey

[Original: English]

Article 2. Definitions

Taking into account the scope of application and the internationality of the draft Model Law, it would be appropriate to re-draft this article so as to include definitions of "rental" and "lease or hire-purchase of goods", which are referred to in subparagraph (a).

Article 18. Procedures for soliciting tenders or application to prequalify

It would be appropriate to introduce a deadline for applications for the invitations to tender or to prequalify, which could be defined according to the existing international traditions.

Article 27. Tender securities

It would be useful to have an additional paragraph with respect to a "certain percentage of the bid value to guarantee tender security" as a precondition of participating in procurement proceedings.

It would also be helpful to define the term "solicitation documents".

Yugoslavia

[Original: English]

General remarks

The draft Model Law on Procurement contains provisions very much needed in many countries—especially those which are seeking international technology, know-how, equipment and capital goods. Nevertheless, the draft—as a whole—is too much oriented to participation of international suppliers and contractors, and exceptions in favour to the domestic ones are indeed marginal. In many countries the reality of life would often require engaging domestic suppliers and contractors—especially in view of the fact that financial resources are lacking in many developing countries.

There is a disproportion between the part of the draft devoted to the substantive provisions and the part which deals with remedies. The part on review procedures contains five articles only—some of which are in a rudimentary form (see for instance, art. 43; in many countries the judicial review would indeed be the only procedure in cases of unlawful procedures). For this reason, it is suggested:

(a) to delete entirely the part which deals with the question of review, or

(b) to leave this question to the applicable law, or

(c) to elaborate in more detail some of the rights which the aggrieved party might have if the procuring entity commits an unlawful act by which the suppliers and contractors suffered loss and/or damage.

Many provisions in the draft are too detailed (see, for instance, article 21 which lists the required contents of the solicitation documents).

It is not clear why chapter II (Methods of procurement and their conditions for use, articles 13-16), is not connected with chapter IV (Procedures for procurement methods other than tendering, articles 33-37). Although there are probably some reasons for this, for the reader and the user of the Model Law it would be easier if the relevant provisions were found in the same place. Should this remark be found to be justified, the only article which would have to be removed from its position would be article 13, which would in fact would be more appropriately placed in chapter III which deals with tendering procedure.

Specific remarks

Article 2. Definitions

Option II for subparagraph (i) is a better one since it is more comprehensive and would be useful especially in cases when it is not clear as to who may fall under a definition of a "procuring entity". If this option were to be favoured by a majority, then the brackets under (ii) should also be deleted.

On the other hand one may question why a definition of "procuring entity" is not more simplified. A single definition may embrace all public organs and entities (enterprises) which a State enacting the Model Law includes in a definition of a procuring entity (in such a case (i) and (ii) should be combined in a single definition).

A more simple definition would be in the interest of a State enacting the Model Law, since the public organs, department and other governmental units subject to the Model Law may vary from one state to another and therefore the State should be left with full freedom to determine which entities are "procuring entities" for the purpose of the Model Law.

Article 12. Inducements from suppliers and contractors

This article is well drafted and it should remain in the Model Law. Its usefulness is obvious and evident and there is no need to elaborate on it. Moreover, this article should be supplemented by another paragraph according to which if an unlawful practice would be discovered the whole procedure should be annulled and a new one established. The second sentence in article 12 for that purpose is not sufficient.

The answer to this remark could be that there is a provision in article 40(3)(e), but the same idea should be reflected in article 12 as well.

Article 17. Domestic tendering

Since the whole Model Law is in fact aimed at international tendering, article 17 should not start with the situa-

tion which is considered to be an exception rather than the rule of the Model Law. The suggestion is not that such a provision should be deleted, since it is very significant for each State, but perhaps it should be put as a separate article, after an article that would emphasize the principle in the Preamble, that tendering proceedings should include all participants "regardless of nationality". Since it is the supreme objective of the Model Law to promote international trade, which indeed is the task of UNCITRAL, domestic tendering should be treated as an exception and the place of the relevant articles should reflect this.

Article 29. Examination, evaluation and comparison of tenders

According to paragraph (2)(b), the "procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics . . . set forth in the solicitation documents . . ." Without questioning the need for such a provision, it may nevertheless be noted that such provision gives rather wide discretion to the procuring entity to consider a tender as responsive even in the cases when such deviations may be more than "minor". The provision should remain since it would help the tendering procedure to proceed, and in practice abuses of such a discretion of the procuring entity would indeed be rare, but in a commentary attention may be drawn to possibilities of such abuses.

Article 30. Rejection of all tenders

According to the Yugoslav law on obligations, rejection of all tenders "if so specified in the solicitation documents" would not be considered as true tendering, but rather *conditional* tendering. However, since this rule is reflected in many solicitation documents, it should remain in the Model Law. The fact that the procuring entity is not obliged to justify the grounds for rejection in that respect is clear and cannot be disputed. Our suggestion, however, would be to clearly explain this right of the procuring entity in the commentary.

Article 31. Negotiations with suppliers and contractors

This article should be redrafted so as to prohibit the procuring entity from negotiating with a supplier or a contractor before the tender is accepted, while recognizing that afterwards negotiations are in fact needed and useful for both parties. The idea in the article is clear, but perhaps some slight redrafting may help to distinguish between the period before and the period after the acceptance of the tender.

Articles 40 and 43. Administrative and judicial review

The general remark (as has already been pointed out above) is that the whole part of the Model Law concerning the review procedure is not sufficient to adequately protect the party against an unlawful procedure. For this reason (irrespective of the difficulties) an effort should be made to define an "unlawful act" (or procedure) within the meaning of the Model Law. If it would be difficult to include a definition of an unlawful act, perhaps a commentary could provide illustrative examples of unlawful acts. The suggestions therefore are:

(a) to define an "unlawful act" (procedure);

(b) to define the circumstances in which an administrative organ or a court has the right to annul the procuring procedure;

(c) to specify when and in which cases the administrative organ or a court may decide on compensation as well as to specify whether the compensation should be given to all participants or only to those who suffered damages due to an unlawful act.

[A/CN.9/376/Add.1]

COMPILATION OF COMMENTS

Canada

[Original: English]

The Government of Canada believes that the draft Model Law on Procurement, as adopted by the UNCITRAL Working Group on the New International Economic Order at its fifteenth session, is generally of a high order of quality and represents a fair and reasonable balance between the interests of procurement entities and those of contractors and suppliers. It would also promote transparency in the bidding process.

Nevertheless, the Government of Canada also believes that, in failing to provide for the fullest possible use of electronic data interchange in the procurement process, the draft Model Law in its present form, if enacted as domestic law, would constitute a step backwards technologically for many States. This will reduce its attractiveness as a legislative model for those States. Canada has expressed this view consistently during the sessions of the Working Group on the New International Economic Order and it has been reiterated in the written comments we have received during our wide consultations on the draft Model Law, as adopted by the Working group. In view of the fact that UNCITRAL is currently engaged in the preparation of the legal rules on Electronic Data Interchange (EDI), the restrictive approach in the draft Model Law is doubly unfortunate.

Based as well on our consultations, Canada also believes that there is some room for improvement of the draft Model Law and offers the following comments on the English language version of the document with the aim of making it more acceptable to States for enactment as domestic legislation.

Article 2(c) An example where the definition of "goods" may cause a problem is the acquisition of printing. In Canada, in many provinces it is considered a service, but in others it is considered a good. It is not clear whether some things might be considered to be a good or a service in various States. The Working Group expanded the definition to include electricity. The definition could be further modified to provide an option for specific inclusion by States of some things and specific exclusion of others. This would add transparency and could lessen the possibility of disputes.

Article 2(e) The use of the expression "supplier or contractor" throughout the draft Model Law seems to be tautological because there does not appear to be any difference between a supplier and a contractor in this context. Both words refer to the same person. In fact, neither word is

really appropriate in the prequalification or even in the tendering process because such persons have not yet become suppliers or contractors; they are applicants for prequalification or tenderers or bidders. The definition in article 2(e) attempts to circumvent the problem by including "any potential party". The document might be improved somewhat by referring throughout to a "supplier" and redefining that term to include, according to the context, the persons it is intended to cover.

Article 6(2)(d) Change the words "this State" at the end to "any State" because a failure to fulfil such obligations in another place may well be of concern to a State considering entering into contractual relations with someone who will perform work in the State. Admittedly, it may not be easy to obtain this information, but at least, the opportunity to use the information is there, if it is known.

Article 6(2)(e) After "years" add "or while a sentence is being served for the offence, whichever is the greater" so as to avoid the anomalous situation of qualifying a firm while its principal or principals are incarcerated for an offence referred to in the paragraph.

Article 6(6); also 7(8) Change the words "false or inaccurate" to "false, inaccurate or incomplete".

Article 6(7) The words "proposals or offers" after the word "tenders" in the penultimate line have somehow been deleted and should be reinserted.

Article 7(1) There is a structural problem with regard to the placement of articles 11 and 12, which will be explained later. This also affects article 7(1). To rectify, delete the words "the submission of tenders, proposals or offers" before the words "procurement proceedings" and replace with the words "engaging in".

Article 7(3) This provision imports article 19(1)(j) and would require the procuring entity to specify the place and deadline for the submission of tenders in the prequalification documents. The procuring entity may not always be in a position to provide this information at this stage. It is not apparent why this requirement is present. Therefore add paragraph (j) to the article 19 exceptions.

Article 7(4) It is not common practice by procurement entities to provide details of all clarifications to all parties during the prequalification process although this is done during the bidding process. As drafted, the provision precludes any discretion by the procurement entity and could result in unnecessary and possibly costly communication of information. Change the word "shall" at the beginning of the penultimate line to "may" so that the requirement is not mandatory.

Article 7(5) The decision is based on the criteria and on the information submitted by the applicant for prequalification. This is not correctly reflected in the last sentence, which should be amended to read, "In reaching that decision, the procuring entity shall use only those criteria that are set forth in the prequalification documents."

Article 7(8) See the comment on article 6(6), which also applies to this article. In any event, the words "and may disqualify . . . if it finds at any time . . . that the information

submitted was false or inaccurate" overlap with and repeat the power in article 6(6) and are unnecessary and could be deleted.

Article 8 This article in effect gives national treatment to foreign firms, subject only to the procurement regulations or other provisions of law. There seems to be no cogent reason why a State would enter into agreements such as the GATT, the Canada-United States Free Trade Agreement or the North American Free Trade Agreement while at the same time giving generally free and open access to procurement to all foreign nationals. While recognizing that a reciprocity provision could be contained in regulations, it would be more transparent and therefore more certain if article 8 were recast and based on reciprocity by referring to participation by suppliers from States that have adopted the Model Law.

Article 9 (in general) This article addresses the form of communication and not the time at which any such communication is deemed to be effective and it is therefore not satisfactory as a notice provision. As drafted, the Model Law seems to address this issue only within the context of article 32(4). A general rule should be agreed on and inserted, e.g. when the notice is dispatched, if sent by EDI or fax, when it is received, if sent by mail or it could be left open as an option for the enacting State.

Article 9(1) As indicated at the outset, the draft Model Law does not adequately respond to the needs of States that utilize electronic data interchange extensively in the procurement process. There are a number of such provisions in the document. The authority in article 9(1) to use EDI is made subject to such provisions. In order to commend itself to States that use EDI, article 9(1) should be amended to provide an option to make such provisions subject to this article so that States that use EDI could continue to do so while others would be free to continue to use paper if they so wish.

Articles 11 and 12 There is a structural drafting problem because these articles refer to tenders, proposals and offers in the context of records and of inducements, but those types of procurement have not been described or even referred to in previous articles. There is therefore no logical structural foundation for the references in these two articles. The draft could be improved by placing articles 11 and 12 after article 16.

Article 11(1) There are jurisdictions where a central procuring entity does the procuring on behalf of client departments, which prepare the records. To accommodate all situations, change "shall prepare" to "shall maintain".

Article 11(1)(k) For consistency with the rest of the document, this provision should refer to "grounds and circumstances", not just to "grounds".

Article 11(3) It is not the normal practice of some procurement entities to automatically produce all this information for inspection, but rather to discuss with a particular bidder, if he inquires on a debriefing, why his bid was deficient or otherwise unsuccessful. Also, the information can be produced upon a specific application under access to information legislation. It is suggested that the words "for inspection by" in the second line be deleted and replaced

by the word "to" so that the article will provide for availability without indicating the mode.

Article 12 As worded at present, this article does not catch bribes, commissions or other inducements that are offered through an agent. To correct this omission, insert the expression "directly or indirectly" in the third line after the words "submitted it". Insert the words "State or the" before the words "procuring entity" in the fourth line so as to cover other persons in a position to exercise influence on the procurement process.

Article 17(b) The reference to the "low amount or value" is not entirely clear. The expression of the idea might be improved by referring instead to the "small quantity or low monetary value".

Article 18(2) The requirement to publish invitations to tender or to prequalify in a newspaper or trade publication or technical journal of wide international circulation could cause significant difficulties and expense for procurement entities in some States unless electronic means could be used instead. This is just one of the problems with article 9, as drafted at present.

Article 19(10(b) or (c)) The place of delivery of the goods should be stated in the invitation to tender.

Article 25(5) The Working Group agreed to add the word "single" before the words "sealed envelope" (paragraph 125 of the Report) and this decision is not reflected in the draft. However, there is a more serious problem for some States in that, as drafted, this provision does not permit electronic tendering. See the comments on article 9 with respect to EDI.

Article 26(1) The phrase "in effect" is somewhat ambiguous and should be replaced by the more specific phrase "open for acceptance".

Article 26(3) As drafted, this provision is contrary to the law and contracting practices as found in Canada and some other common law jurisdictions, a point the Canadian delegation made at the Working Group when it suggested that this article should be deleted. The law in Canada is that absent other specific terms and conditions, a contract is brought into being automatically upon the submission of a tender in response to a tender call. Article 26(3), in its present form, would change this in a way that many procurement entities would likely find disruptive and confusing. It is therefore suggested that the article be modified to permit the solicitation documents to state when, if at all, a bidder can withdraw his tender without forfeiting his tender security.

Article 29(1)(b) This provision places too strong an onus on a procurement entity because it could subject it to a post mortem on whether or not an error was or was not apparent on the face of a tender. The provision should be changed to provide either that the procurement entity "may correct", instead of "shall correct" or else that the procurement entity "shall correct . . . errors that it may discover on the face of a tender".

Article 32(3) It is assumed that the purpose of the last sentence is to provide that a failure by the procuring entity

to obtain the necessary approvals within the specified time will not automatically extend the period of effectiveness of the tender or the tender security although the bidder may wish to do so. As the provision is drafted, this is not entirely clear. The provision should be amended by inserting the word "automatically" before the word "extend" at the beginning of the third last line of the last sentence.

Articles 38 to 43 These provisions on review are optional. Having regard to the fact that Canada has well-developed systems of administrative law, federally and provincially (both common and civil law), it is not likely that these provisions would be adopted as such by any Canadian jurisdiction. Therefore, it would not be appropriate for Canada to comment on them.

[A/CN.9/376/Add.2]

COMPILATION OF COMMENTS

Japan

[Original: English]

Japan believes that the draft Model Law on procurement, when adopted, would contribute a great deal to harmonizing and bringing uniformity to national laws on procurement and would thus facilitate international commercial transactions. To this end, the Model Law should be formulated to be acceptable to as many countries as possible, and in keeping with general legal precepts of those countries. However, apart from some provisions, especially those contained in chapter V, which would not be fit for Japan to incorporate into its domestic legislation, the present text of the Model Law contains provisions with respect of which there seems to be some room for improvement, bearing in mind the existence of an international instrument as well as of national laws on procurement. In this connection, the following comments are offered.

Article 2 "Construction" as defined in paragraph (d) sometimes comprises various types of services themselves. It seems difficult in those cases to draw a line between services incidental to construction and services not incidental to construction. The words, "or to the construction", at the beginning of the third line of paragraph (a), therefore might not be necessary.

Article 6 Japan is not opposed to the substance of this article. However, according to the present paragraphs (2) and (3), a procuring entity is not allowed to impose requirements other than those provided for in paragraph (2) with respect to the qualifications of suppliers and contractors. This approach seems too restrictive, since there might be a case where a procuring entity wants to establish requirements different than those contained in paragraph (2) for the qualifications, depending on such factors as what is going to be procured, the size of the procurement and the nature of the procuring entity. The basic idea behind these paragraphs would be the same as that expressed in subparagraph (b) of article 5(2) of the GATT Agreement on Government Procurement, which reads, "any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to

fulfil the contract in question." Therefore, the present paragraphs (2) and (3) should be formulated in such a manner that would make it possible for a procuring entity to add any other requirements to those contained in paragraph (2), as long as those requirements met the guidelines in the Agreement on Government Procurement referred to above, leaving detailed requirements for the qualifications to procurement regulations.

Article 9 Under Japanese national law, a procuring entity may prohibit the submission of tenders by mail, where necessary for administrative reasons. It is not clear under paragraph (3) of this article whether or not a procuring entity may limit the mode of communications to particular means, although paragraph (1) of this article seems to allow a procuring entity to do so.

Article 18 With a view to promote transparency in selective tendering procedures under paragraph (3), it is suggested that, even where selective tendering procedures are employed, a notice of each proposed procurement should be published in the same manner as prescribed in paragraph (1). This suggestion is also in line with article 5(4) of the GATT Agreement on Government Procurement.

Article 26 Paragraph (3) of this article conflicts with Japanese national law, under which suppliers or contractors are not allowed to modify or withdraw their tenders once

those tenders have been submitted to the procuring entity. This policy is based upon several grounds such as to ensure fair competition, to exclude unjust tenders, to require suppliers and contractors to consider carefully before submitting tenders and to expedite tendering procedures, all of which we believe to be quite reasonable. Article 26(3) should therefore be amended to permit a procuring entity to restrict or prohibit any modification or withdrawal of tenders after their submission, provided that these restrictions or prohibitions are made clear in solicitation documents.

Article 29 Admitting factors contained in paragraph (4)(c) as criteria for the successful tender could negate the purpose of the Model Law and of open tendering procedures, making the process of evaluation tenders unclear and, possibly, unfair. The deletion of paragraph (4)(c) would be preferable. At the least, the list of factors in paragraph (4)(c) should be exhaustive, not illustrative.

Article 32 With regard to paragraph (6), a notice of the procurement contract should not only be given to other suppliers and contractors but, in order to promote transparency, should also be published. In addition, this requirement of publication should, for the same reason, be extended to other methods of procurement, including single-source procurement. This suggestion is in line with article 6(1) of the GATT Agreement on Government Procurement.

E. Proposed amendments to the draft Model Law on Procurement: note by the Secretariat (A/CN.9/377) [Original: English]

The present note sets forth a listing by the Secretariat of possible amendments to the draft Model Law on Procurement that the Commission might wish to consider during its review and adoption of the draft Model Law, in addition to any suggestions made by Governments in their comments as set forth in document A/CN.9/376 (and Add.1).

Title

It is suggested that the full title should read "*UNCITRAL Model Law on Procurement*". This would be in line with the titles of other model laws formulated by the Commission.

It may be helpful for a footnote to be added referring to the *Guide to Enactment of the Model Law*.

Article 2(g)

Consideration may be given to broadening the wording of the subparagraph so as to encompass two other functions of a tender security not presently mentioned. These other functions are: to cover withdrawal or modification of a tender after the deadline for submission of tender and to secure the obligation to supply a performance guarantee, if required to do so (see article 27(1)(f) of the Model Law, which lists those additional functions of a tender security). Instead of adding specific references to those additional functions, which might make the definition unwieldy, a

more general wording might be substituted for the definition along the lines of "to secure fulfilment of *certain obligations*."

Articles 6(6) and 7(8)

It may be specified that disqualification should occur only in the case of "substantial" inaccuracy; disqualification for any inaccuracy may give too much scope for the procuring entity to disqualify for improper motives.

Article 9(2)

The reference to article 11(3) should be replaced by a reference to article 18(3). Moreover, it may be questioned whether paragraph (2) should refer to article 32(1), since the latter provision concerns the notice of acceptance of a tender and therefore may have direct implications for the entry into force of the procurement contract. In that light, it may be preferable for such a communication only to be permitted in a form that provides a record of the communication.

Article 11(1)

Consideration might be given to adding to the required content of the record a summary of requests for clarifications and of the corresponding clarifications.

Article 11(3)

It is envisaged in the present text that a court could order disclosure of the information referred to in article 11(3)(f) and (g) at a point earlier than the termination of the procurement proceedings. However, those subparagraphs concern circumstances that could not arise until the end of the procurement proceedings. It is accordingly suggested to reformulate paragraph (3) as follows:

“... without resulting in a procurement contract. *Disclosure of the portion of the record referred to in subparagraphs (c) to (e) may be ordered by a competent court. However, except when ...*”

In order to distinguish the information referred to in paragraph (3)(b) from the summary referred to in paragraph (1)(e), the following text may be added to paragraph (3)(b):

“... and tender, proposal, offer or quotation prices, *beyond the summary referred to in paragraph (1)(e).*”

Article 14(1)(a)

In the *chapeau*, the expression “is unable to formulate detailed specifications” may be too restrictive since a procuring entity in a given case may be “able” to formulate specifications, but, nevertheless, for legitimate reasons, may seek proposals for solving its procurement need. The words “prefers not to formulate detailed specifications” might be more appropriate.

The Commission may wish to consider replacing the present text of subparagraph (ii) by a formulation along the following lines:

“because of the *nature* of the goods or construction, *specifications cannot be established with sufficient precision to permit the award of the contract by selecting the successful tender according to the procedures set forth in chapter II.*”

Article 14(1)(c)

It may be considered that subparagraph (c) is unnecessary since article 1(2) permits the application of the Model Law to excluded sectors “to the extent that” the procuring entity may decide that it is appropriate.

Article 14(1)(d)

For the purposes of clarity and to avoid disputes as to the decision of the procuring entity on a matter that should be left to its judgment, it may be useful to replace the words “when engaging in new tendering proceedings” by the following: “when, *in the judgment of the procuring entity, engaging in new tendering proceedings*”.

Article 16(f)

The same question may be raised as to the necessity of this provision as is raised above with respect to article 14(1)(c).

Article 16(g)

It may be noted that the approval requirement in subparagraph (g) is not presented as an option, unlike the references to approval at other points in the Model Law.

Article 17

The reference to article 11(2) should be replaced by a reference to article 18(2).

Article 19(1)(d)

The reference to article 8(1)(a) should be replaced by a reference to article (6)(2).

Article 19(2)

Paragraph (2) excludes the place and deadline for the submission of tenders from the information required to be set forth in the invitation to prequalify. However, article 7(3) requires that information to be provided in the prequalification documents. Since there would be cases in which the prequalification documents would be ready at the time of the issuance of the invitation to prequalify, article 19(2) may be modified to require the invitation to prequalify to indicate the place and deadline for submission of tenders, if known at that time.

Article 20

It would appear advisable to expand the application of the rule in the third and last sentence to the price that may be charged for prequalification documents. In that case the words “may charge for the solicitation documents” would be replaced by the words “may charge for the prequalification documents and the solicitation documents”. The title of the article could then be modified to read as follows: “Provision of solicitation documents; *price of prequalification documents and solicitation documents*”.

Article 21(f)

It may not be desirable to require that in all cases in which a contract is to be signed pursuant to article 32(2), the solicitation documents should contain the entire text of the contract to be signed, since there may be cases in which certain minor details may not be determined at the time of the issuance of the solicitation documents. The provision might rather refer to the principal terms and conditions of the procurement contract.

Article 21(g)

At present, the Model Law does not expressly require a procuring entity that solicits alternative tenders to disclose in the solicitation documents the manner in which the alternative tenders would be considered (e.g., whether a supplier or contractor submitting an alternative tender would also have to submit a tender in conformity with the specifications in order to have the alternative considered). The lack of an express rule on this point may be remedied by adding the following text at the end of subparagraph (g): “*and a description of the manner in which alternative tenders are to be evaluated and compared.*”

Article 22

Consideration may be given to moving article 22 to chapter I, since the principle of objectivity in the description of the goods or construction in the solicitation documents would also have application in procurement proceedings involving methods other than tendering.

Article 22(3)(b)

It may be considered that this provision, if interpreted literally, would require the use of standardized trade terms and abrogate the right of the parties to vary those terms. A degree of flexibility may be added by replacing the words "Standardized trade terms shall be used" by the words "*Due regard shall be had for the use of standardized trade terms*".

Article 25(5)

Consideration may be given to adding a requirement that tenders must be signed or authenticated in some other manner.

Article 26(2)(b)

It is suggested that the words "if it is not possible to do so" may be deleted since they suggest that a supplier or contractor agreeing to extend the tender validity period may only provide a new tender security if extension of the existing one were impossible. This would be an unintended effect since the supplier or contractor may have good reason for providing a new security and presumably could do so without negatively affecting the interests of the procuring entity.

Article 29(1)(b)

Consideration may be given to replacing the words "shall give notice" by the words "shall give *prompt* notice".

Article 29(4)(d)

The Commission may wish to consider adding an express requirement that use of a margin of preference should be reflected in the record. Such a requirement would also be reflected in article 11(1).

Article 29(5)

The following text may be added at the end of the paragraph in order to make it clear that the exchange rate used

must be the one prescribed in the solicitation documents: ". . . and comparing tenders *according to the rate indicated in the solicitation documents in accordance with article 21(r)*."

Article 32(3)

For a clearer statement of the role of the solicitation documents, the words "Where the procurement contract is required to be approved" may be replaced by the following: "*Where the solicitation documents stipulate that the procurement contract is subject to approval*".

Article 32(6)

In order to promote transparency in the procurement process, the disclosure requirement set forth in paragraph (6), which is currently limited to suppliers and contractors, could be extended to the general public. This might be accomplished by requiring publication of the notice of the procurement contract, as an obligation separate from the notice presently required to be given to suppliers and contractors.

Article 35(4)

In order to make clear the obligation of the procuring entity, the following text may be added at the end of paragraph (4): ". . . of their proposals. *The procuring entity shall select the successful offer on the basis of the best and final offers.*"

Article 36(1)

The following may be added at the end of paragraph (1) so as to further elucidate the precision with which the procuring entity should describe the components of the price quotation: ". . . are to be included in the price *and shall be informed about those charges, duties and taxes in the supplier's country that are to be excluded.*"

Article 38(2)(d)

The reference to article 28(1) should be replaced by a reference to article 30(1).

II. GUARANTEES AND STAND-BY LETTERS OF CREDIT

A. Report of the Working Group on International Contract Practices on the work of its eighteenth session

(Vienna, 30 November-11 December 1992) (A/CN.9/372) [Original: English]

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INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session,¹ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit (A/CN.9/316). The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

2. The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on

a uniform law should be undertaken and entrusted this task to the Working Group.²

3. At its thirteenth session (A/CN.9/330), the Working Group commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit. The Working Group requested the Secretariat to submit to its fourteenth session a first draft set of articles, with possible variants, on the above issues as well as a note discussing other possible issues to be covered by the uniform law.

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 22.

²Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

4. At its fourteenth session (A/CN.9/342), the Working Group examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 7 of the uniform law. The Working Group also considered the issues discussed in a note by the Secretariat relating to amendment, transfer, expiry, and obligations of the guarantor (A/CN.9/WG.II/WP.68). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a first draft of articles on the issues discussed. It was noted that the Secretariat would submit to the Working Group, at its fifteenth session, a note on further issues to be covered by the uniform law, including fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction.

5. At its fifteenth session (A/CN.9/345), the Working Group considered certain issues concerning the obligations of the guarantor. Those issues had been discussed in the note by the Secretariat relating to amendment, transfer, expiry, and obligations of the guarantor (A/CN.9/WG.II/WP.68) that had been submitted to the Working Group at its fourteenth session but had not then been considered, for lack of time. The Working Group then considered the issues discussed in a note by the Secretariat relating to fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70). The Working Group also considered the issues discussed in a note by the Secretariat relating to conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a first draft set of articles on the issues discussed.

6. At its sixteenth session (A/CN.9/358), the Working Group examined draft articles 1 to 13, and, at its seventeenth session (A/CN.9/361), draft articles 14 to 27 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add.1). The Secretariat was requested to prepare on the basis of the deliberations and conclusions of the Working Group, a revised draft text.

7. The Working Group, which was composed of all States members of the Commission, held its eighteenth session at Vienna, from 30 November to 11 December 1992. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Bulgaria, Canada, Chile, China, Czechoslovakia, Ecuador, Egypt, France, Germany, Hungary, Iran (Islamic Republic of), Japan, Kenya, Mexico, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

8. The session was attended by observers from the following States: Australia, Bolivia, Brazil, Finland, Greece, Indonesia, Lebanon, Malaysia, Netherlands, Nicaragua, Peru, Philippines, Republic of Korea, Romania, Sweden, Switzerland and Ukraine.

9. The session was attended by observers from the following international organizations: International Monetary

Fund (IMF), Hague Conference on Private International Law, Banking Federation of the European Community, International Bar Association, International Union for Marine Insurance (IUMI).

10. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. A. Faridi Araghi (Islamic Republic of Iran)

11. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.75), a note by the Secretariat containing the revision of a draft Convention on international guaranty letters (A/CN.9/WG.II/WP.76 and Add.1) and a note containing a proposal of the United States of America relating to draft rules on stand-by letters of credit (A/CN.9/WG.II/WP.77).

12. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft Convention on international guaranty letters.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

13. It was noted that the draft rules on stand-by letters of credit as proposed by the United States of America (A/CN.9/WG.II/WP.77) were based on the assumption that independent guarantees and stand-by letters of credit would be dealt with in separate parts of the future Convention. It was agreed that the need for such treatment in separate parts could appropriately be determined only when it was clear which, and how many, provisions should be applicable exclusively to bank guarantees or to stand-by letters of credit. The Working Group thus focused its discussion on the draft articles prepared by the Secretariat (A/CN.9/WG.II/WP.76), with special attention to the question whether a given rule was appropriate for both types of undertakings or for only one of them.

14. The deliberations and conclusions of the Working Group relating to draft articles 1 to 8 of the draft Convention are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 1 to 8.

II. CONSIDERATION OF ARTICLES OF A DRAFT CONVENTION ON INTERNATIONAL GUARANTY LETTERS

Chapter I. Sphere of application

Article 1. Substantive scope of application

15. The text of draft article 1 as considered by the Working Group was as follows:

"This Convention applies to international guaranty letters [issued in a Contracting State]."

16. The Working Group reaffirmed its decision taken at its seventeenth session to proceed on the working assumption that the final text would take the form of a convention without thereby precluding the possibility of reverting to the more flexible form of a model law at the final stage of the work (A/CN.9/361, para. 147).

17. Divergent views were expressed as regards the term "international guaranty letters" used in article 1 to delimit the substantive scope of application of the draft Convention. One view was in favour of retaining that term since it embraced in a suitably short way the two types of undertakings to be covered by the Convention, i.e. demand guarantees and stand-by letters of credit. Moreover, the term was in line with the current approach of having common provisions for both types of undertaking unless in particular cases there was a need for referring to only one of those types. However, consideration might be given to using the common name as a shorthand expression only in the provisions of the draft Convention but not in its title where the naming of both types of undertaking might better signal to the reader what the Convention was intended to cover.

18. Another view was that the term was inappropriate since it was not reflective of terminology used in practice. It should therefore be replaced by terms such as bank guarantees (or demand guarantees) and stand-by letters of credit. If, however, there was a need for using a short common name, a truly neutral term such as "undertaking" or "financial assurance" should be used which would not raise the concern of leaning towards one of the two types of undertakings.

19. A concern was that the use of the term "guaranty letter" in the title and article 1 of the Convention might suggest a preference for independent guarantees over accessory guarantees; therefore the qualifier "independent" should be added in the title and article 1. It was stated in reply that article 2 made it clear that only independent guarantees were covered by the Convention.

20. The Working Group was agreed that the need for a common expression depended, at least to some degree, on the future structure of the Convention. If the current approach of largely common provisions (as reflected in document A/CN.9/WG.II/WP.76 and Add.1) was retained, the use of one expression might be preferable from a drafting point of view; if, however, bank guarantees and stand-by letters of credit were to be dealt with in separate parts (as suggested in the United States proposal, A/CN.9/WG.II/WP.77), there would be little need for a common expression.

21. In the light of the divergence of views and the awareness of the linkage with the future structure of the Convention, the Working Group decided to reconsider the terminological issue at a later stage.

22. The Working Group discussed the wording between square brackets "issued in a Contracting State" as a possible criterion for the territorial scope of application of the

Convention. It was noted that the suggested wording represented one of various approaches used in commercial law conventions in that it determined its territorial scope of application by a factor connecting the transaction to a Contracting State autonomously without reference to conflict-of-laws rules. Another approach would be not to provide such a connecting factor and to leave the determination of the applicability exclusively to the rules of conflict of laws (private international law). Yet another approach would be to establish one or possibly two connecting factors and, in addition, provide for the applicability of the Convention in cases where conflict-of-laws rules pointed to the law of a Contracting State. Finally, there was the possibility, tentatively suggested in the current draft, of including in the Convention rules on conflict of laws and jurisdiction.

23. Various questions were raised concerning the delimitation of the territorial scope of application in general and concerning the above approaches. One question was whether the Convention would satisfactorily deal with the situation where only the guarantor but not the beneficiary was in a Contracting State or where only the counter-guarantor but not the second bank issuing an indirect guarantee was in a Contracting State. In that connection, it was suggested that, as provided in article 1(1)(a) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the United Nations Sales Convention), the Convention should apply where the parties concerned had their places of business in different Contracting States. Another question was whether parties in non-contracting States could choose the Convention as governing law. Yet another question was to what extent parties could derogate from provisions of the Convention, only some of which were currently stated to be non-mandatory.

24. As regards the above approaches to determining the territorial scope of application, it was noted that the criterion suggested in article 1 was the same as that suggested in article 27 for determining the law applicable to guaranty letters, failing a choice of law by the parties. While this fact was stated in favour of not providing for a connecting factor in article 1, it was also noted that a territorial factor such as the one suggested would clearly apply to the substantive law provisions of the Convention but not necessarily to the provisions on conflict of laws and certainly not to the provisions of procedural law since those provisions were addressed to the courts of the Contracting States.

25. After deliberation, the Working Group decided to continue its discussion on the territorial scope of application in connection with its discussion on the draft articles on jurisdiction and conflict of laws, in view of the link between those matters.

Article 2. Guaranty letter

26. The text of draft article 2 as considered by the Working Group was as follows:

"(1) A guaranty letter is an independent undertaking [in the form of a demand guarantee or bond or in the form of a stand-by letter of credit,] given by a bank or

other institution or person (“issuer”) [“guarantor”) to pay to another person (“beneficiary”) [or, if so stipulated in the undertaking, to itself acting as a fiduciary or through another branch] a certain or determinable amount of a specified currency or unit of account [or other item of value] [or to accept a bill of exchange for a specified amount] in conformity with the terms and [any documentary] conditions of the undertaking when so demanded in the manner prescribed in the undertaking.

(2) The undertaking may be given

(a) at the request or on the instruction of the customer (‘principal’) of the issuer (‘direct guaranty letter’),

(b) on the instruction of another bank, institution or person (‘instructing party’) that acts at the request of the customer (‘principal’) of that instructing party (‘indirect guaranty letter’), or

(c) on behalf of the issuer itself (‘guaranty letter on issuer’s own behalf’).”

Paragraph (1)

27. The Working Group engaged in an extensive discussion of the various elements contained in the definition of “guaranty letter”. It was noted that the definition, and especially the introductory wording, was crucial for defining the substantive scope of application of the Convention.

“independent undertaking [,in the form of a demand guarantee or bond or in the form of a stand-by letter of credit.]”

28. Various suggestions were made that represented two divergent approaches. One approach was to introduce in the definition as an essential characteristic of the undertakings to be covered the purpose for which the undertaking was given. That purpose could be expressed by such words as currently used in an indirect and non-exclusive manner in article 3, namely as “securing the beneficiary against the non-fulfilment of certain obligations by the principal or against another contingency” or as “guaranteeing fulfilment of an underlying obligation”.

29. In support of that approach, it was stated that the introductory words of article 2(1) defined “guaranty letter” by reference to expressions that were not defined in the Convention and thus did not clearly delimit those types of independent undertakings that were to be covered by the Convention. Without the additional element of the guaranteeing purpose the definition would be too wide and, for example, embrace commercial letters of credit and other independent undertakings for payment against documents. While the guaranteeing purpose did not necessarily have to be stated in the text of each individual undertaking, it was necessary as a common element descriptive of all independent undertakings to be covered by the Convention. The guaranteeing purpose was said to be a practical and understandable point of reference on which the definition could be based. It was also stated that in some countries it was assumed that stand-by letters of credit were issued for the purpose of guaranteeing or backing an underlying obligation and that universal coverage of stand-by letters of credit that were not issued for such purpose would not be well understood.

30. Another approach, opposed to the inclusion of the guaranteeing purpose as an essential requirement, was to refer to the undertakings covered by the Convention by words used in practice to designate those undertakings. This might be done by referring to undertakings designated as bank guarantees or stand-by letters of credit or similarly designated undertakings or, without requiring designation, by merely referring to demand guarantees and stand-by letters of credit as understood and used in the market.

31. In support of that approach, it was stated that the purpose of an undertaking was more a psychological or economic motive than an objective legal element, and that requiring a guaranteeing purpose would introduce an unacceptable degree of uncertainty as to whether the Convention was applicable. Moreover, undertakings were found in stand-by as well as guarantee practice that were not given for a guaranteeing purpose in a strict sense but for purposes of enhancing creditworthiness or for providing an assured mechanism of payment owed by another person (so-called “direct-pay” stand-bys or guarantees). It was further stated that to require a guaranteeing purpose might be construed as establishing a duty of the guarantor or a court to ascertain that purpose, which might erode the independent nature of the undertaking. Even if the purpose was not required to be stated in the individual undertaking, there remained uncertainty as to the consequences of any inaccurate statement of the purpose of a given guaranty letter.

32. While it was recognized that demand guarantees and stand-by letters of credit were typically issued in order to backup an obligation, support was expressed for the approach according to which the Convention would apply to those undertakings without making a particular purpose a definitional requirement for the applicability of the Convention. Nevertheless, it was not considered appropriate to make the applicability dependent solely on the use in the undertaking of the designation “demand guarantee” or “stand-by letter of credit”. It was said that the Convention should recognize the use of undertakings that served the same purpose as demand guarantees or stand-by letters of credit, but did not use those designations. In line with this thinking, support was expressed for stating in article 2 that the undertakings covered were independent undertakings designated as demand guarantee (or bank guarantee), stand-by letter of credit or an equivalent instrument typically given to secure the beneficiary against the non-fulfilment of certain obligations by the principal or against another contingency. In connection with this modification of article 2, it was considered appropriate to provide in article 1 that the Convention applied to demand guarantees and stand-by letters of credit.

33. An alternative suggestion was not to reference any typical purpose but to list those independent undertakings that should not be covered. Examples of such undertakings included insurance contracts and, especially, commercial letters of credit, which the Working Group again decided not to cover in the draft Convention, without thereby precluding consideration at a later stage as to the appropriateness of the finally agreed provisions for commercial letters of credit.

34. After deliberation, the Working Group requested the Secretariat to suggest wording, with possible variants, for articles 2 and 1 that would, with possible reference to the guaranteeing purpose but not as an exclusive requirement, draw the line between, on the one side, commercial letters of credit and other undertakings not covered and, on the other side, demand guarantees and stand-by letters of credit as well as similar undertakings that might emerge in the market.

“given by a bank or other institution or person ([issuer] [guarantor])”

35. A concern was expressed that the reference to “person” might be misinterpreted as establishing the right for individual consumers to issue independent guarantees or stand-by letters of credit. At the same time, it was realized that the test of internationality set forth in draft article 4 was likely to limit the practical consequences of such possible misinterpretation. Moreover, it was understood that the Convention as a text of private law was neither designed nor able to deal with regulatory matters of authorization or prohibition of certain activities. However, if it were later felt that any clarification was needed, consideration might be given to including an indication, for example, along the lines of the footnote appended to article 1 of the UNCITRAL Model Law on International Credit Transfers.

36. A view was expressed that it might be appropriate for the draft Convention to contain different rules for those cases where guaranty letters were issued by banks and financial institutions as an ordinary part of their business and for those cases where a guaranty letter was occasionally issued by a non-professional. The prevailing view was that the legal regime applicable to the guaranty letter should not depend upon the professional or non-professional character of the issuer and that the draft Convention should leave it to other applicable rules of law to determine the legal capacity of entities or persons to issue guaranty letters.

37. As regards the reference to the “issuer” or “guarantor” between square brackets, the view was expressed that the term “issuer” was preferable. Apart from being typical of stand-by letter of credit practice, it was described as sufficiently neutral to be applicable to bank guarantee practice as well, while the term “guarantor” might be misunderstood as embracing the issuer of an accessory guarantee. Another view was that the term “guarantor” should be used since it reflected better the characteristic purpose of the undertakings covered.

38. It was felt that, if a single neutral term to designate the issuing entity were to be used, the same should be done in respect of the designation of the customer who requested the issuance of the guaranty letter. Since no agreement could be reached on common terminology, the Working Group decided to maintain in the draft Convention references to both stand-by letter of credit and bank guarantee terminology and to use the double expressions “guarantor or issuer” and “principal or applicant”, subject to review by the drafting group that would be set up at the next session.

“to pay to another person (“beneficiary”) [or, if so stipulated in the undertaking, to itself acting as a fiduciary or through another branch]”

39. As regards the words “to pay to another person (‘beneficiary’)”, a suggestion was made to replace the word “person” by the words “bank or other institution or person”, as used in the preceding wording describing the issuer or guarantor. In the interest of simplicity and brevity of the definition, the Working Group decided not to accept the suggestion.

40. Divergent views were expressed as regards the wording between square brackets (“or, if so stipulated in the undertaking, to itself acting as a fiduciary or through another branch”). One view was that the wording should be deleted. In support of the deletion it was said that the meaning of the wording was unclear and that the practice intended to be covered gave rise to serious concerns. Both the reference to the issuer acting as a “fiduciary” (or trustee) and the reference to “another branch” were said to lack clarity. As regards the latter reference, it was noted that no provision was necessary for the case where the other branch was a separate legal entity.

41. The concerns expressed in respect of the practice intended to be accommodated by the wording included the following. The role of the issuer as a fiduciary was stated to be potentially in conflict with its responsibilities towards the principal or applicant and that such potential conflict of interest had to be guarded against by high standards of fiduciary conduct, as had been imposed by regulatory authorities in some countries. However, the draft Convention should not condone such practice without itself imposing such high standards, and without providing appropriate operational rules for such special situations. Therefore, the preferable approach was to retain only the words “to pay to another person”, in line with the approach used in the UCP and the URDG. A less far-reaching suggestion was to use the expression “to pay to the beneficiary” which would enable States to provide for an interpretation of the term beneficiary as encompassing the above fiduciary practice.

42. The prevailing view, however, was that the draft Convention should accommodate that practice which was not only found in the context of stand-by letters of credit but occasionally also with bank guarantees. Unlike the UCP and the URDG which constituted operational rules of practice, the draft Convention had to provide clear legal rules about the rights and obligations of the parties and should therefore contain express wording accommodating that practice. The wording might be clarified by using such expression as “acting for and on behalf of another person” or “acting in favour of another person”, instead of using the uncertain concept of fiduciary and the unclear reference to another branch. In order to keep the provision of article 2(1) short and easily readable, it might be sufficient to refer therein simply to payment, or to payment to the beneficiary, and then to include the wording accommodating that practice either in a separate paragraph of article 2 or in article 6.

43. After deliberation, the Working Group requested the Secretariat to prepare revised wording along the lines of the prevailing view.

"a certain or determinable amount of a specified currency or unit of account [or other item of value] [or to accept a bill of exchange for a specified amount]"

44. At the outset, the Working Group was agreed that, in whichever way the object of the payment obligation was finally described in the draft Convention, the reference to "a certain or determinable amount" was necessary in order to provide certainty. It was also agreed that a reference to the possibility of stipulating a specified unit of account might be welcome in view of the increased number of guaranty letters that were stipulated to be payable in units of account.

45. Differing views were expressed as to the desirability of retaining the words "or other item of value", which would place within the scope of the draft Convention guaranty letters in which payment was in a form other than money. A proposal was made to delete those words on the ground that they were too vague and might, for example, embrace services and that any reference to a non-monetary mode of payment might jeopardize the essentially monetary function of the undertaking. It was stated that, while payment in a form other than money might be acceptable if the guaranty letter were conceived primarily as a credit instrument, such mode of payment was not acceptable in the case of an undertaking given for a guaranteeing purpose. The possible need, at the time of payment, to convert an amount of a non-monetary item of value into an amount expressed in a given currency might defeat the purpose of the guaranty letter, which was to ensure prompt payment (a feature described as "moneyness"). While it was felt that payments in precious metals constituted a practice that might increase and should be addressed by the draft Convention, a concern was expressed that payment through commodities might necessitate investigations to ascertain quality, thus detracting from the independence of the guarantor's undertaking. Payment through commodities might implicate various national regulatory laws which might, for example, prohibit certain transfers of commodities.

46. In response, it was stated that inclusion of such instruments within the scope of the draft Convention would not affect the continued applicability of regulatory laws in question. In support of retention of the words "or other item of value", it was also stated that stand-by letters of credit in which payment was made in a form other than money were used and that their use was likely to increase. The draft Convention should therefore include such instruments within its scope so as to avoid restricting the options of the parties, as well as to stay abreast of new forms of payment that might develop in the coming years. It was also suggested that a broad reading of the term "units of account" would not be sufficient to secure coverage of such instruments. The prevailing view was that the question of the modes of payment should be left open to determination by the parties.

47. As regards the reference to the acceptance of a bill of exchange, it was stated that such a mode of payment was rarely used where the main purpose of the undertaking was a guaranteeing purpose. It was stated that it would be contrary to the guaranteeing function to allow the guarantor (or issuer) to accept a bill of exchange instead of paying once

the demand was made. Moreover, where a bill of exchange was discounted before it reached its date of maturity, events might occur (e.g., the issuance of a restraining order) that would prevent payment at the date of maturity; in such a case, uncertainties might arise as to whether the obligation under the guaranty letter had been properly discharged. However, the prevailing view was that, since payments by way of acceptance of bills of exchange were used in practice, the draft Convention should validate such practice.

48. The Working Group discussed the question whether paragraph (1) should contain a provision addressing the case where the issuer was to pay the claim under the guaranty letter after the expiry of a stipulated period of time after the demand for payment. The words "or to incur a deferred payment obligation", mentioned in remark 5 to draft article 2 and suggested in article 2(1) of the United States proposal, were mentioned as possible formulation covering such a case. While some support was expressed for including those words since they reflected a practice to which some banks resorted when so requested by their clients, the concern was expressed that the use of those words might be interpreted as requiring the issuer to assume *vis-à-vis* the beneficiary a payment obligation whose nature was unclear, in particular whether there was a separate and additional obligation to be incurred by the issuer after presentation of the demand. Such a duality of obligations would be a source of concern, in particular when there arose an obstacle to the fulfilment of the obligation incorporated in the guaranty letter.

49. After deliberation, the Working Group was agreed that a provision on deferred payment should not envisage the assumption by the issuer of a payment obligation that was separate from the obligation incorporated in the guaranty letter. However, that would not hinder the stipulation in the guaranty letter of a modality of payment such as "X days after receipt of a conforming demand".

50. While the general view was that any acceptable banking practice should be validated by the draft Convention, it was also stated that, as a matter of drafting, it might be preferable not to include such practical considerations as to the object of the payment obligation in a definition of the guaranty letter, which should be limited to listing the essential elements of the guaranty letter.

51. Divergent views were expressed as to whether the possible objects of the payment obligation should be set forth elsewhere in the draft Convention. One view was that the draft Convention should simply refer to an obligation to pay to the beneficiary in conformity with the terms of the undertaking. Such a general statement would allow commercial practice to develop any appropriate means of payment, while an attempt to list acceptable means of payment might be considered as overly exclusionary. Another view was that the draft Convention should accommodate practice in an express and liberal manner. Silence of the draft Convention as to the means through which an obligation of payment under a guaranty letter might be discharged was likely to be interpreted as overly restrictive and could result in a situation where the draft Convention, for failure to expressly recognize a given means of payment, would be

construed as disqualifying means of payment the parties might have agreed upon. It was suggested that wording along the following lines might be included in article 2(2) or article 6:

“Payment may be made in any form specified in the undertaking, including:

- (a) a deferred payment;
- (b) a specified currency or unit of account;
- (c) the acceptance of a bill of exchange for a specified amount; or
- (d) any other item of value.”

52. After deliberation, the Working Group requested the Secretariat to prepare, in the light of the above suggestions, a revised draft of a provision on acceptable means of payment for later consideration by the Working Group.

“in conformity with the terms and [any documentary] conditions of the undertaking when so demanded in the manner prescribed in the undertaking”

53. The Working Group approved the phrase, subject to the possibility of later reconsidering the expression “any documentary” (particularly the modifier “any”), which was linked to the treatment of non-documentary conditions in draft article 3.

Paragraph (2)

54. The Working Group accepted subparagraphs (a) and (b).

55. As to subparagraph (c), a view was expressed that the traditional understanding of a guarantee was that the guarantor answered for the debt of another and that therefore an undertaking issued by the guarantor in support of its own primary obligation could not properly be regarded as a guaranty letter. Particular reservation was expressed with respect to the possibility that a trading enterprise, as opposed to a bank, would issue a guaranty letter on its own behalf. The Working Group, however, recalling its consideration of the matter at its sixteenth session (A/CN.9/358, paras. 24-25), approved the substance of subparagraph (c). A view was expressed that it might be more appropriate to include the possibility of issuing a guaranty letter on one’s own behalf in the definition of the guaranty letter; by using that approach, the draft Convention would not appear as portraying the issuance of such undertakings as a practice that was at the same level as the issuance of the undertakings mentioned in subparagraphs (a) and (b).

Article 3. Independence of undertaking

56. The text of draft article 3 as considered by the Working Group was as follows:

“(1) [For the purposes of this Convention,] an undertaking is [deemed to be] independent if:

- (a) it provides for payment upon demand and presentation of any specified documents [, without any verification of facts that are outside the operational purview of the issuer];

or

(b) it contains [as its heading and] within its text the words ‘Stand-by letter of credit’ or ‘Demand guarantee’ [or ‘Independent documentary promise’ or ‘International guaranty letter’].

(2) Where an undertaking referred to in paragraph (1)(b) of this article provides for payment upon the occurrence of a future uncertain event without specifying the documentary means for establishing that occurrence, payment is due only upon certification of that occurrence by the beneficiary [or the principal], unless its verification falls within the operational purview of the issuer. The same rule applies to any non-documentary condition for the effectiveness of a guaranty letter or for the [reduction or increase] [adjustment] of its amount.

(3) While the purpose of an undertaking covered by this Convention [would ordinarily be] [may be] to secure the beneficiary against the non-fulfilment of certain obligations by the principal or against another contingency, the undertaking is not subject to, or qualified by, any underlying transaction or other relationship, even if referred to in the undertaking, and the payment obligation does not depend on the [ultimate] determination of the occurrence of that contingency but solely on the presentation of any documents required in the undertaking or by paragraph (2) of this article. [The same rule applies to a counter-guaranty letter in respect of the contingency of the beneficiary of the counter-guaranty letter being demanded to pay under its guaranty letter.]”

Independence of undertaking (paragraph (1)(a))

57. The Working Group decided to retain the words “For the purposes of this Convention” and to remove the words “deemed to be”.

58. Divergent views were expressed as regards the way in which subparagraph (a) defined an independent undertaking. One view was that it was inappropriate and unnecessary to equate the independent character with the documentary character since the documentary character provided a clear-cut criterion while the concept of independence was vague in that there might exist varying degrees of independence. It was stated in response that, depending on the type and number of documents required, it might in some cases be more burdensome than in others for the beneficiary to obtain the required documents but that the undertaking was independent in that payment depended solely on the presentation of facially conforming documents.

59. Another view was that the notion of independence should be retained in subparagraph (a) and that the description of that notion in paragraph (3) provided useful guidance. A similar, and finally prevailing, view was that the notion of independence should not only be retained in subparagraph (a) but also elaborated in that definitional provision. It was suggested that the provision should be modelled on draft article 3(2) of the United States proposal (A/CN.9/WG.II/WP.77), which read as follows:

“An undertaking is independent in that the issuer’s performance to the beneficiary is not subject to or qualified

by the existence or validity of an underlying transaction or of any terms other than those appearing in the undertaking or any condition, act or event other than presentation of stipulated documents.”

60. Various suggestions were made with a view to improving the formulation. One such suggestion was to provide guidance as to the distinction between terms and conditions, for example, by defining “condition” as a future, uncertain event. As regards the reference to “any condition, act or event other than presentation of stipulated documents”, a concern was expressed that this wording might be read as allowing the issuer to act imprudently by disregarding relevant facts known to it.

61. The same concern, based on public policy considerations, was raised as regards the wording between square brackets in subparagraph (a). Another concern in respect of that wording was that the expression “operational purview” was uncertain and inappropriate since the scope of that purview could be influenced by the individual issuer. Another view was that the reference to the operational purview was not needed since the documentary character was sufficiently clearly described by the words “without any verification of facts”.

62. After deliberation, the Working Group requested the Secretariat to prepare a revised version of subparagraph (a) along the lines of draft article 3(2) of the United States proposal.

“Safe-haven” rule (paragraph (1)(b)) and treatment of “non-documentary conditions” (paragraph (2))

63. The Working Group discussed subparagraph (b), according to which parties could ensure that the Convention would apply by designating the undertaking in a certain way (“safe-haven” rule), and the related question of how the Convention should treat a non-documentary condition found in a guaranty letter thus designated. It was felt that, if it were found to be acceptable to disregard non-documentary conditions or to treat such conditions as documentary ones, the safe-haven rule could provide a certain and easily applicable criterion for the applicability of the Convention. If, however, it were found that non-documentary conditions should neither be disregarded nor converted into documentary ones, the safe-haven rule served no practical purpose.

64. One view was that a safe-haven rule was useful since it provided certainty as to the applicability of the Convention. Without such a rule, it would be necessary to screen each guaranty letter as to the presence of any non-documentary condition in order to ascertain whether the Convention applied. Furthermore, it would be inappropriate to deny the applicability of the Convention if by oversight or poor drafting the undertaking contained a non-documentary condition. Some proponents of this view favoured the solution that a non-documentary condition should be disregarded (draft article 3(3) of the United States proposal, A/CN.9/WG.II/WP.77) since the implementation of a required conversion posed serious practical problems. Others favoured the solution that a non-documentary condition should be treated as a documentary one (draft article 3(2)

prepared by the Secretariat, A/CN.9/WG.II/WP.76) since that was less draconian than to ignore the agreed condition.

65. The prevailing view was that the safe-haven rule should not be adopted since it gave priority to a label over the substance or content of an undertaking. Above all, it was not justified to frustrate the intention of the parties by disregarding a non-documentary condition or by requiring that the fulfilment of the condition be certified by the beneficiary. It was pointed out that in practice non-documentary conditions might be within or without the operational purview of the issuer. Some proponents of that view considered that certain less important non-documentary conditions might be disregarded or treated as documentary ones, but that a general safe-haven rule was not acceptable. Accordingly, the Working Group decided to delete paragraphs (1)(b) and (2).

Paragraph (3)

66. In view of the decision to include in paragraph (1) the reference to the independence from the underlying transaction, the Working Group decided not to retain paragraph (3).

Article 4. Internationality of guaranty letter

67. The text of draft article 4 as considered by the Working Group was as follows:

“(1) A guaranty letter is international if:

(a) the places of business specified in the guaranty letter of any two of the following persons are in different States: issuer, beneficiary, principal, instructing party [adviser] or confirmer; or

(b) it expressly states that it is international or that it is subject to [generally recognized] international rules or usages of guarantee or letter of credit practice.

(2) For the purposes of the preceding paragraph:

(a) if the guaranty letter lists more than one place of business of a given party, the place of business is that which has the closest relationship to the guaranty letter;

[(b) if the guaranty letter does not specify a place of business for a given party but specifies its habitual residence, that residence is relevant for determining the international character of the guaranty letter.]”

Paragraph (1)

68. It was generally felt that the scope of application of the draft Convention should be broad. In connection with the discussion of a possible need to broaden the scope of the definition of internationality, it was recalled that the Working Group had previously discussed, and left open the final decision on, whether the draft Convention should extend to domestic transactions. A concern was expressed that, even in the context of purely domestic transactions, the development of modern telecommunication techniques involving the use of computer facilities that might be operated from foreign countries might increase the difficulty in distinguishing international from domestic transactions. It was also stated that, should the scope of the draft Con-

vention be limited to international transactions, possible differences between rules contained in the draft Convention and the general rules of domestic law might be less acceptable.

69. While support was expressed in favour of encompassing domestic transactions, a note of caution was struck about going too far in the direction of regulating domestic transactions since that might affect the acceptability of the draft Convention. States would anyway remain free to use the final text also for domestic transactions. After discussion, the Working Group decided to continue focusing its work on international transactions and to postpone a final decision as to the application of the draft Convention to domestic transactions until it had completed its review of the substantive provisions of the draft Convention.

Subparagraph (a)

70. The Working Group found the objective criteria provided in the subparagraph for determining the internationality of an undertaking to be generally acceptable. However, concerns were expressed as to the reference to the "adviser" of a guaranty letter since the role of an adviser was of a subordinate character. It was stated in reply that advisers might have important functions as paying agents or as negotiating banks and that the reference to the adviser would to some extent broaden the scope of application. The Working Group decided to leave the term "adviser" between square brackets for reconsideration at a later session.

Subparagraph (b)

71. The Working Group next considered the merits of retaining the subjective criteria set forth in subparagraph (b) for determining the internationality of an undertaking. With respect to the possibility that the parties could meet the internationality requirement merely by calling the instrument international, the appropriateness of retaining the provision was questioned, as had previously been the case at the sixteenth session of the Working Group (see A/CN.9/358, para. 70), in particular because it was felt to be inappropriate to describe a purely domestic instrument as international. Such a device might be regarded as an intrusion into the sphere of domestic legislation. Various suggestions were made to limit such possible consequences with respect to domestic legislation. It was suggested that an additional connecting factor be introduced in the paragraph that would require the existence of a link between the object of a given guaranty letter and an international trade transaction. The suggestion was objected to on the ground that it would not be apparent on the face of an instrument whether such a requirement had been met, thus injecting an unacceptable degree of uncertainty. Another suggestion was that subjective criteria might be used to establish the internationality of an undertaking only if the Contracting States were given the possibility of ensuring, by means of a reservation, that parties that opted for the application of the Convention would not be allowed to disregard mandatory rules of public policy (e.g., rules on jurisdiction) in the case where the transaction involved only nationals of that State.

72. After discussion, the Working Group was agreed that a provision should be included in the draft Convention to

the effect of permitting parties to opt for the application of the draft Convention. It was agreed that this should be done in a straightforward manner, rather than through a somewhat artificial extension of the test of internationality. The Working Group decided that a straightforward opting-in provision should be added to article 1 along the following lines: "and to any guaranty letter that states that it is subject to this Convention". Accordingly, it was decided that subparagraph (b) should be deleted. However, consideration might later be given to allowing Contracting States, by way of a reservation, to limit for their nationals the facility of subjecting their relationship to the provisions of the Convention. Another question to be considered at a later stage, in conjunction with the territorial scope of application, was whether parties should be given the facility of opting out of the draft Convention.

Paragraph (2)(a)

73. Various suggestions were made as to the way in which the draft Convention should address the possibility that a guaranty letter specified two places of business for a party, for example, when a guarantor with multiple places of business issued a guaranty letter with its letterhead listing more than one place of business. A first suggestion was that a guaranty letter should fall under the scope of the draft Convention if at least one of the various places of business of a party mentioned on the guaranty letter met the objective criteria set forth in paragraph (1)(a). Such an approach would be consistent with the preference expressed by the Working Group for a broad scope of application of the Convention and would provide a clear and simple solution. The suggestion was objected to on the ground that the place of business of a party should be relevant for determining whether an undertaking was international only if that place of business was somehow linked to that undertaking.

74. A second suggestion was that a preferable solution, as currently expressed in subparagraph (a), was to require some functional link between the relevant place of business and the guaranty letter. The possible difficulties in determining the closest relationship were regarded as acceptable in view of the fact that banks were unlikely to issue undertakings with a plurality of places. It was also stated in support of retention of the subparagraph that it was based on similar provisions that had been incorporated in a number of international conventions and that were therefore widely accepted and understood. A third suggestion was that, in case of a doubt as to the relevant place of business of a party, the principal place of business of that party should be decisive. That suggestion was objected to on the ground that there might be uncertainty as to what constituted the principal place of business of a party.

75. After discussion, the Working Group decided to retain the substance of the subparagraph.

Paragraph (2)(b)

76. The question was raised whether a rule relating to habitual residence was necessary. It was stated in reply that the draft Convention should address the case, however rare, where a given party (e.g., a non-professional party) had no place of business. It was also observed that the indication

of a place or address of a given party did not always reveal whether it was a place of business or the habitual residence. It was suggested that a solution to that difficulty might be not to use the words "place(s) of business" in article 4 but simply to refer to the "place" of a given party. After discussion, the Working Group adopted that proposal and, as a consequence, decided to delete subparagraph (b).

Chapter II. Interpretation

Article 5. Principles of interpretation

77. The text of draft article 5 as considered by the Working Group was as follows:

"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international guarantee and stand-by letter of credit practice."

78. The appropriateness of including a provision on interpretation in the draft Convention was questioned in view of the fact that generally applicable principles of interpretation were already contained in the 1969 Vienna Convention on the Law of Treaties. It was generally felt, however, that, as was already the case in other international instruments such as the United Nations Sales Convention, it was preferable to include in the draft Convention a specific provision on interpretation.

79. As to the wording of the provision, a concern was expressed that the reference to "good faith" might be more appropriate as a standard of conduct to be observed by parties to a guarantee transaction than as a standard for the interpretation of a legal text. Another concern was that the reference to the concept of "good faith" might raise difficult questions of interpretation in some jurisdictions. However, it was generally agreed that a provision along the lines of article 5, as embodied in many comparable international conventions, was useful. As to the drafting of the provision, a view was expressed that there was no need to limit the promotion of good faith to international guarantee and stand-by letter of credit practice. Instead, a general reference should be made to "the observance of good faith in international trade", along the lines of article 7(1) of the United Nations Sales Convention. Another suggestion was to simplify the text and to refer only to the need to promote uniformity and good faith in international guarantee and stand-by letter of credit practice.

80. After discussion, the Working Group decided to retain article 5 in its current wording.

Article 6. Rules of interpretation and definitions

81. The text of draft article 6 as considered by the Working Group was as follows:

"For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) 'guaranty letter' includes 'counter-guaranty letter' and 'confirmation of guaranty letter', and 'guarantor' includes 'counter-guarantor' and 'confirmer';

(b) any reference to the guaranty letter or the undertaking of the issuer, or to its terms and conditions, is to the text as originally established in accordance with article 7 or, if later amended in accordance with article 8, to the text in its last amended version;

(c) where a provision of this Convention refers to a possible agreement or stipulation of the parties, the parties meant are the issuer and the beneficiary of the guaranty letter in question;

(d) 'counter-guaranty letter' means a guaranty letter given to the issuer of another guaranty letter by its instructing party [or to the issuer of another guarantee or letter of credit] and providing for payment upon demand and presentation of any specified document stating that payment [under that other guaranty letter or undertaking] has been demanded from, or made by, the beneficiary of the 'counter-guaranty letter';

(e) 'counter-guarantor' means the issuer of a counter-guaranty letter;

(f) 'confirmation' of a guaranty letter means an independent undertaking added to that of the issuer providing the beneficiary with the option of demanding payment and, unless expressly stipulated otherwise, presenting any required documents to the confirmer [instead of to the issuer];

(g) 'confirmer' means the person confirming a guaranty letter;

(h) 'document' means a communication made in a form that provides a complete record thereof [and is authenticated as to its source by generally accepted means or by a procedure agreed with the recipient]."

Subparagraph (a)

82. A concern was expressed that the text of subparagraph (a) might be misinterpreted as equating the legal nature of the confirmation of a guaranty letter with the nature of a counter-guaranty letter. It was explained that, while the confirmation of a guaranty letter would give the beneficiary an option to claim payment either from the issuer of the original guaranty letter or from the confirmer, payment under a counter-guaranty letter could be sought exclusively from the counter-guarantor. In response, it was stated that that difference between a counter-guaranty letter and a confirmation was clearly reflected in the definitions in subparagraphs (d) and (f). Moreover, subparagraph (a) merely established as a rule of interpretation that provisions referring to a "guaranty letter" were also applicable to a counter-guaranty letter and to the confirmation of a guaranty letter unless otherwise indicated in the draft Convention or required by the context. It was generally agreed that subparagraph (a) had no bearing on the legal nature of the counter-guaranty letter.

83. After discussion, the Working Group found the text of the subparagraph to be generally acceptable.

Subparagraph (b)

84. While the view was expressed that the rule contained in subparagraph (b) might be considered as self-evident, it was felt that such a rule should be maintained in the text of the draft Convention. Another view, however, was that the provision contained in subparagraph (b) might create difficulties, particularly in the situation where a payment under a guaranty letter was effected by means of a negotiable instrument that was negotiated prior to the later amendment of the guaranty letter. It was stated that the draft Convention should expressly address that situation to ensure that a bona fide holder of the instrument could base a claim for payment on the amount stipulated in the text of the guaranty letter as it stood at the time when the instrument was negotiated. A similar concern was expressed with respect to the situation where rights under the guaranty letter were transferred prior to an amendment.

85. While support was expressed for the deletion of subparagraph (b), it was generally agreed that the concerns expressed should not be discussed in the context of article 6, which merely established an interpretation rule and expressly allowed for possible exceptions, but that they should be addressed during the discussion of the substantive rules set forth in articles 8 and 9 on amendment and transfer of rights. In addition, it was stated that matters such as the date relevant for establishing the rights and obligations of the parties would normally be addressed in the text of the amendment itself.

86. After discussion, the Working Group decided to place the text of subparagraph (b) between square brackets, subject to later reconsideration after review of the substantive provisions of the draft Convention.

Subparagraph (c)

87. The view was expressed that subparagraph (c) should be deleted since it might be overly restrictive and create uncertainty in the case where parties other than the issuer and the beneficiary of a guaranty letter might be envisaged under a provision of the draft Convention. For example, it was stated that, while the issuer and the beneficiary were the normal parties to the undertaking, such issues as amendment, assignment of proceeds, transfer of rights and notification that a demand for payment had been presented under the guaranty letter would typically involve "parties" other than the issuer and the beneficiary of the guaranty letter.

88. A view was also expressed that the reference to a possible "stipulation of the parties" should be dealt with separately from the "agreement of the parties". While the word "agreement" rightly referred to both the issuer and the beneficiary of a guaranty letter, the word "stipulation" was to be understood as encompassing the provisions contained in the text of the guaranty letter and thus referred to the guarantor only. It was stated that the current text should therefore be redrafted to avoid the possible misinterpretation that the consent of the beneficiary be required with respect to the stipulations of the undertaking.

89. In favour of retention of subparagraph (c), it was stated that, by addressing the "agreement or stipulation of

the parties", subparagraph (c) only dealt with the relationship between the guarantor and the beneficiary, which was distinct from all other legal relationships envisaged in the draft Convention, and which the Working Group had previously agreed should be the focus of the draft Convention. It was also noted that subparagraph (c) merely set forth a general rule of interpretation to which exceptions could be made. Furthermore, as a matter of drafting, the only alternative to a general provision, such as currently embodied in subparagraph (c), was to designate expressly the parties concerned in each specific provision of the draft Convention containing a rule applicable to "parties". While it was noted that such a drafting technique might be excessively cumbersome, the Working Group was generally agreed that subparagraph (c) should be deleted and the parties expressly designated in each relevant provision of the draft Convention, subject to reconsideration of the issue by the Working Group at a future session.

Subparagraph (d)

90. The view was expressed that the definition should be limited to establishing that a counter-guaranty letter meant a guaranty letter given to the issuer of another guaranty letter by its instructing party. As to the rule that payment under the counter-guaranty letter would be conditioned by the production of a statement that payment under the other guaranty letter had been demanded from, or made by, the beneficiary of the counter-guaranty letter, it was suggested that that rule might undermine the independence of the counter-guaranty letter from the other guaranty letter.

91. While support was expressed for the deletion of the latter portion of subparagraph (d), the prevailing view was that the current text sufficiently established that, in all cases, the obligation of the counter-guarantor under the counter-guaranty letter was to be regarded as legally independent not only from the underlying commercial relationship between the principal and the beneficiary but also from the other guaranty letter issued to the ultimate beneficiary. It was also felt by the Working Group that the reimbursement function performed by the counter-guaranty letter in the context of inter-bank relationships should be reflected in the text of the draft Convention, as was done in the latter portion of the current text of subparagraph (d).

92. After discussion, the Working Group found the text of subparagraph (d) to be generally acceptable.

Subparagraph (e)

93. The Working Group accepted subparagraph (e).

Subparagraph (f)

94. It was proposed to add to subparagraph (f), which defined "confirmation", the requirement that a confirmation had to be authorized by the issuer. Clarifications were given that some banks had a policy not to have their guarantees or stand-by letters of credit confirmed by other banks, but that nevertheless beneficiaries sought, and sometimes obtained from their banks, an undertaking that purported to be a confirmation without the issuer being informed about or having authorized the undertaking given by the beneficiary's bank. Such unauthorized confirmations

were sometimes in practice referred to as "silent confirmations". It was further said that issuing banks were, as a matter of principle, dissatisfied with the practice of silent confirmations, one reason being that it involved them in relations with banks with which the issuing banks would not otherwise deal.

95. One view was to leave subparagraph (f) unchanged and to deal in the operative provisions of the draft Convention with consequences of a silent confirmation. One such consequence would be that a confirmer acting without authorization would have no right to reimbursement from the issuer.

96. However, the widely prevailing view was supportive of including the element of authorization in the definition; thus, a silent confirmation would not be a confirmation under the draft Convention, and it would depend on the terms of the silent undertaking whether or not it was to be regarded as an independent and documentary undertaking governed by the draft Convention. It was agreed to consider at a later stage whether silent confirmations should be mentioned in the draft Convention.

97. A suggestion was made to address in the draft Convention other issues concerning the relationship between the issuer and the confirmer (in particular the issue of reimbursement). The Working Group reserved its decision as to whether it was appropriate for the Convention to deal with those issues.

Subparagraph (g)

98. The Working Group accepted subparagraph (g).

Subparagraph (h)

99. A view was expressed that the concept of "a communication made in a form that provides a complete record" was unclear and could be confounded with archiving of documents. The question was raised whether oral communications recorded on certain types of media, such as laser discs, which were an inalterable medium, were covered by the concept. If the purpose of the definition was to validate the use of electronic data interchange (EDI), it would be more appropriate to refer to EDI directly, for example, in a manner done in article 2(d) of URDG. It was stated in reply that the notion of EDI was in itself highly unclear. The Working Group, in approving the drafting approach taken in regard of the form of documents, noted that the purpose of referring to "a communication made in a form that provides a complete record" was to exclude from the draft Convention purely oral communications. It was observed that the provision on the form of documents should be understood as requiring records to be in tangible form, while being broad enough to embrace equivalent forms that might be developed in practice.

100. A suggestion was made to include within the definition of "document" bills of exchange, promissory notes and demands for payment so as to avoid any uncertainty as to the applicability of the Convention to clean stand-by letters of credit and simple demand guarantees. The Working Group did not discuss the suggestion.

101. It was suggested that the wording between square brackets be deleted. It was said that authentication and in particular its form were matters that depended on the terms and conditions of the undertaking as well as on the applicable law; thus, an unqualified requirement of authentication was not a necessary element of the definition of document. A counter-suggestion was to retain the wording unchanged in view of the generally accepted requirement that documents to be presented under a guaranty letter had to be authentic. A further suggestion was for the subparagraph to clarify the nature of the requirement of authentication. Some supporters of that suggestion considered that the subparagraph should limit itself to requiring authentication "where appropriate" or "where required by the terms and conditions of the undertaking" without a reference to the applicable law; it was said that observance of the applicable law was to be assumed and that it was not necessary for the draft Convention on that point to touch upon the question of the applicable law. Others were of the view that the subparagraph should clarify that documents had to be authenticated if so, and in the form, required by the applicable law or by the terms and conditions of the undertaking. After deliberation, the Working Group adopted that latter view.

102. A concern was expressed that the reference to "generally accepted means" of authentication was unclear in that it did not give sufficient guidance as to what standard of authentication was required, and a suggestion was made to either delete the words "as to its source by generally accepted means or by a procedure agreed with the recipient" or to clarify the standard of authentication. As a possible way to clarify the matter, it was suggested to use the concept of commercially reasonable method of authentication, used in article 5(2) of the UNCITRAL Model Law on International Credit Transfers.

Suggested addition of definition of "condition"

103. It was recalled that, in connection with the decision by the Working Group to adopt a definition of an independent undertaking that relied on a distinction between the terms and the conditions of the undertaking, a suggestion had been made that guidance should be provided in the draft Convention as to the distinction between terms and conditions (see above, paragraphs 59-60). A proposal was made to define in article 6 the word "condition" as referring to a future, uncertain event. While such a definition was commonplace in the legislation of many countries, it might serve a useful purpose in the draft Convention for other countries, and it would be of special value in all those countries where the expression "condition" was also used to refer to any clause or stipulation in an undertaking. It was generally felt that, should the draft Convention define "condition", the word "term" should also be defined.

104. While support was expressed in favour of the proposed definitions, there were also doubts expressed as to the need for such general definitions. It was noted that, except for article 3(1)(a) where a distinction between the notions of "term" and "condition" would be crucial, the wording "terms and conditions" was used indistinctively throughout the draft Convention as an equivalent for the word "stipulations". After discussion, the Working Group

was agreed that, since the words "terms" and "conditions" were used with a specific meaning in article 3(1)(a), an attempt should be made to incorporate the notion of a "condition" as a future, uncertain event into that article, where it served an essential purpose in the definition of the independence of an undertaking by placing those undertakings that were subject to non-documentary conditions outside the scope of the draft Convention. If that attempt were to prove unsuccessful, the question of providing general definitions for the words "term" and "condition" could be reconsidered.

Suggested addition of a definition of "stand-by letter of credit"

105. It was recalled that, at a previous session, the Working Group had accepted a suggestion that a definition of the term "stand-by letter of credit" should be added to the draft Convention (A/CN.9/358, para. 74). It was stated that the purpose of such a definition might be to distinguish a stand-by letter of credit not only from a bank guarantee but also from a commercial letter of credit. It was noted that the definition of a stand-by letter of credit contained in article 2 of the United States proposal differed little in substance from the definition of a guaranty letter in the draft Convention. In addition, article 6(2) of the United States proposal contained a description of a number of possible types of stand-by letters of credit characterized by their purpose in a given commercial or financial context as reflected in the contents of the required documents.

106. The view was expressed that a definition of the stand-by letter of credit would be particularly useful if the different features of the stand-by letter of credit and of the bank guarantee were found to be of such a nature that the draft Convention should deal with the two instruments in two separate sets of rules, in which case a definition of the bank guarantee would also be needed. Should most provisions of the draft Convention eventually be found to be equally applicable to both instruments, the need for such definitions might be less obvious.

107. With respect to a possible distinction between a stand-by letter of credit and a commercial letter of credit, it was noted that in those countries where stand-by and commercial letters of credit were used extensively, the same legal regime applied to both instruments and there existed no abstract definition of a stand-by letter of credit. The only known distinction, based on an assessment of the different credit risks that were inherent in the two types of instruments, was that established by banking regulatory authorities for reasons of capital adequacy. It was suggested that a definition relying on the purpose of the undertaking might be desirable and that such a definition might describe a stand-by letter of credit as a letter of credit issued for a guaranteeing purpose (or as a guarantee undertaking given in the form of a letter of credit). However, it was stated that a definition along those lines would not be workable in practice since undertakings were found in stand-by (as well as guarantee) practice that were not given for a guaranteeing purpose in a strict sense but for purposes of enhancing creditworthiness or for providing an assured mechanism of payment owed by another person (so-called "direct-pay" stand-bys or guarantees). Another suggestion

was that the only workable criterion to distinguish a stand-by from a commercial letter of credit might be a formal one, stand-by letters of credit being letters of credit that called themselves stand-by letters of credit.

108. As regards the distinction between stand-by letters of credit and bank guarantees, a suggestion, based on article 6 of the United States proposal, was that, instead of attempting to establish an abstract definition of a stand-by letter of credit, the Working Group might consider as an appropriate focus for its work a list of conceivable forms of stand-by letters of credit. It was noted, however, that the proposed list was not exhaustive and that various other practices involving stand-by letters of credit might also need to be included. Moreover, a definition of a "direct-pay" stand-by letter of credit might be necessary, despite the attempt to cover it in a broad definition of a financial stand-by. As a possible definition of a direct-pay stand-by letter of credit, the following tentative wording was suggested:

"A direct-pay stand-by, which provides for honour upon presentation of documents stating that payment is due in direct payment of a financial obligation."

109. Objections were raised against attempting to define a stand-by letter of credit by way of a list of examples. It was stated that a description of various types of guaranty letters would not serve the definitional purpose of determining the applicability of the draft Convention or of certain provisions of the draft Convention; such a mere description, however informative it might be, would not be appropriate in a text of a legislative nature such as the draft Convention. Moreover, it was pointed out that a definition by way of examples for the purpose of differentiating the two instruments was only valuable to the extent that the practices described were typical of one instrument as opposed to the other one. However, most of the functions performed by stand-by letters of credit were identical to the purposes for which bank guarantees were given.

110. After discussion, it was concluded that a stand-by letter of credit was distinguishable from independent guarantee undertakings by its form only. The Working Group decided that, for the time being, a stand-by letter of credit should be described in the draft Convention as a guaranty letter that adopted the form of a letter of credit. However, a concern was expressed that in those countries where there existed no statutory or other legal definition of the notion of "letter of credit", a reference to "the form of a letter of credit" would not provide the necessary certainty.

Chapter III. Effectiveness of guaranty letter

Proposal for a new provision on required contents of a guaranty letter

111. A suggestion was made to include in chapter III a provision enumerating certain elements that a guaranty letter had to contain. Examples of such elements were the places of the issuer and the beneficiary, the currency and amount of the guaranty letter, the place of payment, the place where documents were to be presented and the date of expiration of the guaranty letter. The proposal was not

accepted since it was felt that the imposition of necessary requisites would be too strict in that it would lead to the invalidity of many undertakings with missing elements, while it might be useful to provide guidance in rules of practice (as done in article 3 URDG). Moreover, it seemed preferable to leave to practice the level of detail at which guaranty letters would be issued. Furthermore, the amount of information included in various elements of a guaranty letter might develop, for example, as a result of developments in the area of communication and recording techniques, and the suggested requirements might stand in the way of such developments.

Article 7. Establishment of guaranty letter

112. The text of draft article 7 as considered by the Working Group was as follows:

“(1) A guaranty letter may be established in any form which preserves a complete record of the text of the guaranty letter and provides authentication of its source by generally accepted means or by a procedure agreed upon by the parties.

(2) *Variant A:* Unless otherwise stated therein, a guaranty letter becomes effective and irrevocable when it leaves the issuer’s sphere of control (‘issuance’).

Variant B: A guaranty letter becomes effective and [unless it expressly states that it is revocable,] irrevocable when it is issued, provided that it does not state a different time of effectiveness.”

Paragraph (1)

113. The Working Group accepted paragraph (1).

Paragraph (2)

114. The use of the expression “effective”, used in both variants, was criticized for being unclear as to whether it referred to the act of putting in place the guaranty letter as a binding and irrevocable undertaking or to the time as of which the guaranty letter was in force entitling the beneficiary to make a conforming demand for payment. While retaining the term “effective”, the Working Group was agreed that the meaning of that term might need to be clarified.

115. The Working Group, having reaffirmed its decision that the guaranty letter should become effective at the time of its issuance, as opposed to the time of its receipt by the beneficiary, noted that the concept of issuance used in article 7(2) was the same as the concept of issuance used in article 8(2), which dealt with amendment of the guaranty letter. A view was expressed that the terms “issuance” in variant A and “issued” in variant B appeared to imply that the guaranty letter was a unilateral act as opposed to a contract. The Working Group, recalling its understanding that the draft Convention would not address that question of the legal nature of the guaranty letter, was of the view that the notion of issuance was appropriate and that the use of the notion should not be understood as giving an answer to that question.

116. Doubts were expressed as to the utility of the test of “the issuer’s sphere of control” incorporated in variant A

for defining the issuance of the guaranty letter. It was said that the test was unclear and gave rise to more questions than it solved. The prevailing view, however, was that the test was useful in that it provided guidance for the interpretation of the concept of issuance.

117. The Working Group preferred the drafting approach taken in variant B. While a suggestion was made for deleting in that variant the reference in square brackets to revocability, the widely prevailing view was that the reference should be retained. In accordance with the prevailing view on the utility of defining “issuance”, it was decided to include in article 6 a provision defining the moment of issuance of the guaranty letter as the moment when the guaranty letter left the issuer’s sphere of control.

Article 8. Amendment

118. The text of draft article 8 as considered by the Working Group was as follows:

“(1) A guaranty letter may be amended in the form agreed upon by the parties or, failing such agreement, in any form referred to in paragraph (1) of article 7.

(2) The amendment becomes effective, unless a different time of effectiveness is stated in the amendment or has been agreed upon by the parties,

Variant A: when it is issued [by the issuer], provided that it consists solely of an extension of the validity period of the guaranty letter; any other amendment becomes effective when the issuer receives a notice of acceptance by the beneficiary, unless a different time of effectiveness is stipulated.

Variant B: when it is issued, unless the issuer receives a notice of rejection by the beneficiary within [ten] [business] days.

[(2 *bis*) An amendment affects the confirmation of a guaranty letter only if the confirmer consents to the amendment.]

[(3) *Variant Y:* The provisions of paragraphs (1) and (2) of this article do not entitle the issuer to invoke the amendment in support of any claim for reimbursement against the principal if the issuer failed to obtain the consent of the principal required by agreement or law.

Variant Z: When issuing an amendment, the issuer shall promptly dispatch a copy thereof to the principal.]”

Paragraph (1)

119. The Working Group found the text of the paragraph to be generally acceptable.

Paragraph (2)

120. With respect to the proposed variants, the Working Group noted that while variant B embodied the concept of implied or silent acceptance, variant A required express agreement by the beneficiary. While views were expressed in favour of each variant, it was generally felt that, as a general rule, implied agreement by the beneficiary should not be presumed, since an amendment inherently affected the legal position of the beneficiary. A general rule equat-

ing silence and implied agreement by the beneficiary would be unfair since silence might be caused by difficulties in communication or by other events beyond the control of the beneficiary. It was also not in line with banking practice as reflected in draft article 9(d)(iii) of the proposed revision of the UCP.

121. At the same time, a concern was expressed that a general rule requiring that notice of acceptance be given by the beneficiary along the lines of variant A might be excessively burdensome. It was observed that in practice the vast majority of amendments were made at the request of the beneficiary. Where an amendment was based on a request by the beneficiary presented to the guarantor either directly or indirectly through the principal, the consent of the beneficiary should be presumed. It was stated in response that the time of effectiveness should not be made dependent on such uncertain and not easily verifiable criteria as whether the amendment originated from a request by the beneficiary. It was noted, however, that amendments made pursuant to a request by the beneficiary addressed to the issuer would be covered by the general rule if acceptance were to be understood as covering previous consent.

122. Based on a similar concern, a suggestion was made that the rule expressed in variant A should apply only to the very few cases where the amendment was detrimental to the beneficiary. In response, it was recalled that the Working Group at previous sessions had examined proposals to prepare a dual set of rules depending on whether a given amendment was beneficial or detrimental to the beneficiary. As had been felt then, rules that involved subjective judgements were not easy to administer and did not provide the certainty required in practice. As an example, it was stated that it might be difficult to decide whether a change in the place or currency of payment would be favourable to the beneficiary (see A/CN.9/358, para. 98). Even the extension of the validity period of the undertaking might not, in certain circumstances, be considered as favourable to the beneficiary.

123. Yet another concern was that the rule contained in variant A might be overly burdensome to the issuer of the amendment if no time limit was imposed on the beneficiary for notifying its agreement to the amendment. The draft Convention should provide a fixed period of time (e.g. 15 or 30 days) after which an issuer who had not received a required notice of acceptance could assume rejection of the amendment. The suggestion was opposed on the grounds that no fixed period of time would be appropriate in all cases and that any issuer who wanted certainty about the beneficiary's reaction was free to set a time limit for the beneficiary's acceptance.

124. A suggestion was made to specify in paragraph (2) that agreement by the beneficiary, whether implied or express, validated the amendment as of the date of issuance of the amendment, irrespective of whether the agreement had emanated from the beneficiary prior to the issuance of an amendment or whether the agreement validated the amendment retroactively.

125. A suggestion was made to consider at a later stage the treatment of partial acceptance.

126. After deliberation, the Working Group was agreed on the principle that the effectiveness of an amendment depended on the consent of the beneficiary. Such consent might be given before or after the issuance of the amendment, and it might be given expressly in any form or it might be implied in a certain act. As regards possible exceptions to the general rule, the Working Group was agreed that further information on banking practice was needed for determining the appropriateness of making an exception for certain types of amendments such as those solely extending the validity period or increasing the amount. It was further agreed that the parties should be permitted to derogate from the provisions of the draft Convention and that, thus, standby letters of credit incorporating the UCP would not be subject to the amendment rules contained in the Convention.

127. The Working Group requested the Secretariat to prepare a new draft of paragraph (2) reflecting the above discussion and conclusions for further consideration at a later session.

Paragraph (2 bis)

128. While the principle contained in paragraph (2 bis) met with the general agreement of the Working Group, divergent views were expressed on the appropriateness of retaining the paragraph. One view was that, since the principle contained in the paragraph obtained even if the paragraph were not included in the draft Convention, the paragraph should be deleted. Another view, which received considerable support, was that paragraph (2 bis) was useful; it was important to emphasize that the confirmer's undertaking was independent since the confirmation, according to article 6(f), constituted an additional undertaking on the very same guaranty letter that was now being amended by the issuer and since, at the moment of the confirmation, the content of the confirmer's undertaking tracked the content of the issuer's undertaking.

129. Those that supported the retention of the substance of the paragraph were of different opinions as to how that substance should be expressed. One opinion was that the current wording of paragraph (2 bis) should be retained. Another opinion was that the paragraph should be limited to stating only the principle that an amendment of the guaranty letter did not affect the rights and obligations of the confirmer of that guaranty letter. According to yet another opinion, it would be useful to add to that principle the wording "unless consented to by the confirmer". An observation was made that consent to an amendment could be given either upon receipt of information on the amendment or in advance of any future amendment of a certain kind.

130. The Working Group discussed the appropriateness of adding to the paragraph a reference to the form in which consent could be given. A suggestion was made to establish a rule to the effect that the form of consent should be the same as the form in which the original confirmation had been given. Others considered that, if a rule on form was needed at all, the preferable rule would be to allow consent to be expressed in any form mentioned in article 7(1), even if it was different from the form in which the original confirmation had been given. Strong reservations

were expressed regarding the proposal to include in the draft Convention a rule on the form of consent. It was stated that no problems were reported in respect of the form in which consents to amendments were given; thus, it was preferable to leave the matter to practice to establish suitable rules.

131. It was recalled that a confirmation had to be authorized by the issuer and that "silent confirmations" were not to be considered confirmations in the sense of the draft Convention (see above, paragraph 96). While it was suggested that the principle of paragraph (2 *bis*) should also apply to an amendment of a "silent confirmation", it was noted that the Working Group had not yet decided on whether "silent confirmations" should be mentioned at all in the draft Convention.

Proposal for extension of rule to include counter-guarantor

132. Some support was expressed for the suggestion that a new provision be added to the effect that, when a counter-guaranty letter was issued to the issuer of another guaranty letter, a modification in one of those two guaranty letters did not affect the other guaranty letter. It was stated in support that the counter-guaranty letter was an independent undertaking, as was a confirmation, and that, after the decision of the Working Group to delete article 3(3), the draft Convention nowhere expressly stated that the counter-guaranty letter was independent from the other guaranty letter. Reservations were stated regarding the suggestion. It was said that it followed clearly from the draft Convention that a counter-guaranty letter, as a guaranty letter, was an independent undertaking and that stating that principle in the limited context of article 8 would not be in harmony with the structure of the draft Convention. Furthermore, a counter-guaranty letter might contain terms and conditions that ratified in advance some types of amendments that might be made to the guaranty letter for which the counter-guaranty letter was issued, and it required detailed drafting to express the difference between such possible indirect effects and the principle embodied in paragraph (2 *bis*), namely that the amendment was not effective towards third parties. (See further discussion below, paragraphs 135-138)

Paragraph (3)

133. Differing views were expressed regarding paragraph (3). One view was that paragraph (3) should be retained. In that connection, it was suggested that both variants Y and Z should be retained and combined into one paragraph in reverse order.

134. Another view was that paragraph (3) should be deleted. Proponents of that view criticized in particular variant Z as giving rise to more problems than it attempted to solve. It was said that variant Z was unclear as to whether the consequence of a failure to dispatch a copy of the amendment was invalidity of the amendment or loss or restriction of the right to reimbursement.

Proposal for merged provision

135. A proposal was made to include in article 8 a rule providing that an amendment of the guaranty letter had no effect on the rights and obligations of the confirmer,

counter-guarantor and principal. The proposed rule was to replace current paragraphs (2 *bis*) and (3). Various observations and suggestions were made in respect of the proposal, based on positions taken previously in respect of the proposed extension of paragraph (2 *bis*) to counter-guarantors and of paragraph (3).

136. One observation was that the rights and obligations mentioned in the proposal were diverse in nature and origin: the rights and obligations of the confirmer tracked those of the issuer of the confirmed guaranty letter; the rights and obligations of the counter-guarantor arose from a separate undertaking that was independent from the other guaranty letter; and the rights and obligations of the principal pertained to the underlying transaction that was distinct from the guaranty letter. Thus, the terms of the proposed rule would have a different meaning depending on the relationship at issue. In that context, it was noted that UCP, the set of rules relevant to stand-by letters of credit, was limited to addressing only the effect of an amendment on the confirmer. The suggested conclusion was that the article should not address the rights and obligations of the counter-guarantor and principal.

137. According to another suggestion, the proposed provision should refer to the confirmer and the principal, but not to the counter-guarantor.

138. After deliberation, the Working Group decided to reconsider the question of a rule encompassing the principal (or instructing party) on the basis of a redrafted version of paragraph (2 *bis*) that would cover the confirmer and the principal (or instructing party).

III. FUTURE WORK

139. The Working Group noted that the dates of its next session had had to be changed and that the session would be held from 24 May to 4 June 1993 in New York.

140. It was agreed that the Working Group, at that session, would not have before it and consider a revised text of articles 1 to 8 but would continue its discussion of the current draft text, commencing with article 9.

141. Concerned about the pace of its work during the current session, the Working Group accepted a suggestion to consider its working methods at the beginning of its next session. Various proposals were made for consideration by the Working Group. One proposal was that representatives and observers might, between sessions of the Working Group, wish to consider, and hold consultations within their countries on, especially those substantive issues that were known from previous reports to be open and controversial. Another proposal was to find ways of enhancing the process of consensus building and the spirit of compromise. Procedural proposals included the utilization of ad hoc working parties that would, outside meeting hours, prepare drafts to be considered by the Working Group later in the same session, the adoption of a time schedule allotting limited time to the discussion of individual articles, and to limit the time for individual interventions.

**B. Working papers submitted to the Working Group on International Contract Practices
at its eighteenth session**

***1. Independent guarantees and stand-by letters of credit: revised articles
of draft Convention on international guaranty letters: note by the Secretariat
(A/CN.9/WG.II/WP.76 and Add.1) [Original: English]***

[A/CN.9/WG.II/WP.76]

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[A/CN.9/WG.II/WP.76]

INTRODUCTION

1. The Working Group on International Contract Practices examined at its sixteenth session draft articles 1 to 13 and at its seventeenth session draft articles 14 to 27 of a uniform law on international guaranty letters prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add.1). The deliberations and conclusions of the Working Group are set forth in the reports of the Working Group on those two sessions (A/CN.9/358 and 361). The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 1 to 27.

2. The present note has been prepared pursuant to that request. It presents revised articles on sphere of application, interpretation and effectiveness of guaranty letter. Revised articles on rights, obligations and defences, and on court measures, jurisdiction and conflict of laws will be presented in an addendum to this note. The style of presentation is the same as that used in previous drafts and explained in paragraphs 3 and 4 of the introduction to document A/CN.9/WG.II/WP.73.

CHAPTER I. SPHERE OF APPLICATION

Article 1. Substantive scope of application [1]

This Convention [2] applies to international guaranty letters [3] [issued in a Contracting State] [4].

Remarks

1. The article heading should be modified to read "Scope of application" if the suggested addition of a territorial connecting factor would be accepted (see remark 4).

2. The term "Convention" is used here and in other provisions of the draft text following the Working Group's decision "to proceed on the working assumption that the final text would take the form of a convention without thereby precluding the possibility of reverting to the more flexible form of a model law at the final stage of the work when the Working Group would have a clear picture as to the provisions included in the draft text" (A/CN.9/361, para. 147).

3. Despite a concern expressed at the sixteenth session that the term "guaranty letter" did not embrace the stand-by letter of credit, the term has been retained in view of the Working Group's conclusion that it would be premature to take a final decision on the nominal issue of a common name (A/CN.9/358, para. 15). In an effort to meet that concern, revised article 2 defines the term expressly as embracing the independent guarantee and the stand-by letter of credit; that clarification might also be included in article 1. If the Working Group were in favour of establishing a clear dichotomy between these two types of guaranty letters, consideration might be given to specifying the applicability of the Convention to independent guarantees and stand-by letters of credit, providing separate definitions for these two types and using a simple, generic term (e.g. "banker's undertaking" or "assurance") as a common name to be used in those provisions applicable to both types.

4. The wording between square brackets has been added to solicit consideration of the issue of the territorial scope of application, based on the working assumption that the final text would be adopted in the form of a convention. Among the questions to be considered would be whether a territorial link with a Contracting State should be required and, if so, whether the tentatively suggested criterion of the place of issuance is appropriate. The answers to those questions, particularly the first one, will have implications on, and should thus be considered in conjunction with, possible provisions on conflict of laws (see draft articles 26 and 27 and accompanying remarks).

Article 2. Guaranty letter

(1) A guaranty letter is an independent undertaking [1] [in the form of a demand guarantee or bond or in the form of a stand-by letter of credit,] [2] given by a bank or other institution or person ("issuer") ["guarantor"] [3] to pay to another person ("beneficiary") [or, if so stipulated in the undertaking, to itself acting as a fiduciary or through another branch] [4] a certain or determinable amount of a specified currency or unit of account [or other item of value] [or to accept a bill of exchange for a specified amount] [5] in conformity with the terms and [any documentary] conditions [6] of the undertaking when so demanded in the manner prescribed in the undertaking [7].

(2) The undertaking may be given

(a) at the request or on the instruction of the customer ("principal") of the issuer ("direct guaranty letter"),

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal") of that instructing party ("indirect guaranty letter"), or

(c) on behalf of the issuer itself ("guaranty letter on issuer's own behalf").

Remarks

1. It may be noted that the Working Group decided at its sixteenth session to maintain the reference to the "essentially documentary" character between square brackets as a reminder and to reconsider the issue at a later stage (A/CN.9/358, paragraph 21). However, that controversial reference has not been maintained in this draft article, in view of the later agreement of the Working Group "that the provisions in the uniform law should focus on instruments containing only documentary conditions" (A/CN.9/358, para. 61). As to an alternative suggestion for introducing the documentary character into the definition of "guaranty letter", see below, remark 6.

2. The reference to demand guarantees or bonds and to stand-by letters of credit has been included here for consideration by the Working Group for the reason set forth in remark 3 to article 1.

3. As regards the reference to the "guarantor" or "issuer" between square brackets, the Working Group decided at its sixteenth session to leave the matter to the drafting group

that would be set up at a later session. However, the revised draft suggests a certain preference for the term "issuer" by inverting the order of the alternative terms in this draft article and by using in later articles only the term "issuer". There are at least three reasons for that preference: the term "issuer" is used in stand-by letter of credit practice; the term "guarantor" might be misunderstood as embracing the issuer of an accessory guarantee; and the term "issuer" appears to be closer to the respective term used in the context of guarantees in a number of languages, including non-official languages. In consideration of the first reason, it is submitted that the proponents of stand-by letter of credit terminology could accept the retention of the term "principal" rather than insist on the term "applicant".

4. The wording between square brackets is modelled on draft article 6(6) of the United States proposal (A/CN.9/WG.II/WP.77). If its substance were to be adopted by the Working Group, consideration might be given to presenting it as a separate rule of interpretation in article 6.

5. The revised text does not retain the previous reference to "negotiation without recourse", taking into account the objections raised at the sixteenth session (A/CN.9/358, para. 33). However, consideration might be given to adding the wording "or to incur a deferred payment obligation" as suggested in the United States proposal, article 2(1).

6. The reference to "documentary conditions" has been inserted in view of the Working Group's agreement to focus on instruments containing only documentary conditions (A/CN.9/358, para. 61). The qualifier "any" has been added with a view to clearly embracing simple demand guarantees and clean stand-by letters of credit. The reference to the documentary nature of the conditions has been placed between square brackets since it might not be needed in view of revised draft article 3. Moreover, it might not be appropriate if the provisions of draft article 3(1)(b) and (2) were adopted.

7. It may be noted that variants X and Y of previous draft article 2 have not been retained in the revised article. However, their substance has been included in other articles, i.e. articles 3(3) and 14.

Article 3. Independence of undertaking

(1) [For the purposes of this Convention,] an undertaking is [deemed to be] independent if:

(a) it provides for payment upon demand and presentation of any specified documents [,without any verification of facts that are outside the operational purview of the issuer];[1]

or

(b) it contains [as its heading and] within its text the words "Stand-by letter of credit" or "Demand guarantee" [or "Independent documentary promise" or "International guaranty letter"].[2]

(2) Where an undertaking referred to in paragraph (1)(b) of this article provides for payment upon the occurrence of a future uncertain event without specifying the documentary means for establishing that occurrence,

payment is due only upon certification of that occurrence by the beneficiary [or the principal] [3], unless its verification falls within the operational purview of the issuer. The same rule applies to any non-documentary condition for the effectiveness of a guaranty letter or for the [reduction or increase] [adjustment] of its amount.

(3) While the purpose of an undertaking covered by this Convention [would ordinarily be] [may be] to secure the beneficiary against the non-fulfilment of certain obligations by the principal or against another contingency, the undertaking is not subject to, or qualified by, any underlying transaction or other relationship, even if referred to in the undertaking, [4] and the payment obligation does not depend on the [ultimate] determination of the occurrence of that contingency but solely on the presentation of any documents required in the undertaking or by paragraph (2) of this article. [The same rule applies to a counter-guaranty letter in respect of the contingency of the beneficiary of the counter-guaranty letter being demanded to pay under its guaranty letter.] [5].

Remarks

1. Paragraph (1) of completely revised draft article 3 describes the types of undertakings covered by the Convention. Retaining the concept of independence known in all legal systems, it defines as independent, in subparagraph (a), all undertakings not containing any non-documentary condition of payment, thus reflecting the Working Group's agreement to focus on instruments containing only documentary conditions (A/CN.9/358, para. 61).

2. Subparagraph (b) is intended to provide a "safe haven" in terms of certainty of the Convention's application. It is submitted that the benefits of certainty outweigh the possible disadvantages of the suggested provision, including the need for changing practice by requiring new labels, especially if one of those labels between square brackets were adopted. Apart from its main purpose of providing certainty, the provision might operate as an opting-in provision for some instruments that contain a non-documentary condition. It is in view of that possibility that paragraph (2) provides for conversion of any such condition into a documentary one. The result is, as summed up in paragraph (3), that no undertakings would be covered by the Convention that would require issuers to verify any facts outside their purview.

3. The reference to the principal might usefully be added in view of the fact that for many contingencies certification by the principal puts matters beyond doubt, although an exception would have to be made for the rule in the second sentence of paragraph (2) as regards the reduction of the amount of the guaranty letter. However, it should be clear that the issuer does not have the right to choose between the principal and the beneficiary but must be content with the certification by either of them. It may also be noted that the mode of conversion imposed by paragraph (2) would not be applicable if the issuer and the beneficiary agree on another documentary means of establishing the occurrence of the contingency and thus amend the guaranty letter.

4. Consideration might be given to adding wording to the effect that neither the issuer nor the beneficiary may invoke

any defence arising from a relationship other than that created between them by the undertaking. If such clarifying wording were to be added it might be appropriate to add also the last sentence of previous draft article 3(1): "The independent character of an undertaking is not affected by the fact that the issuer, as provided in article 17(1)(c), may raise certain objections to payment that might be based on facts relating to any such other relationship."

5. The sentence between square brackets is not absolutely necessary since its substance is already included in the first sentence that covers all undertakings, including those of counter-guarantors. However, it might help to emphasize the independent nature of the counter-guaranty letter, as, for example, done in article 2(c) of the ICC Uniform Rules for Demand Guarantees (URDG 458). For a definition of counter-guaranty letter see article 6(d).

Article 4. Internationality of guaranty letter [1]

(1) A guaranty letter is international if:

(a) the places of business specified in the guaranty letter of any two of the following persons are in different States: issuer, beneficiary, principal, instructing party [, adviser] [2] or confirmer; or

(b) it expressly states that it is international or that it is subject to [generally recognized] international rules or usages of guarantee or letter of credit practice. [3]

(2) For the purposes of the preceding paragraph:

(a) if the guaranty letter lists more than one place of business of a given party, the place of business is that which has the closest relationship to the guaranty letter;

[(b) if the guaranty letter does not specify a place of business for a given party but specifies its habitual residence, that residence is relevant for determining the international character of the guaranty letter.] [4]

Remarks

1. It may be recalled that the Working Group has previously discussed, and left open the final decision on, whether the uniform law should extend to domestic transactions (A/CN.9/358, para. 66). If the prevailing view were in favour of such extension, consideration might be given to including in the draft Convention a reservation that would allow States to limit its application to international guaranty letters.

2. As suggested in the United States proposal (article 4(1)(a)), the term "adviser" has been added to reflect stand-by letter of credit practice, although the practical effect of that addition would probably be limited. If the addition is based on the assumption that the adviser's place of business is often the place of payment, consideration might be given to referring directly to the place of payment as one of the places relevant for determining internationality.

3. Subparagraph (b) presents two ways of fulfilling, by means of a statement, the internationality requirement as a condition of the Convention's application. If, as suggested at the sixteenth session for the uniform law (A/CN.9/358,

para. 70), a straightforward opting-in provision would be preferred to the provision in subparagraph (b), such opting-in provision might be added to article 1 along the following lines: "and to any guaranty letter that states that it is subject to this Convention".

4. Revised paragraph (2)(b) has been adjusted to the rule adopted in paragraph (1)(a). It has been placed between square brackets with a view to soliciting consideration of whether such a rule relating to habitual residence is necessary.

CHAPTER II. INTERPRETATION

Article 5. Principles of interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international guarantee and stand-by letter of credit practice.

Article 6. Rules of interpretation and definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "guaranty letter" includes "counter-guaranty letter" and "confirmation of guaranty letter", and "guarantor" includes "counter-guarantor" and "confirmer";

(b) any reference to the guaranty letter or the undertaking of the issuer, or to its terms and conditions, is to the text as originally established in accordance with article 7 or, if later amended in accordance with article 8, to the text in its last amended version;

(c) where a provision of this Convention refers to a possible agreement or stipulation of the parties, the parties meant are the issuer and the beneficiary of the guaranty letter in question;

(d) "counter-guaranty letter" means a guaranty letter given to the issuer of another guaranty letter by its instructing party [or to the issuer of another guarantee or letter of credit] [1] and providing for payment upon demand and presentation of any specified document [2] stating that payment [under that other guaranty letter or undertaking] has been demanded from, or made by, the beneficiary of the "counter-guaranty letter";

(e) "counter-guarantor" means the issuer of a counter-guaranty letter;

(f) "confirmation" of a guaranty letter means an independent undertaking added to that of the issuer providing the beneficiary with the option of demanding payment and, unless expressly stipulated otherwise, presenting any required documents to the confirmer [instead of to the issuer] [3];

(g) "confirmer" means the person confirming a guaranty letter;

(h) "document" means a communication made in a form that provides a complete record thereof [and is

authenticated as to its source by generally accepted means or by a procedure agreed with the recipient] [4].

Remarks

1. The wording between square brackets is designed to embrace guaranty letters that back, or ensure reimbursement of, undertakings of the beneficiary other than guaranty letters such as accessory guarantees or commercial letters of credit. However, it is difficult to find wording that is sufficiently precise so as not to embrace too many types of undertakings, e.g. insurance obligations.
2. The reference to documents specified in the counter-guaranty letter might have to be modified if the suggested provisions of draft article 3(1)(b) and (2) were adopted.
3. It is submitted that the suggested definition of "confirmation" of guaranty letters is suitable for bank guarantees as well as stand-by letters of credit. See, however, the suggested definition of "confirmer" in the United States proposal which includes the requirement of an authorization by the issuer.
4. The suggested definition of "document" is modelled on article 7 that sets forth the form requirement for the establishment of the guaranty letter and it has the effect of excluding purely oral communications. The reference to authentication has been placed between square brackets so as to solicit consideration of whether that requirement is appropriate for all documents envisaged by the Convention.

CHAPTER III. EFFECTIVENESS OF GUARANTY LETTER

Article 7. Establishment of guaranty letter

(1) A guaranty letter may be established in any form which preserves a complete record of the text of the guaranty letter and provides authentication of its source by generally accepted means or by a procedure agreed upon by the parties.

(2) *Variant A:* Unless otherwise stated therein, a guaranty letter becomes effective and irrevocable when it leaves the issuer's sphere of control ("issuance"). [1]

Variant B: A guaranty letter becomes effective and [unless it expressly states that it is revocable,] irrevocable when it is issued, provided that it does not state a different time of effectiveness [2].

Remarks

1. As suggested at the sixteenth session (A/CN.9/358, para. 81), a definition of the term "issuance" has been incorporated in variant A. If variant B were to be adopted, such a definition could be included in article 6.
2. Consideration might be given to formulating the proviso in a more elaborate manner along the lines of the second sentence of variant X of previous draft article 7(2).

If a reference to conditions of effectiveness were to be included, account would have to be taken of the decision on article 3(1) and (2) concerning the possibility of non-documentary conditions of effectiveness and their conversion into documentary ones.

Article 8. Amendment

(1) A guaranty letter may be amended in the form agreed upon by the parties or, failing such agreement, in any form referred to in paragraph (1) of article 7.

(2) The amendment becomes effective, unless a different time of effectiveness is stated in the amendment or has been agreed upon by the parties,

Variant A: when it is issued [by the issuer], provided that it consists solely of an extension of the validity period of the guaranty letter; any other amendment becomes effective when the issuer receives a notice of acceptance by the beneficiary, unless a different time of effectiveness is stipulated.

Variant B: when it is issued, unless the issuer receives a notice of rejection by the beneficiary within [ten] [business] days.

[(2 *bis*) An amendment affects the confirmation of a guaranty letter only if the confirmer consents to the amendment.] [1]

[(3) *Variant Y:* The provisions of paragraphs (1) and (2) of this article do not entitle the issuer to invoke the amendment in support of any claim for reimbursement against the principal if the issuer failed to obtain the consent of the principal required by agreement or law.

Variant Z: When issuing an amendment, the issuer shall promptly dispatch a copy thereof to the principal.]

Remarks

1. New paragraph (2 *bis*) has been added with a view to underlining the independent nature of the confirmer's undertaking.

Article 9. Transfer of rights

Variant A: The beneficiary's right to demand payment under the guaranty letter may be transferred only if so, and to the extent and in the manner, [1] authorized in the guaranty letter. [2]

Variant B: (1) The beneficiary's right to demand payment under the guaranty letter may not be transferred unless so expressly authorized by the issuer in the guaranty letter [or by prior consent in a form referred to in paragraph (1) of article 7] [3].

(2) Partial or successive transfers are permitted only if so expressly authorized by the issuer.

(3) If a guaranty letter is designated as "transferable" [or contains words of similar import,] without specifying whether or not the consent of the issuer [or another authorized person] is required for the actual transfer,

Variant X: the issuer must, and any other authorized person may, within the limits of the authorization [effect] [implement] the transfer. [4]

Variant Y: no such consent is needed. [5]

Variant Z: neither the issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it. [6]

Remarks

1. It is submitted that the inserted reference to the extent and manner of the transfer authorized in the guaranty letter covers such issues of detail as whether partial or successive transfers are permitted. However, the reference might be viewed as too general or abstract; for that reason, a more detailed alternative is presented in variant B, especially its paragraph (2).

2. The reference to authorization in the guaranty letter which, according to article 6(b), includes any amendment, appears to be sufficiently comprehensive, provided that no other form of consent would be envisaged. However, it might not clearly determine the question addressed in paragraph (3) of variant B, namely whether in addition to the authorization in the guaranty letter a consent to the actual transfer request is required.

3. The wording between square brackets is designed to solicit consideration of whether an authorization or consent could be given outside the guaranty letter or amendment procedure.

4. Variant X, which is modelled on the more elaborate article 9A(3) of the United States proposal, presents an intermediate solution between those presented in variants Y and Z. It reflects the view that the issuer's authorization is sufficient in itself and thus no further consent is required while any other authorized person such as the confirmer or adviser is merely authorized but not obliged by the authorization contained in the guaranty letter.

5. Variant Y reflects the view that an authorization which is not qualified by such words as "subject to our written consent" binds not only the issuer but also any other authorized person ("transferring bank" in letter of credit parlance) since that person knew and is regarded as having accepted the authorization when, for example, confirming or advising the guaranty letter. However, consideration might be given to softening somewhat the radical solution presented in variant Y by wording along the following lines: "however, the issuer or other authorized person may not implement or recognize any transfer that would manifestly be contrary to public policy or otherwise unlawful".

6. Variant Z reflects the view that the designation of a guaranty letter as transferable opens the door for transfer requests without, however, obliging any bank to comply with such requests. It is inspired by the interpretation given to article 54 of the Uniform Customs and Practice for Documentary Credits by the Privy Council in its (controversial) decision in *Bank Negara Indonesia 1946 v. Lariza (Singapore) Pte Ltd* [1988] AC 583.

Article 9 bis. Assignment of proceeds

(1) The beneficiary may assign to another person any proceeds to which it may be [, or may become,] [1] entitled under the guaranty letter.

(2) *Variant A:* If the issuer, or another person obliged to effect payment, has received a notice in a form referred to in paragraph (1) of article 7 of the beneficiary's [irrevocable] assignment, payment to the assignee discharges the obligor [,to the extent of its payment,] [2] from its liability under the guaranty letter.

Variant B: An assignment obliges the issuer or other person authorized to effect payment to honour a demand made by the beneficiary in conformity with the terms and conditions of the guaranty letter by payment to the assignee, when the recipient of the demand acknowledges the [notified] assignment in a form referred to in paragraph (1) of article 7; the acknowledgement may be made dependent on an agreement with the beneficiary on procedural and similar points with a view to ensuring certainty of, and to preventing measures conflicting with, the assignment and its implementation [3].

(3) The issuer or other person effecting payment may

Variant X: exercise any right of set-off with a claim against the beneficiary within the limits of article 20.

Variant Y: invoke towards the assignee any right of set-off referred to in article 20. [4]

Remarks

1. The wording between square brackets is designed to address clearly the situation of an assignment made before the beneficiary demands payment. However, it may be thought that this situation is covered with sufficient clarity by the words "it may be entitled".

2. The reference to the extent of the payment is designed to match the amount of the payment with the extent of the discharge. It may become relevant where the assigned proceeds are less than the amount available under the guaranty letter. Consideration might be given to addressing more directly the question of partial assignment.

3. An illustrative description of the possible points to be regulated in the agreement is provided in comment 1 on article 9B of the United States proposal.

4. Variant X expressly limits the right of set-off to claims against the beneficiary, thus excluding any possible claims against the assignee. Variant Y, like a general proviso such as "subject to the provisions of article 20", does not clearly address that important question.

Article 10. Cessation of effectiveness of guaranty letter

(1) The guaranty letter ceases to be effective when:

(a) the issuer receives from the beneficiary a statement of release from liability in a form referred to in paragraph (1) of article 7;

(b) the beneficiary and the issuer agree on the termination of the guaranty letter [in a form referred to in paragraph (1) of article 7] [1];

(c) *Variant A:* the issuer [, or other person authorized to effect payment,] [2] pays the amount [available] [owed] under the guaranty letter; or

Variant B: the issuer pays

- (i) the maximum amount as stated in the guaranty letter or as reduced according to an express provision in the guaranty letter that sets forth a clear [and readily workable] method of reduction by a specified or determinable amount on a specified date or upon presentation to the issuer of a required document [3];
- (ii) if a part of the maximum amount has previously been paid, the remaining balance;
- (iii) if the beneficiary of a guaranty letter [that does not provide for partial demands] [4] demands payment of only part of the maximum amount and consents to the release of the issuer from liability as to the remaining balance, the requested partial amount,

unless the guaranty letter provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness; or

(d) the validity period of the guaranty letter expires in accordance with the provisions of article 11.

(2) The provisions of paragraph (1) of this article apply irrespective of whether any document embodying the guaranty letter is returned to the issuer, and the retention of any such document by the beneficiary does not preserve any rights of the beneficiary under the guaranty letter, unless the guaranty letter stipulates [otherwise] [that it does not cease to be effective without the return of the document embodying it][5].

Remarks

1. Consideration might be given to requiring the form of article 7(1) only for the beneficiary's agreement or consent and to consolidating subparagraphs (a) and (b) along the following lines "the issuer receives from the beneficiary a statement to that effect in a form referred to in paragraph (1) of article 7".

2. The wording between square brackets is intended to solicit consideration of whether the reference to another authorized person should be included, as, for example, done in article 9 *bis*, in all provisions dealing with payment and payment demands, whether that point should be clarified in a general rule of interpretation, or whether no express clarification is needed in view of general principles of interpretation.

3. The required document would be the one specified in the guaranty letter or, if article 3(1)(b) and (2) were to be adopted, a certification by the beneficiary.

4. The wording between square brackets is geared to the case, referred to at the sixteenth session (A/CN.9/358, para. 127), of a single partial drawing under a stand-by letter of

credit that does not permit or envisage partial drawings. It is submitted that the single partial drawing would render the guaranty letter ineffective only if the understanding is that such payment exhausts the guaranty letter. If that analysis is correct there appears to be no reason for limiting the provision to guaranty letters that do not provide for partial drawings.

5. The latter wording between square brackets describes the required substance of any stipulated derogation from paragraph (1). This more elaborate wording would, better than the alternative wording "otherwise", make it clear that, for example, a stipulation merely obliging the beneficiary to return the document would not fall under the proviso.

Article 11. Expiry

The validity period of the guaranty letter expires:

(a) at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the guaranty letter, provided that, if the expiry date is not a business day at the place of business of the issuer, expiry occurs on the first business day which follows [1];

(b) if expiry depends according to the guaranty letter on the occurrence of an event, when the guarantor receives confirmation that the event has occurred by presentation of the document specified for that purpose in the guaranty letter [or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event];

(c) *Variant A:* if the guaranty letter does not contain a provision on the time of expiry, when five years have elapsed from the date at which the guaranty letter had become effective. [2]

Variant B: if the guaranty letter states neither an expiry date nor an expiry event, or if a stated expiry event has not yet been established by presentation of the required document, five years after the establishment of the guaranty letter, unless the guaranty letter [is issued in the form of a demand guarantee or bond and] [3] contains an express stipulation of indefinite validity.

Remarks

1. The rule set forth as a proviso is modelled on article 2(2) of the UNCITRAL Arbitration Rules; its application might be expanded to other periods of time that might be included in the final text.

2. It is submitted that variant A, despite its brevity, covers all situations of stipulations or their absence that are spelled out in variant B. However, it does not embrace the situation of a stated expiry event that has not been established within five years.

3. The wording between square brackets is designed to exclude stand-by letters of credit from the application of the proviso, as suggested at the sixteenth session (A/CN.9/358, para. 152). Depending on the future number of provisions that the Working Group decides would not be applicable to stand-by letters of credit, consideration might be given to listing all those provisions in one place, probably in the first chapter.

[A/CN.9/WG.II/WP.76/ADD.1]

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 12. *Determination of rights and obligations*

(1) Subject to the provisions of this Convention, [1] the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, general conditions or usages [specifically] referred to therein.

(2) *Variant A:* The parties are considered, unless otherwise agreed, to have impliedly made applicable to [their relationship] [the guaranty letter] a usage of which the parties knew or ought to have known and which in international [trade and finance] [guarantee or stand-by letter of credit practice] is widely known to, and regularly observed by, parties to guaranty letters.

Variant B: [In interpreting terms and conditions of the guaranty letter and] [2] in settling questions that are not addressed by the terms and conditions of the guaranty letter or by the provisions of this Convention, regard [may] [shall] be had to generally accepted international rules and usages of guarantee or stand-by letter of credit practice.

Remarks

1. As stated during the sixteenth session of the Working Group (A/CN.9/358, para. 155), the proviso has been used in previous international instruments and is commonly interpreted as meaning that only the mandatory provisions of the Convention prevail over stipulations by the parties; suppletive provisions, *i.e.* provisions from which the parties may derogate, apply only in the absence of an agreement by the parties on the matters addressed by those provisions. If the Working Group were to regard the proviso as not being sufficiently clear, consideration might be given to limiting the proviso to mandatory provisions of the Convention and to adding to paragraph (1) or (2) a separate reference to suppletive provisions, taking into account the decision on whether such provisions should prevail over usages not referred to in the guaranty letter, as suggested in variant B, or whether the opposite result is desirable, as suggested in variant A.

2. The wording between square brackets is based on an intermediate view expressed at the sixteenth session concerning the relevance of usages not referred to in the guaranty letter (A/CN.9/358, para. 161). However, that view is presented here as an additional field of application of such usages, in addition to the questions that cannot be answered by the sources of determination mentioned in paragraph (1).

Article 13. *Liability of issuer*

(1) The issuer shall act in good faith and exercise reasonable care [as required by good guarantee or stand-by letter of credit practice].

(2) *Variant A:* Issuers [and instructing parties] may not be exempted from liability for their failure to act in good faith or for any grossly negligent conduct.

Variant B: The issuer may not be exempted from liability [towards the beneficiary] [1] for failing to discharge its obligations under the guaranty letter in good faith and [, subject to the provisions of paragraph (1) of article 16,] [2] with reasonable care. However, the extent of liability may be limited to [the amount of the guaranty letter] [foreseeable damages].

Remarks

1. The wording between square brackets has been added to variant B with a view to soliciting consideration of whether the strict standard of mandatory liability suggested in that variant should benefit only the beneficiary. While such a restriction might be viewed as balancing the strictness of the standard and could meet the possible desire of the principal and the issuer to agree on a lower standard, it would considerably reduce the practical relevance of the suggested standard.

2. The proviso referring to article 16 has been added with a view to accommodating a possible consent by the principal to requiring less than reasonable care in the examination of documents, as suggested for consideration by the Working Group in article 16 and as envisaged in article 13(1) of the United States proposal. Since such lower standard of care is likely to affect adversely the principal rather than the beneficiary, the proviso would seem appropriate only if the restriction to the beneficiary discussed in remark 1 were not to be adopted. The proviso, if accepted, would constitute one of the elements built into variant B with a view to softening the strictness of the liability standard, together with the reference to the discharge of the obligations under the guaranty letter and with the limits of the recoverable amount suggested in the alternative at the end of variant B.

Article 14. *Demand*

Any demand [for payment] [1] under the guaranty letter shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the guaranty letter. In particular, any certification or other document required by the guaranty letter [or this Convention] shall be presented, within the time of effectiveness of the guaranty letter, to the issuer at the place where the guaranty letter was issued, unless another person or another place has been stipulated in the guaranty letter [2]. If no statement or document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that payment is due.

Remarks

1. Deletion of the words "for payment" which seem unnecessary here might meet the concern, raised at the seventeenth session (A/CN.9/361, para. 15) and in the United States proposal (note to article 14), relating to the presentation of a bill of exchange under a stand-by letter of credit. However, the reference to payment which is found in vari-

ous other articles and appears to be necessary there could be retained in view of the fact that article 2 embraces the acceptance of a bill of exchange and other types of obligations of the issuer in terms of payment modalities. If all such modalities suggested in article 2 were to be adopted, consideration might be given to embodying them in a definition of payment in article 6.

2. The proviso has been added with a view to accommodating, as suggested at the seventeenth session (A/CN.9/361, para. 17), situations where payment is claimed not directly from the issuer or a confirming bank but from another bank. It would also accommodate the situation, apparently not envisaged by article 14 URDG which requires presentation at the place of issue, where payment by the issuer has to be demanded by presentation of documents at a place other than that where the guaranty letter was issued.

[Article 15. Notice of demand [1]]

Without delaying the fulfilment of its duties under articles 16 and 17, [2] the issuer shall promptly upon receipt of the demand give notice thereof to the principal or, where applicable, its instructing party, unless otherwise agreed between the issuer and the principal. Failure to give notice does not deprive the issuer from its right to reimbursement but entitles the principal to recover from the issuer damages for any loss suffered as a consequence of that failure.]

Remarks

1. If the article were to be retained, consideration might be given to exempting stand-by letters of credit from the notice requirement, as suggested at the seventeenth session, although it was also then suggested that the notice procedure might usefully be applied to them (A/CN.9/361, paras. 26-27). It is submitted that deletion of the article would in practice lead to a similar result since, as expected by the International Chamber of Commerce, stand-by letters of credit are likely to be subject to the UCP which do not require such notice, and demand guarantees are likely to incorporate the URDG which, in article 17, require notice of demand, without, however, addressing the consequences of failure to give the notice.

2. Consideration might be given to placing article 15, if retained, after articles 16 and 17 with a view to adding emphasis to the rule expressed in the opening words of article 15, namely that the required giving of notice shall not adversely affect the process leading to payment.

Article 16. Examination of demand and accompanying documents

(1) *Variant A:* The issuer shall examine documents in accordance with the standard of conduct referred to in paragraph (1) of article 13 [, unless the principal has agreed to a lower standard] [1]. In determining whether the documents are in facial conformity with the terms and conditions of the guaranty letter, the issuer shall

observe the [pertinent] [applicable] standard of international guarantee or stand-by letter of credit practice. [2]

Variant B: The issuer shall examine the demand and accompanying documents with the professional diligence required by international guarantee or stand-by letter of credit practice [, unless the principal has consented to a lesser duty of care,] to ascertain whether they appear on their face to conform with the terms and conditions of the guaranty letter and to be consistent with one another. [3]

(2) Unless otherwise stipulated in the guaranty letter, the issuer shall have reasonable time, but not more than seven days [4], in which to examine the demand and accompanying documents and to decide whether or not to pay.

Remarks

1. The wording between square brackets has been added with a view to accommodating the possible need, referred to at the sixteenth session (A/CN.9/358, para. 171), for guaranty letters at lower costs, in particular, with reduced examination fees.

2. Variant A embodies the division proposed at the seventeenth session (A/CN.9/361, paras. 37-39) between the examination of documents and the determination of their facial compliance with the terms of the guaranty letter.

3. Based on the view that such a division may be artificial and lead to complications, variant B embodies another approach suggested at the seventeenth session (A/CN.9/361, para. 36) and combines the standard of diligence with international practice requirements. As regards the examination of documents, the difference between variant A and B seems to be minimal if the Working Group were to retain in article 13 the suggested reference to practice requirements.

4. The reference to "days", rather than "business days" as used in the previous draft, accords with the terminology used in other legal texts elaborated by the Commission. If, however, the term "business days" were to be preferred, consideration should be given to including in the draft Convention, probably in article 6 and together with the rule currently embodied in the proviso in article 11(a), a provision on the calculation of a period of business days, particularly on the effect of non-business days falling within that period.

Article 17. Payment or rejection of demand

(1) The issuer shall pay against a demand

Variant A: in conformity with the terms and conditions of the guaranty letter. [1]

Variant B: made by the beneficiary in accordance with the provisions of article 14. [2]

(2) The issuer shall not make payment if

Variant X: it knows or ought to know [3] that the demand is improper according to article 19.

Variant Y: the demand is manifestly and clearly improper according to the provisions of article 19.

(3) If the issuer decides to reject the demand [on any ground referred to in paragraphs (1) and (2) of this article], it shall promptly give notice thereof to the beneficiary by teletransmission or, if that is not possible, by other expeditious means. Unless otherwise stipulated in the guaranty letter, [4] the notice shall

Variant A: indicate the reason for the rejection.

Variant B: , if non-conformity of documents with the terms and conditions of the guaranty letter constitutes the reason for the rejection, specify each discrepancy and, if the rejection is based on another ground, indicate that ground.

[(4) If the issuer fails to comply with the provisions of article 16 or of paragraph (3) of this article, it is precluded

Variant X: from claiming that the demand was not in conformity with the terms and conditions of the guaranty letter.

Variant Y: from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions.]

Remarks

1. Variant A closely follows a suggestion made at the seventeenth session (A/CN.9/361, para. 49). Since variant A does not clearly embrace the requirements set forth in article 14 relating to the form of the demand and the place of presentation, variant B which refers to article 14 has been added for consideration by the Working Group. It should be recalled that it was stated in support of the above suggestion, and apparently accepted by the Working Group, that the reference to conformity with the terms and conditions of the guaranty letter would encompass the issues of existence, validity and enforceability of the undertaking that had been specifically addressed in previous subparagraph (a) of paragraph (1). The Working Group may wish to consider whether that interpretation is sufficiently clear or whether it would not be appropriate, for example, to add to paragraph (2) as further ground of rejection the invalidity of the guaranty letter.

2. Paragraph (1), in whichever variant, leaves open the question whether the issuer, in the exceptional case where it would not be obliged to pay, would have an obligation or a mere authorization to refuse payment. The Working Group may wish to decide that question; if the decision were in favour of an obligation not to pay, that solution might be included in paragraph (2).

3. Variant A contains, as agreed at the seventeenth session, a rule to the effect that an issuer who knows or ought to know that the demand is improper shall reject the demand (A/CN.9/361, para. 55). However, it is submitted that the concept of knowledge of a person or institution creates difficulties of proof because of its subjective character. Moreover, knowledge of the issuer might not be an appropriate criterion if one wants to achieve strict parallelism between article 17 and article 21 as regards the required

standard of proof. It is for those reasons that variant Y has been added for consideration by the Working Group.

4. The proviso would help to accommodate different practices as reflected, for example, by the fact that article 10(b) URDG does not require the statement of reasons, while the UCP (in article 16(d)) contains a rule requiring reasons that differs in scope and content from those suggested in variants A and B.

[Article 18. Request for extension or payment in the alternative [1]]

If the beneficiary combines a demand for payment with a request for an extension of the validity period of the guaranty letter, the issuer shall comply with the following rules, unless otherwise agreed by the parties:

Variant A: (a) The issuer shall give to the principal prompt notice of the alternative demand for extension or payment;

(b) The issuer may not extend the validity period without the consent of the principal; however, even if the principal consents to the extension, the issuer is not obliged to extend the validity period, unless so required by an agreement with the principal;

(c) The issuer shall examine the demand for payment in accordance with article 16 and decide whether to pay or to reject that demand; if the issuer decides not to reject the demand, it may defer payment until ten days have elapsed after receiving the alternative demand from the beneficiary and then make payment, unless the issuer extends the validity period.

Variant B: (a) The issuer shall reject the demand for payment because of its [conditional] [equivocal] character [and promptly notify the beneficiary thereof];

(b) The issuer shall treat the request for extension as a request for amending the guaranty letter in accordance with the provisions of article 8.] [2]

Remarks

1. If the article were to be retained, consideration might be given to excluding from its scope stand-by letters of credit, as suggested at the seventeenth session, although it was also then suggested that no such limitation would be warranted (A/CN.9/361, para. 67). It is submitted that deletion of the article would in practice lead to a similar result since, as expected by the International Chamber of Commerce, stand-by letters of credit are likely to be subject to the UCP which do not address the extend-or-pay situation, and demand guarantees are likely to incorporate the URDG which, in article 26, contain rules that are roughly comparable with those suggested in variant A.

2. If the article were to be retained with variant B, consideration might be given to adding here or to article 8 some rules on communications and other procedures to be followed in the case of an amendment request made by the beneficiary. Consideration might also be given to placing the article before article 16 so as to emphasize the lack of any need for examining the demand.

Article 19. Improper demand

(1) *Variant A:* The issuer shall reject a demand as improper if, having due regard to the independent and documentary character of the undertaking, it is clear and beyond doubt to the issuer that: [1]

Variant B: A demand for payment is improper if:

(a) [the beneficiary knows that] any document is forged;

(b) the beneficiary knows or cannot be unaware that no payment is due [on the basis asserted in the demand and the supporting documents]; or

(c) judging by the type and purpose of the guaranty letter, the demand has no conceivable basis.

(2) *Variant X:* The following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the guaranty letter was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal has been declared invalid by a court or arbitral tribunal;

(c) The secured obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented solely by wilful misconduct of the beneficiary. [2]

Variant Y: Instances of a demand that has no conceivable basis include [, but are not limited to,] [3] the following, unless otherwise indicated in the guaranty letter [4]:

(a) In the case of a guaranty letter that supports the financial obligation of a third party [5], neither the principal amount nor any interest is due [and the third party has not become insolvent];

(b) In the case of a tender guaranty letter, the contract has not been awarded to the principal or, if so awarded, the principal has signed the contract and procured any required performance guaranty letter;

(c) In the case of a repayment guaranty letter, no advance payment has been made or it has been repaid in full;

(d) In the case of a performance guaranty letter, the underlying obligation of the principal has been declared invalid in a final decision of a competent court or arbitral tribunal, or it has been completely fulfilled [to the satisfaction of the beneficiary], or its fulfilment has been prevented exclusively by wilful misconduct of the beneficiary;

(e) In the case of a counter-guaranty letter, the beneficiary has not received a demand for payment under the guaranty letter issued by it, or the beneficiary has paid upon such a demand although it was obliged [under the law applicable to its guaranty letter] [6] to reject the demand [as lacking conformity or as being improper].

ever, it duplicates some elements already contained in article 17(2), namely the duty to reject and the requirement that the improper nature of the demand be known or manifest and clear. If variant A were to be retained, it would have to be aligned with article 17(2), and consideration might be given to incorporating article 19, depending on its final length, into article 17.

2. Variant X attempts to provide some guidance to the application of the general formula of lack of conceivable basis, without providing examples for the various types of guaranty letters. While the basic situations described in variant X probably embrace all particular situations arising under the various types of guaranty letters, it is submitted that variant X would not provide sufficient guidance to ensure certainty and uniformity. For that reason, and based on the request of the Working Group to focus on a description of the improper demand and to take into account various types of instruments and their different purposes (A/CN.9/361, para. 91), the list of particular situations arising under different types of instruments is presented in variant Y for consideration by the Working Group.

3. The words between square brackets are designed to emphasize the non-exhaustive character of the situations listed thereafter. It is submitted that, despite their illustrative character, the listed situations of clear impropriety are not only useful in cases where such situations occur but may also prove useful in setting guide-posts for other, comparable cases.

4. The proviso is designed to address situations where the terms of the guaranty letter indicate a restriction or an expansion of the risk usually covered by the particular type of guaranty letter.

5. If variant Y were to be adopted, consideration might be given to giving a name to that type of guaranty letter (e.g., "financial guaranty letter") and to providing definitions of that and other types referred to in variant Y, as already done in article 6(d) for "counter-guaranty letter" and for all types of stand-by letters of credit in the United States proposal, article 6(2).

6. The wording between square brackets, while not absolutely necessary, might serve as a useful reminder that the obligations of the beneficiary in its capacity as issuer of a separate guaranty letter may be governed by a law other than the Convention.

Article 20. Set-off

Variant A: Unless otherwise agreed by the parties and subject to the provisions of the law of insolvency, the issuer may discharge its payment obligation under the guaranty letter by availing itself of a right of set-off with a claim against the person demanding payment [1], excepting any claim assigned to the issuer by the principal.

Variant B: Unless otherwise stipulated in the guaranty letter, the issuer may not discharge its payment obligation by means of a set-off with any claim assigned to it by the principal.

Remarks

1. Variant A follows the approach previously embodied in variant D and preferred by the Working Group. How-

Remarks

1. The wording "by availing itself of a right of set-off" has been chosen, instead of the previous wording "by means of a set-off", in view of the understanding of the Working Group that the general law of set-off might impose further restrictions (A/CN.9/361, paras. 97-98). Taking this understanding one step further, variant B merely presents the restriction and prohibits for claims assigned by the principal the exercise of any right of set-off available under the general law of set-off.

CHAPTER V. PROVISIONAL COURT MEASURES [1]

Article 21. Preliminary injunction [against issuer or beneficiary] [2]

(1) Where [on an application by the principal,] it is manifestly and clearly shown [by documentary and other readily presentable means of evidence] that a demand made [or expected to be made] [3] by the beneficiary is improper according to article 19, [the] [a competent] [4] court may issue a preliminary order:

(a) enjoining the issuer from meeting the demand [or from debiting the account of the principal], or

(b) enjoining the beneficiary from accepting payment or ordering the beneficiary to withdraw the demand [or, if such a demand is expected to be made, not to make the demand],

provided that the refusal to issue such an order would cause the principal [serious harm] [irreparable loss].

[(2) Before deciding whether or not to issue a preliminary order, the court may provide the respondent with an opportunity to be heard.]

[(3) The court may make the effect of an order referred to in paragraph (1) of this article subject to the furnishing by the principal of such security as the court deems appropriate.]

(4) *Variant A:* Paragraph (1) of this article does not preclude a court from issuing a preliminary order based on a ground other than improper demand if its procedural law so permits [; however, it may not issue a preliminary order based on non-conformity of documents with the terms and conditions of the guaranty letter] [5].

Variant B: The provisions of paragraph (1) [and paragraphs (2) and (3)] of this article apply equally to an application by the principal for a preliminary order based on the ground of invalidity [non-existence, ineffectiveness or unenforceability] of the guaranty letter.

Variant C: The court may not issue a preliminary order [of the kind referred to in paragraph (1) of this article] [6] based on any ground other than improper demand.

[(5) The court may not order an attachment or seizure of assets of the beneficiary or of the issuer based on improper demand unless, in addition to the requirements of its procedural law, the conditions referred to in paragraph (1) of this article are met.] [7].

Remarks

1. This chapter might later be combined with chapter VI, depending on the final content and length of the provisions covered therein. Both chapters as well as chapter VII are addressed, as noted in a previous working paper (A/CN.9/WG.II/WP.73/Add.1, remark 1 to article 26), to the courts of the States where those chapters would be in force. If, following what is currently a working assumption, the final text were to be in the form of a Convention, questions relating to the territorial scope of application would need to be considered. For example, if the connecting factor suggested in article 1 were to be adopted, its effect on the applicability of chapters V to VII needs to be discussed. The Working Group may also wish to consider, probably at a later stage, whether the concerns expressed in respect of chapters V to VII might be met by making the provisions of those chapters subject to other treaties, or by including a reservation allowing Contracting States not to apply those provisions.

2. As agreed at the seventeenth session (A/CN.9/361, para. 116), an attempt has been made to merge the provisions of articles 21 and 22 and to reduce the procedural details regulated in paragraphs (2) to (4) of those articles.

3. As was stated at the seventeenth session (A/CN.9/361, para. 106), the need for allowing anticipatory injunctive relief would be greater if the Working Group were to decide against the notice requirement currently envisaged under article 15.

4. The reference to the competent court would not be needed if the provisions of article 21 were later to be combined with the provisions on court jurisdiction for provisional measures (article 25(2)).

5. The wording between square brackets has been included in response to a concern expressed at the seventeenth session (A/CN.9/361, para. 109) that it would be especially disruptive if an injunction were allowed on the ground of non-conformity of documents. Although the concern was expressed in support of the view reflected now in variant C, it might be appropriately addressed also in variant A.

6. The wording between square brackets attempts to limit the prohibition embodied in variant C to applications based on objections to the payment demanded by the beneficiary.

7. New paragraph (5) is based on a proposal to expand article 21 to deal also with other provisional measures such as pre-judgement seizure or attachment of assets. While leaving the requirements and procedures of such measures to the general procedural law, the provision attempts to add the conditions for preliminary injunctions set forth in paragraph (1) as minimum conditions for such other measures, as an underpinning of the practical effect of the provisions on preliminary injunctions.

(Article 22 has been incorporated into article 21.)

(Article 23 has been deleted.)

CHAPTER VI. JURISDICTION [1]

Article 24. Choice of court or of arbitration

(1) The parties may, in the guaranty letter or by a separate agreement in a form referred to in paragraph (1) of article 7, designate a court or the courts of a specified State to settle disputes that have arisen or may arise in relation to the guaranty letter, or stipulate that any such dispute shall be settled by arbitration.

(2) The provisions of the preceding paragraph do not affect the jurisdiction of the courts [of Contracting States] [2] for provisional or protective measures.

Remarks

1. As regards the scope of application of this chapter and other questions relating to the entire chapter, see remark 1 to article 21.

2. The wording between square brackets is intended to solicit consideration of whether the rule of paragraph (2), according to which a choice-of-forum clause or an arbitration agreement does not affect any existing court competence for provisional or protective measures, should be limited to the courts of Contracting States or whether the rule, which does not itself confer jurisdiction on any court, should be as universal in scope as is paragraph (1).

Article 25. Determination of court jurisdiction

(1) Unless otherwise provided in accordance with paragraph (1) of article 24 [or if a designated court of another State declines to exercise jurisdiction] [1], the courts of the [Contracting] State where the guaranty letter was issued [may exercise] [have] jurisdiction over disputes between the issuer and the beneficiary relating to the guaranty letter.

(2) The courts of the [Contracting] State where the guaranty letter was issued may also entertain an application by the principal [in accordance with the provisions of article 21] for a preliminary order against the issuer

Variant A: or against the beneficiary. [2]

Variant B: , and the courts of a [Contracting] State in which the beneficiary has a place of business may entertain an application by the principal for a preliminary order against the beneficiary. [3]

Remarks

1. It is submitted that the wording between square brackets has not been rendered obsolete by the decision of the Working Group to delete paragraph (2) of article 24 which attempted to confer exclusive jurisdiction on the court chosen by the parties; even in the case of a non-exclusive jurisdiction clause the designated court might decline to exercise jurisdiction. In view of that decision, however, no provisions have been added for consideration by the Working Group on such issues as *lis pendens*, *res judicata* or stay of proceedings.

2. Consideration might be given to limiting the jurisdictional rule presented in variant A by adding such requirements as probable enforceability in the beneficiary's country or non-availability of preliminary orders in that country.

3. Consideration might be given to expanding the scope of paragraph (2) by including preliminary orders sought by the issuer against the beneficiary. It is submitted that such preliminary orders, like those sought by the beneficiary against the issuer, would otherwise be covered by paragraph (1), although that interpretation might not be immediately clear, especially in view of the distinction drawn in article 24 between applications for provisional measures and other court actions. If variant A were to be adopted, such an expansion would clarify that interpretation by specifying for preliminary orders against the beneficiary the same rule as paragraph (1), and the same clarification should be made for preliminary orders sought by the beneficiary against the issuer. However, if variant B were to be adopted, an expansion of paragraph (2) to include preliminary orders against the beneficiary would lead to a different result from that obtaining under paragraph (1).

CHAPTER VII. CONFLICT OF LAWS [1]

Article 26. Choice of applicable law

The rights, obligations and defences relating to [a] [an international] [2] guaranty letter are governed by the law designated by the parties. Such designation shall be by an express clause in the guaranty letter or in a separate agreement, or be demonstrated by the terms and conditions of the guaranty letter.

Remarks

1. As to the scope of application of chapter VII and other general questions relating to articles 21-27, see remark 1 to article 21. As regards the scope of application of chapter VII, there appears to be no theoretical reason not to limit the application of the conflict-of-laws rules to the field of application suggested in article 1. However, such limitation appears to be undesirable in practical terms. It is therefore suggested that the conflict-of-laws rules should be applied in a Contracting State irrespective of whether the guaranty letter was issued in any of the Contracting States.

2. The reference to the international character of the guaranty letter has been added to solicit consideration of whether such express limitation would be appropriate. One the one hand, one might object to that reference as being redundant since a conflict-of-laws context necessarily includes international elements. On the other hand, one might favour the reference on the ground that it might be surprising to find conflict-of-laws rules not expressly limited to international instruments in a draft Convention on international guaranty letters, assuming that that limitation will be retained in the final text. Moreover, some States might be unwilling to accept a provision that may be interpreted as allowing two parties of that State to choose the law of another State.

Article 27. Determination of applicable law [1]

Failing a choice of law in accordance with article 26, the rights, obligations and defences relating to a guaranty letter are governed by the law of the State where [the guaranty letter was issued] [the issuer has its place of business or, if the issuer has more than one place of business, where the issuer has that place of business at which the guaranty letter was issued] [2].

Remarks

1. In view of the brevity of the provisions of articles 26 and 27, consideration might be given to combining those provisions into a single article.
2. If the latter, more elaborate wording between square brackets were to be preferred by the Working Group, it should also be included in other articles containing that connecting factor (i.e., articles 1 and 25).

2. Independent guarantees and stand-by letters of credit: proposal of the United States of America: note by the Secretariat

(A/CN.9/WG.II/WP.77) [Original: English]

1. At the seventeenth session of the Working Group the delegation of the United States of America expressed the concern that the draft text disregarded the existing difference in terms of firmness between stand-by letters of credit and European-style bank guarantees and that it might be inappropriate to aim for a unitary set of rules that would do justice to neither type of undertakings, for both of which there was a demand on the market. It therefore suggested to envisage some separate provisions that applied only to firm undertakings, whether or not labelled in the uniform law as stand-by letters of credit, and promised for that purpose, to provide the Secretariat with a list of such provisions and relevant information. It was stated in reply that the degree of firmness was not a valid criterion to distinguish between stand-by letters of credit and bank guarantees as such; differences in firmness existed within each of these two categories that were developed separately for historical reasons. It was also recalled that, during a similar discussion, suggestions had been made for taking into account practical differences of undertakings according to their purpose and payment conditions and, above all, that it had been agreed to continue with the effort of formulating rules of general application. (A/CN.9/361, paras. 148-149).

by letters of credit are frequently used to examine the rules proposed by the United States as to whether they reflect the current practice in their countries and whether they conform to what should be the rules of universal application for the years to come.

2. Following the above suggestion, the Secretariat received from the United States delegation a set of annotated draft rules for a separate chapter dealing exclusively with stand-by letters of credit, based on the assumption that another chapter would deal exclusively with independent guarantees. The draft rules proposed by the United States are set forth in the annex to this note.

3. While the revised draft prepared by the Secretariat (A/CN.9/WG.II/WP.76 and Add.1) follows the above recalled agreement "to continue with the effort of formulating rules of general application" and takes into account specific features of stand-by letters of credit, for example, by incorporating into many provisions elements that are of practical relevance only to stand-by letters of credit, it was thought advisable to bring the United States proposal to the attention of delegates in advance of the next session. Such information is expected to facilitate the decision on the crucial question of the treatment of stand-by letters of credit in the future Convention. It should also help delegates, particularly those from other countries where stand-

ANNEX

PROPOSAL OF THE UNITED STATES OF AMERICA: DRAFT RULES ON STAND-BY LETTERS OF CREDIT [N1]

CHAPTER I. INDEPENDENT UNDERTAKINGS [N2]

Article 1. Substantive Scope of Application of Convention
[N3]

This Convention applies to international independent undertakings in the form of independent guarantees and standby letters of credit. [N4]

1. In response to paragraph 148 of UNCITRAL Document A/CN.9/361 (27 April 1992) as to the possible need for separate provisions that would apply only to firm undertakings (whether or not some or all standbys are firmer than some or all bank guarantees) and to the comment of the European Banking Federation and others at the UNCITRAL Working Group's XVIIth Session that there were insufficient specific references to standby practices in the UNCITRAL working papers, the United States Department of State, Office of the Legal Advisor on Private International Law, appointed a Select Advisory Group of experts in standby letter of credit law and practice to develop this draft for submission to the Secretariat. The Select Advisory Group members, which included two members of the United States delegation, two bank operation managers specialized in letter of credit issuance, and a private attorney also specialized in this field, are:

James G. Barnes, Baker & McKenzie, Chicago, IL
 Alan Bloodgood, Morgan Guaranty Trust Co., New York, NY
 James E. Byrne, George Mason School of Law, Arlington, VA
 Boris Kozolchik, University of Arizona College of Law,
 Tucson, AZ
 Vincent Maulella, Chemical Bank, New York, NY

2. This draft focuses on standby letters of credit insofar as the law applicable to them differs from the law applicable to independent guarantees. Therefore, this draft focuses on the changes to be made in the current UNCITRAL draft in order to treat standbys appropriately. (The current UNCITRAL draft is set forth in UNCITRAL Working Paper 73, entitled *Independent Guarantees and Standby Letters of Credit*; Tentative Draft of a "Uniform Law on International Guaranty Letters", A/CN.9/WG.II/WP.73, dated 17 Sept. 1991 and A/CN.9/WG.II/WP.73/Add.1, dated 14 Oct. 1991, as modified by the Working Group as reported in Document A/CN.9/358, dated 12 Feb. 1992 and A/CN.9/361 dated 27 April 1992.)

For purposes of organization, it is assumed that the first chapter of the next UNCITRAL draft will deal with common elements, the second chapter with independent guarantees and the third with standbys. Otherwise, this draft follows the format, language and tentative conclusions of the UNCITRAL Working Group's current draft and working papers.

3. This draft assumes that the next UNCITRAL draft will be cast in the form of a convention rather than a model law (see paragraph 147 of A/CN.9/361). Should the working Group decide otherwise, this draft could be easily adapted to a model law format.

4. The term "independent undertakings" is substituted for "guaranty letters" because it more clearly includes both guarantees and letters of credit, and it is better balanced than "guaranty letter" (or any other term which includes the word "guarantee"). The expression "independent undertakings to honor documentary demands for payment" should also be considered as a substitute term.

CHAPTER 2. INDEPENDENT GUARANTEES

[See UNCITRAL Draft]

CHAPTER 3. STANDBY LETTERS OF CREDIT [N1]

Article 1. Standby Letters of Credit

This Chapter applies to standby letters of credit ("standbys").

1. It is uncertain whether this chapter should include rules of interpretation in the event of any conflict with the rules in Chapter 1 and 2. This approach was not taken here on the assumption that Chapter 1 will be drafted to include only those legal principles that are common for independent guarantees and standbys and will thereby avoid conflicts with Chapter 3 and that it will be self-evident from the scope of Chapter 2 that its rules do not apply to standbys.

Article 2. Definition of Standby Letter of Credit

(1) A standby letter of credit is an independent undertaking given by one or more banks or other institutions [or persons] ("issuer") to honor presentations by another person or persons ("beneficiary") [for the benefit of such person(s) or others] [N1] for a certain or determinable amount of a specified currency or unit of account or other item of value [N2] or to accept a bill of exchange or draft for a specified amount or to incur a deferred payment obligation [N3] in conformity with the terms and documentary [N4] conditions of the undertaking upon presentation of stipulated documents. [N5]

(2) The undertaking may be given

(a) at the request of the customer ("applicant") [N6] of the issuer; or

(b) on the instruction of another bank, institution or person acting at the request of the applicant of that instructing party ("instructing party"); or

(c) on behalf of the issuer itself. [N7]

1. The term "another person" in the definition of "beneficiary" might not adequately accommodate standby letters of credit issued by the issuer to itself acting as a trustee for another or acting through another branch. For this reason, the term has been broadly defined in Article 6.

2. The brackets surrounding the language, "[or other item of value]" introduced in the UNCITRAL draft are removed in view of the fact that standbys sometimes provide for honor by delivery of e.g., gold or units of stock or other securities. Although this practice is not widespread, there is no theoretical reason to preclude it. In order to leave an opening for future development should the market so dictate, the brackets have been removed.

3. The UNCITRAL draft language "[or to accept or negotiate without recourse a bill of exchange for a specified amount]" is retained without brackets with respect to standby letters of credit for the reasons stated in Paragraph 35 of document A/CN.9/358 (12 Feb. 1992). Although this practice is not widespread, there is no theoretical reason to preclude it. Consequently, it is thought prudent not to foreclose this option.

4. Standby letter of credit law and practice are exclusively documentary. Indeed, the independence of standbys is derived from and defined by their exclusively documentary character. The reference in the UNCITRAL draft to "essentially documentary" is unacceptable to the extent it calls into question the exclusively documentary character of the standby. This draft refers to the documentary character of standbys in ways that are compatible with the latest draft revision (ICC 500) of the Uniform Customs and Practice (UCP).

5. The Working Group has not determined the extent to which it may be appropriate to address commercial letters of credit. Should it decide to exclude commercial letters of credit, then the definition of standby (and of independent guarantee) may need further qualification in order to distinguish one from the other. See note 2 to Article 6 of this draft.

6. UNCITRAL Draft Article 2 uses the terms "guarantor" and "principal" as the titles of the parties to the undertaking. These terms are peculiar to guarantee practice and are not appropriate for standby letters of credit. The terms "issuer" and "applicant" are appropriate to standbys and reflect the terminology used in the UCP.

7. This draft chooses neither Variant X nor Y of UNCITRAL Draft Article 2 because the discrete examples and situations addressed in those variants might have regulatory significance but would have no commercial law effect on standby letters of credit. See the definitions of various types of standbys in Article 6 of this draft.

Article 3. Independence of Standby

(1) An undertaking issued by a bank or other financial institution [or other person who regularly issues such undertakings] is irrefutably deemed to be independent [N1] if it contains the heading "Standby Letter of Credit" or "Letter of Credit", is stated to be subject to international rules of letter of credit practice [N2], or undertakes to honor solely upon presentation of stipulated documents [N3].

(2) An undertaking is independent in that the issuer's performance to the beneficiary is not subject to or qualified by the

existence or validity of an underlying transaction or of any terms other than those appearing in the undertaking or any condition, act or event other than presentation of stipulated documents. [N4]

(3) If a standby credit contains condition(s) without stating the document(s) to be presented in compliance therewith such condition(s) shall be deemed as not stated and shall be disregarded. [N5]

1. The use of an irrebuttable presumption based upon a formal heading in UNCITRAL Draft Article 3(2)(a) is accepted and expanded. For letters of credit, however, the names "Independent Guaranty Letter", "Independent Documentary Promise", or "First Demand Guaranty Letter" suggested in the UNCITRAL draft would be inappropriate and, so, the terms "Letter of Credit" or "Standby Letter of Credit" are used to reflect standby law and practice.

2. Incorporation of internationally recognized rules of letter of credit practice in an undertaking also clearly signals that the undertaking is intended to be a standby letter of credit.

3. Should it be determined that the rules set out in this draft Chapter 3 for a firm, payment oriented undertaking apply to certain types of guarantees as well as to standbys, a method of identifying and distinguishing these guarantees may be needed here and/or in the definitions provided in Chapters 1 and 2.

4. The use of recitals of independence in UNCITRAL Draft Article 3 is not followed in the Select Advisory Group's draft because standby independence is a consequence of the determination that the undertaking is a standby letter of credit based on formal criteria rather than recitals that the undertaking is independent. Accordingly, this draft Article 3 of Chapter 3 sets forth the meaning of independence and its inextricable linkage with its documentary character, as well as the formal requirements by which an undertaking will irrebuttably be deemed a standby letter of credit.

5. Because the independence of a standby letter of credit is irretrievably linked to its documentary character, the substance of Article 13(c) of the Uniform Customs and Practice for Documentary Credits No. 500 is incorporated at this point in the standby rules.

Article 4. Internationality of the Standby Letter of Credit [N1]

(1) A standby letter of credit is international if:

(a) The places of business specified in the standby letter of credit of any two of the following parties are in different States: issuer, beneficiary, applicant [instructing party], adviser or confirmer [N2] or

(b) The standby letter of credit states that it is "international" or that it is subject to this Convention or to international rules of letter of credit practice [N3]

(2) For the purposes of paragraph (1)(a), if it appears in the standby letter of credit that a party has more than one place of business, its place of business is that which has the closest relationship to the standby letter of credit. [N4]

1. These draft rules for standby letters of credit reflect variant A or Article 4 of the UNCITRAL draft which was preferred by the Working Group.

2. This draft adds "adviser" and deletes the brackets surrounding "confirming bank" in the UNCITRAL draft to reflect the assumption in standby practice that the place of business of an adviser and a confirmer would be relevant in determining the internationality of a standby letter of credit.

3. UNCITRAL draft Article 4 is expanded to include those standbys which are issued subject to international rules of letter of credit practice, because under current law and practice in most jurisdictions the simplest and surest way to make an undertaking enforceable as a standby letter of credit is to make it subject to and within the scope of the UCP.

4. Article 4(2) of this draft discourages the use of contacts not apparent from the face of the standby and therefore deletes UNCITRAL Draft Article (2)(b) and clarifies UNCITRAL Draft Article (2)(a) to refer only to a standby which itself shows more than one place of business for a party.

Article 5. Interpretation of this Convention

[There is no need for specific provisions for standbys; UNCITRAL draft Article 5 is acceptable as the general rule.]

Article 6. Definitions and Rules of Interpretation

For the purposes of this Convention unless otherwise indicated in a provision of this Convention or required by the context:

(1) "Document" includes any paper, draft, demand, promise, instrument, or representation of fact or of law, whether in writing or in any manner generally used in letter of credit practice. [N1]

(2) "Standby letter of credit" is defined in Article 2. Standby letters of credit are governed by the same principles and rules that govern all letters of credit without regard to differences in their purpose or function. [N2] In so far as they serve different purposes of the applicant and beneficiary, they may be identified and categorized to include the following types of standbys:

(a) A financial standby, which provides for honor upon presentation of documents stating that payment is due for money borrowed or advanced, or on account of any mature indebtedness undertaken by the applicant or another person.

(b) A performance standby, which provides for honor upon presentation of documents stating that payment is due because of a default in the performance of a nonfinancial or commercial obligation.

(c) An advance payment standby, which provides for honor upon presentation of documents stating that an advance payment has been made and that its return is demanded.

(d) A bid standby, which provides for honor upon presentation of documents stating that there has been a failure to tender a bid and/or to execute the award on the bid.

(e) A commercial standby, which provides for honor upon presentation of documents stating that there has been a failure to deliver or to pay for delivery of goods or services under an underlying commercial transaction, supported or not by a commercial letter of credit.

(f) A clean standby, which provides for honor solely upon the presentation of drafts or demands for payment.

(g) A counter standby, which provides for honor upon presentation of documents stating that the beneficiary has honored or is obligated to honor its standby or commercial letter of credit, guarantee or other undertaking.

(3) "Issuer" includes one or more banks or other institutions [or persons] acting severally or otherwise, and identified as issuer(s) in a standby letter of credit and may include one or more agent(s) acting for some or all issuers in the issuance, amendment, honor or dishonor or any other identified action to be taken relative to the credit. [N3]

(4) "Beneficiary" includes one or more persons identified as beneficiary(ies) and may include one or more of them acting in their own right or as agent for some or all of them in making demands for honor or transfer, consenting to cancellation or amendment or taking any other action that may be taken by a beneficiary of a letter of credit.

(5) "Confirmer" is a person authorized by the issuer to add its independent undertaking to honor to that of the issuer. Unless expressly stated otherwise, the confirmer's undertaking is to honor conforming presentations to the confirmer, and the issuer's authorization obligates the issuer to reimburse the confirmer upon such honor. [N4]

(6) "Person" includes as "another person" one acting also as a fiduciary or through a branch in another jurisdiction. [N5]

1. In order to avoid confusion resulting from the historical distinction between documents, on the one hand, and drafts and demands, on the other hand, this draft includes a definition of the term "document" which makes it clear that drafts and demands are included in the term "document". It also expressly avoids the connotation that the term is paper-based.

2. The catalogue of standbys is given here for illustrative purposes. All standbys, as well as commercial letters of credit, are governed by the same legal principles without regard to function or purpose. The differences relate to the types of documents to be presented, the value of those documents (to the applicant or as collateral for others) and whether and how a particular undertaking will be regulated, e.g., under risk based capital adequacy guidelines for international banks.

3. Large standby letter of credit arrangements are frequently syndicated in a form in which all credit providers act as issuers, severally liable for their respective percentage interests in the arrangements but represented by a single bank through which presentation and payment are effected.

4. A purported confirmation that is not authorized by the issuer may be enforceable as a separate letter of credit by the purported confirmer issued on its own behalf, but it is not a confirmation.

5. The phrase "another person or persons" is broadly defined for the reason stated in Note 1 to Article 2 of this draft.

Article 7. Format and Establishment of the Standby Letter of Credit [N1]

A standby letter of credit may be issued in any form which preserves a complete record of the information contained therein and is authenticated [N2] as to its source by means generally accepted in international letter of credit practice or by procedures agreed upon by the parties. [N3] A standby letter of credit becomes effective and irrevocable when it is issued. [N4]

2. Authentication may be by means of comparing signatures or by the use of test keys or algorithms or other commercially acceptable means.

3. The brackets in Variant B of UNCITRAL draft Article 7 are deleted because authentication is necessary for purposes of electronic transmission of standby letters of credit.

4. In accordance with the decision of the Working Group at its XVth session, Variant Y of UNCITRAL draft Article 7 was followed with the introductory clause deleted.

Article 8. Amendment

Unless otherwise provided in the credit [N1], a standby once established [as irrevocable [[N2]] cannot be canceled or amended without the agreement of the issuer, the confirmer (if any) as to its confirmation [N3] and the beneficiary, and no cancellation or amendment proposed by the issuer is effective against the beneficiary until the beneficiary communicates its consent [N4].

1. This clause signals that a letter of credit may effectively provide for increase, extension or other amendment or for cancellation upon the issuer's unilateral act or failure to act, including the issuer's mere sending of a notice or receipt of a document from the beneficiary or applicant.

2. Irrevocability need not be mentioned here if the prior article on establishment makes standbys irrevocable where silent on the point.

3. A confirmer's consent is required before an amendment proposed by the issuer affects the confirmation. If the confirmer withholds consent, the amendment is nonetheless effective as to the issuer.

4. The requirement for express consent is derived from Article 9e of draft UCP 500.

Article 9A. Transfer of Rights [N1]

(1) A standby letter of credit must be designated as transferable in order to transfer the beneficiary's right to demand honor. The beneficiary's right to make a demand for honor may not be transferred except to the extent and in the manner authorized in the standby letter of credit. [N2]

(2) If the credit is transferable, but does not specify the extent or manner of the transfer [N3],

(a) partial transfers are prohibited unless permitted,

(b) successive transfers are prohibited unless permitted, and

(c) the issuer or other person authorized in the credit to effect transfer may impose reasonable conditions to avoid increased risk [N4]

(3) An issuer must, and any other authorized person may, effect transfer in accordance with the transfer conditions applicable to the credit. The transfer of the right to demand honor affects the name of the beneficiary and such other terms and conditions of the credit, if any, as are specified in the transfer provisions of the credit. [N5]

1. This draft reflects Variant B of the UNCITRAL draft Article 7, which was preferred by the Working Group.

1. For greater clarity, this draft has put into separate articles the topics of transfer of drawing rights and assignment of proceeds of honor.

2. Because standbys are regularly issued as transferable, the alternative represented in UNCITRAL draft Article 9(1) Variant B is not appropriate. Because standbys are enforceable on the basis of mere representations, frequently on the basis of the beneficiary's own representations of fact or conclusions that a default has occurred, they are presumed to be non-transferable, and any permission for transfer in the credit is to be strictly construed.

3. Transferable standbys frequently provide for a precise form of transfer demand to be presented to the issuer and specify, e.g. that partial transfers are prohibited but that successive transfers are permitted, that the transferor and/or transferee must certify that the underlying contract or fiduciary relationship or other underlying transaction has been duly transferred, and that the transferee supplants the transferor for all purposes after the effective date of transfer, plus other terms intended to protect the issuer and/or applicant.

There remain instances in which the standby states merely that it is "transferable" or is addressed to a named beneficiary "and successor or assigns" or is deemed transferable by operation of law that overrides letter of credit presumptions and policies of nontransferability and strict enforcement (see comment 5 below). In such instances, this Article supplies appropriate norms for standbys, including the right to impose reasonable conditions such as presentation of the standby with a written request for an irrevocable transfer signed by the beneficiary and transferee, payment of customary fees, and certifying as to compliance with all applicable laws and regulations. These norms are necessary because the UCP transfer articles are typically excluded from standby transfer provisions because they are designed solely to facilitate transfer in the context of a commercial letter of credit issued to a seller for transfer in part to the seller's supplier.

4. This provision analogizes a transfer to an amendment of the credit. By transferring the credit, the name of the named beneficiary is changed but, absent additional amendments pursuant to Article 8, including comment 1 to Article 8, nothing else in the credit changes. Accordingly, the transferee beneficiary signs all demands and other documents that may be signed by the beneficiary but must obtain third party documents or signatures if any are specified in the credit.

5. This draft does not deal expressly with the enforcement of standbys by persons claiming to have succeeded to the beneficiary's rights by operation of law. Increasingly, transfers by operation of law are expressly addressed in standbys because this aspect of the form of many standbys is dictated by government agencies that regulate the beneficiaries to whom the standbys are issued. In those instances in which the letter of credit policy of strict construction against transfer has conflicted with the policies favoring the protection of the beneficiary's creditors and other constituencies, the courts have sometimes permitted the latter to override the former. Because this is largely a matter of balancing letter of credit law and policy against other public policies, it may be prudent to treat this issue by way of comment mentioning these non letter of credit policies in favor of certain successors by operation of law and the desirability of never overriding an issuer's right to decline to effect a transfer that is not accompanied by a signed written demand with appropriate documentation establishing that succession by operation of law has in fact occurred under applicable law.

Article 9B. Assignment of Proceeds [N1]

(1) The beneficiary may assign to another person any proceeds to which it may be entitled under a standby letter of credit. An assignment of the proceeds of the credit becomes effective against the issuer or any other person effecting payment of proceeds upon notice from the beneficiary of the assignment and

written approval of the notified assignment signed by the issuer or other person effecting payment of the proceeds.

(2) The rights of an assignee of proceeds do not include the right to demand honor under the standby letter of credit, do not exceed the rights of the beneficiary to receive such proceeds, and, unless otherwise specified in the approval of the assignment, are subject to the rights of the payee or endorsee, if different from the beneficiary, of any draft drawn under the credit and subject to set off rights of the issuer or other person effecting payment of the proceeds.

(3) The issuer or other person requested to approve an assignment of proceeds may impose reasonable conditions to avoid increased risk. An approval is effective only against the issuer or other person signing it.

(4) An issuer or other person effecting payment of the proceeds who pays the proceeds to the beneficiary and/or the assignee(s) in accordance with the terms of the letter of credit, its assignment approval(s) and this Article shall be discharged from its obligations to all interested persons including third parties.

1. Most banks use assignment of proceeds forms signed by the beneficiary and the issuer (or other paying or negotiating bank) for both commercial and standby letters of credit for the purposes of clarifying and protecting the expectations of all concerned. This approval procedure is fairly simple in the case of a straight standby payable against the beneficiary's demand, but can become quite complicated if the credit permits drafts to be drawn for negotiation or payment by a bank other than the issuer. Because of the possible complexity and because the UCP does not supply relevant norms, this draft Article provides a framework for protecting the parties against unauthorized or conflicting irrevocable assignments. In this regard, reasonable conditions that may be imposed would include presentation of the standby with the beneficiary's signed written request for an irrevocable assignment of proceeds and certifying as to compliance with all laws, payment of customary fees, and certifying as to no prior or subsequent transfer of rights, assignment of proceeds, or drawing or endorsement of any draft that would conflict with the requested assignment.

Article 10. Termination

(1) A standby letter of credit terminates [N1] irrespective of whether any document embodying it is surrendered when:

(a) the issuer receives from the beneficiary a statement of release from liability in any form referred to in paragraph 1 of Article 7; or

(b) the validity period of the standby letter of credit expires in accordance with Article 11. [N2]

Termination does not affect rights or obligations previously acquired by compliance with the terms and conditions of the standby letter of credit.

(2) That the amount available under a standby may have been reduced to zero does not terminate it if it provides for automatic reinstatements or other automatic increases of the amounts available. [N3]

1. The language in UNCITRAL draft Article 10 "ceases to be effective" and the phrase "Cessation of effectiveness" in the title to Article 10 are inappropriate for standbys because they introduce an artificial and commercially undesirable distinction between the existence and the effectiveness of a letter of credit.

2. Although language appropriate to standbys is introduced, the provisions in UNCITRAL draft Article 10 (a) and (b) are retained.

3. This draft adds a subparagraph (2) to Article 10 to take into account standby letters of credit that are "revolving" or otherwise provide for automatic reinstatement of the amount available after a drawing has been honored. There is an established "reinstatement" practice for direct pay financial standbys that secure long term debt obligations. These standbys provide for automatic reinstatement of the amount honored within, e.g., 10 days after honor of a drawing of an amount equal to a periodic interest payment due on the debt obligation that underlies the credit. See paragraph 127 of Document A/CN.9/358 regarding the inappropriateness of draft Article 10(c) with regard to standbys.

Article 11. Expiry

(1) The validity period of a standby letter of credit expires at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the standby. [N1]

(2) If the standby letter of credit does not state an expiry date, the validity period expires [one(1)] year [N2] after the establishment of the standby letter of credit, unless amended in accordance with Article 8 to state an expiry date. [N3]

1. UNCITRAL Draft Article 11(1)(b) contradicts standby law and practice which requires that an expiration event be documentary. Document A/CN.9/358, Paragraph 144 refers to "a significant degree of use, in guarantees as well as in stand-by letters of credit, of expiry-event clauses that did not specify the presentation of a particular document." Non-documentary conditions in standby letters of credit are unacceptable whether for purposes of demanding payment or determining whether the credit is in force.

2. The issuance of a standby with no stated expiration date is an aberrant practice which should not be endorsed by a long presumed validity period.

3. UNCITRAL draft Article 11(2) contains a reference to an agreement by the parties to an extension of the validity period. Under standby practice, such an agreement, if not expressed in the credit, can only take the form of an amendment. See draft Article 8 and Note 1 thereto.

Article 12. Determination of Rights and Liabilities

Subject to the provisions of this Convention, the rights and obligations of the parties under a standby letter of credit are determined by the terms and conditions [N1] set forth in the standby letter of credit and any rules, [general] conditions or international usages, such as international rules of letter of credit practice, to which it is subject. [N2]

1. The bracketed language of the UNCITRAL draft Article 12 "and conditions" is retained without the brackets since it is necessary to refer to terms and conditions with respect to standbys.

2. The reference in the UNCITRAL draft to "rules, [general] conditions or usages referred to therein" is vital to standby practice and is given further emphasis in this draft by express reference to international rules of letter of credit practice to which standbys are commonly made subject.

Article 13. Liability of Issuer

(1) The issuer, and any confirmer, shall act in good faith and exercise reasonable care as required by standard banking practice as provided below. The applicant may agree that examina-

tion of some or all of the documents under some or all circumstances is not required or that the examination be carried out within a very short period of time and subject to a lesser duty of care. The examiner's duty of reasonable care owed to the beneficiary shall be satisfied upon honor or justifiable dishonor of a demand in accordance with the standards set forth in Article 16. Examiners may also be exempted [generally] from [grossly] [negligent conduct] but not from their failure to act in good faith or for any [grossly negligent conduct] [act or omission done either with the intent to cause damage or recklessly and with the knowledge that damage would probably result]. [N1]

(2) Nothing herein precludes an issuer, confirmer, or other examiner from recovering from an applicant or beneficiary for mistaken or undue payment under principles of unjust enrichment or from limiting recovery against it to the amount available under the credit. [N2]

1. The Select Advisory Group here retained the basic approach and text of the UNCITRAL draft with some elaboration on the parties' freedom of contract, including the right, e.g., for reduced examination fees, to reduce or eliminate the usual examination that an applicant expects from its issuer. Although premature at this stage, it may be that this and related Articles will need to be made more precise in order to guard against confusion as to whether and under what circumstances one party owes a duty to another that is not expressed in the party's credit, confirmation, advice or other writing or in written international rules of letters of credit practice. Similarly, it may be desirable to provide examples as to what constitutes bad faith conduct by an issuer (e.g., dishonor pursuant to prior agreement with the applicant to dishonor arbitrarily and without regard to the existence of any defense) if such examples are to be provided in the case of fraudulent conduct by the beneficiary (e.g., presentation of a demand arbitrarily and without regard to the existence of any basis for making the demand).

2. This Convention will not cover all of the legal relations between the various parties, a point which the Select Advisory Group determined should be made express here (and/or in Article 12).

Article 14. Demand for Payment

[There is no need for specific provisions for standbys if the term "payment" is broadly defined or the term "honor" is substituted for it. See Notes 2 and 3 to Article 2 of this draft.]

Article 15. Notice of Demand

[Text and concept of UNCITRAL draft Article 15 are unacceptable for standbys. There is no parallel under standby law and practice, and it will be necessary to reflect this distinction in the UNCITRAL draft should it be deemed necessary for guarantees. Should notice be required as a result of considerations between the beneficiary and the applicant, there is available in standby letter of credit practice a documentary method by which this can be achieved in a manner fair to all parties by means of an express provision in the letter of credit requiring a documentary method of giving such notification by the beneficiary.]

Article 16. Examination of Demand

(1) The examination of documents shall be conducted in accordance with international standard banking practice to ascertain their facial compliance with the terms and conditions of the credit.

(2) Unless otherwise stipulated in the credit or by reference to international standard banking practice, the issuer or confirmer shall have a reasonable time, but not more than [seven] business days, following the day of presentation in which to examine the documents and to decide whether or not to honor. [N1]

1. This draft Article is based on UNCITRAL draft Article 16 Variants A and Z and the treatment of these topics in draft UCP 500 Articles 13 and 14.

Article 17. Honor or Rejection of Demand

- (1) The issuer or confirmer shall honor the credit unless:
- (a) the standby credit was not issued or was terminated prior to such demand; [N1] or
 - (b) the demand does not meet the requirements referred to in Article 14; or
 - (c) the demand is improper according to Article 19.
- (2) The issuer or confirmer may honor despite an assertion by the applicant that the demand is improper according to Article 19 provided that the issuer or confirmer acts in good faith. [N2]
- (3) Unless otherwise stipulated in the credit, upon a decision to dishonor, the issuer or confirmer shall promptly, in accordance with international standard banking practice, give notice of dishonor listing all discrepancies and account for the documents. [N3]
- (4) If the issuer or confirmer fails to comply with the provisions of Article 16 or paragraph (3) of this article in accordance with international standard banking practice, it shall be precluded from claiming that the documents are not in conformity with the terms and conditions of the credit. [N4]

1. The references in the UNCITRAL draft to categories such as "Non-existent, invalid, or unenforceable" are not commonly used with respect to letters of credit and, consequently, are omitted in favor of the categories "issued" (or "established") or "terminated".

2. The UNCITRAL draft Variant B is included because it reflects an important principle of letter of credit practice under which the issuer is not required to dishonor based upon allegations of fraud as long as it can honor in good faith. The balance of UNCITRAL draft Article 17(2) is omitted because it runs contrary to standby practice under which honor occurs upon a decision by the issuer or confirmer that conforming documents have been presented unless the issuer or confirmer have actual knowledge of fraud or are enjoined from honoring.

3. Because standbys are letters of credit, the notice rules applicable to letters of credit apply to them. The language in the UNCITRAL draft Article 17(3) does not make clear the absolute and binding character of the requirement to give reasons and hold the documents at the disposal of the presenter. Therefore, reference is made to international standard banking practice, which is currently embodied in UCP 500 Article 14.

4. The bracketed language of UNCITRAL draft Article 17(4) is included without brackets and expanded to indicate that this provision is not optional under standby practice which reflects letter of credit practice in adopting a rule of preclusion where there has been a failure to give notice without regard to whether or not the defect was curable.

Article 18. Request for Extension or Payment/Honor

[There is no law or practice for beneficiary demands or requests that a standby be extended or be paid other than the law and practice applied to demands for honor and to requests for amendment. The law should discourage beneficiary "extend or pay" demands on the issuer that are not provided for in the credit and therefore no provision for them should be made with regard to standbys.]

Article 19. Improper Demand

- (1) A demand for honor is improper if made in bad faith or fraudulently or abusively, including fraud or forgery relating to the documents or fraud in the underlying transaction.
- (2) The making of a demand is abusive and fraudulent where:
- (a) the beneficiary [has no belief that the amount demanded is due] [knows or cannot be unaware that the amount demanded is not due] on the basis asserted in the demand and any supporting documents; or
 - (b) any supporting document is forged; or
 - (c) [the beneficiary exercises its right for a purpose other than that for which the standby letter of credit was given.] [The contingency against the consequences of which the standby letter of credit was designed to indemnify the beneficiary has undoubtedly not materialized or has clearly been brought about by a fundamental breach of the underlying transaction wilfully committed by the beneficiary.] [N1]

1. This draft adopts the approach taken in UNCITRAL Draft Article 19 Variant C with some modifications designed to bring the language in line with that commonly used in letter of credit decisional law and to elaborate on the meaning of fraud in this context, i.e. in identifying hidden defects in the presentation that are so serious as to permit the issuer (or a court) to ignore the independence of the undertaking. Two alternate ways of expressing the intent are proposed in subarticles (2)(a) and (2)(c).

Article 20. Set-Off

[Variant B of UNCITRAL text is acceptable providing that set-off rights are extended to the confirmer or other person effecting payment of the proceeds. (See Article 9.)]

NOTE WITH REGARD TO ARTICLES 21 THROUGH 27:

With respect to UNCITRAL draft Articles 21 through 27, there is nothing peculiar to standby letter of credit law and practice that would warrant separate rules. It is noted, however, that the language in the text and titles of these draft UNCITRAL rules are derived chiefly from guarantee, not standby, law and practice. In order to accommodate standbys these names and titles would need to be changed or new names added.

**C. Report of the Working Group on International Contract Practices on
the work of its nineteenth session**

(New York, 24 May-4 June 1993) (A/CN.9/374 and Corr.1)

[Original: English]

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INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session,¹ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees then being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit (A/CN.9/316). The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

2. The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on a uniform law should be undertaken and entrusted this task to the Working Group.²

3. At its thirteenth session (A/CN.9/330), the Working Group commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit. The Working Group requested the Secretariat to submit to the Group at its fourteenth session a first draft set of articles, with possible variants, on the above issues as well as a note discussing other possible issues to be covered by the uniform law.

4. At its fourteenth session (A/CN.9/342), the Working Group examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 7 of the uniform law. The Working Group also considered the issues discussed in a note by the Secretariat relating to amendment, transfer,

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 22.

²Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

expiry and obligations of the guarantor (A/CN.9/WG.II/WP.68). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a first draft of articles on the issues discussed. It was noted that the Secretariat would submit to the Working Group, at its fifteenth session, a note on further issues to be covered by the uniform law, including fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction.

5. At its fifteenth session (A/CN.9/345), the Working Group considered certain issues concerning the obligations of the guarantor. Those issues had been discussed in the note by the Secretariat relating to amendment, transfer, expiry and obligations of the guarantor (A/CN.9/WG.II/WP.68) that had been submitted to the Working Group at its fourteenth session but had not then been considered for lack of time. The Working Group then considered the issues discussed in a note by the Secretariat relating to fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70). The Working Group also considered the issues discussed in a note by the Secretariat relating to conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a first draft set of articles on the issues discussed.

6. At its sixteenth session (A/CN.9/358), the Working Group examined draft articles 1 to 13, and at its seventeenth session (A/CN.9/361), draft articles 14 to 27 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add.1). The Secretariat was requested to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft text. At the end of its sixteenth session, the Working Group decided to proceed on the working assumption that the final text would take the form of a convention without thereby precluding the possibility of reverting to the more flexible form of a model law at the final stage of the work when the Working Group would have a clear picture as to the provisions included in the draft text (A/CN.9/361, para. 147).

7. At its eighteenth session (A/CN.9/372), the Working Group examined articles 1 to 8 of the draft Convention prepared by the Secretariat (A/CN.9/WG.II/WP.76). The Working Group also had before it draft rules on stand-by letters of credit as proposed by the United States of America (A/CN.9/WG.II/WP.77). It was noted that those draft rules were based on the assumption that independent guarantees and stand-by letters of credit would be dealt with in separate parts of the future Convention. It was agreed that the need for such treatment in separate parts could appropriately be determined only when it was clear which, and how many, provisions should be applicable exclusively to bank guarantees or to stand-by letters of credit. The Working Group thus focused its discussion on the draft articles prepared by the Secretariat, with special attention to the question whether a given rule was appropriate for both types of undertakings or for only one of them.

8. The Working Group, which was composed of all States members of the Commission, held its nineteenth

session in New York, from 24 May to 4 June 1993. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Bulgaria, Cameroon, Canada, Chile, China, Costa Rica, Ecuador, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

9. The session was attended by observers from the following States: Algeria, Australia, Bolivia, Botswana, Brazil, Central African Republic, Côte d'Ivoire, Czech Republic, El Salvador, Finland, Indonesia, Iraq, Jordan, Kuwait, Myanmar, Pakistan, Panama, Peru, Philippines, Republic of Korea, Romania, Sweden, Switzerland, Tunisia, Turkey and Ukraine.

10. The session was attended by observers from the following international organizations: International Monetary Fund (IMF), Banking Federation of the European Community, Cairo Regional Centre for International Commercial Arbitration, International Bar Association (IBA), International Chamber of Commerce (ICC) and Grupo Latinoamericano de Abogados para el Derecho de Comercio Internacional (GRULACI).

11. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. A. Faridi Araghi (Islamic Republic of Iran)

12. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.78), a note by the Secretariat containing the revision of a draft Convention on international guaranty letters (A/CN.9/WG.II/WP.76 and Add.1) and a note containing a proposal of the United States of America relating to draft rules on stand-by letters of credit (A/CN.9/WG.II/WP.77).

13. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft Convention on international guaranty letters.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

14. The Working Group examined articles 9 to 17 of the draft Convention prepared by the Secretariat (A/CN.9/WG.II/WP.76 and Add.1). The deliberations and conclusions of the Working Group are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 9 to 17 of the Convention.

II. CONSIDERATION OF ARTICLES OF A DRAFT CONVENTION ON INTERNATIONAL GUARANTY LETTERS

Chapter III. Effectiveness of guaranty letter (continued)

Article 9. Transfer of rights

15. The text of draft article 9 as considered by the Working Group was as follows:

Variant A: The beneficiary's right to demand payment under the guaranty letter may be transferred only if so, and to the extent and in the manner, authorized in the guaranty letter.

Variant B: (1) The beneficiary's right to demand payment under the guaranty letter may not be transferred unless so expressly authorized by the issuer in the guaranty letter [or by prior consent in a form referred to in paragraph (1) of article 7].

(2) Partial or successive transfers are permitted only if so expressly authorized by the issuer.

(3) If a guaranty letter is designated as 'transferable' [or contains words of similar import,] without specifying whether or not the consent of the issuer [or another authorized person] is required for the actual transfer,

Variant X: the issuer must, and any other authorized person may, within the limits of the authorization [effect] [implement] the transfer.

Variant Y: no such consent is needed.

Variant Z: neither the issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it."

16. The Working Group considered the utility on a general basis of including a provision on transfer of the rights of the beneficiary under a guaranty letter. It was reported in that connection that bank guarantees were rarely issued in a transferable form, but that in stand-by letter of credit practice, in particular in the case of financial stand-bys, the stipulation of transferability was frequently found. Accordingly, it was generally felt to be desirable to formulate unified rules in that respect for the guaranty letter, rather than to leave the matter to be resolved by divergent national laws.

17. A question was raised as to whether it was necessary to divide the provisions on transfer of rights and the provisions on assignment of proceeds into two different articles, as had been done pursuant to a suggestion at the sixteenth session. It was stated in response that the question of transfer of rights and the question of assignment of proceeds should continue to be treated in separate articles in order to underscore and make clearer their distinct character. It was suggested that the distinction might be highlighted by revising the title of article 9 along the lines of "Transfer of beneficiary's right to claim payment".

18. As to the content of article 9, the Working Group considered which of the two approaches presented in the draft text would be preferable, particularly from the stand-

point of how the two variants treated the question of whether a guaranty letter designated as transferable still required a specific consent by the issuer to an actual transfer. It was noted that variant A might not determine that question clearly, whereas paragraph (3) of variant B did do so.

19. Differing views were expressed on that question, namely, whether in addition to the authorization in the guaranty letter a consent to the actual transfer would be required. Under one view, the requirement of an additional consent to an actual transfer would be an unjustified restriction on transferability that had already been conceded by the issuer of a transferable guaranty letter. According to that view, at least the issuer and probably also any confirmer of a transferable guaranty letter should be bound to implement a transfer without any additional consent being required.

20. The prevailing view, however, was that the consent requirement should be retained since it was an approach widely used in practice, and that a contrary approach would create an undesirable inconsistency with the Uniform Customs and Practice for Documentary Credits (UCP), to which many stand-by letters of credit were subject. It was also suggested that the consent requirement established some modicum of protection for the principal. A view was that it permitted the issuer to obtain further specific authorization of the principal prior to granting its own consent, a procedure that was reported to be used in stand-by practice. It was stated that such a procedure would be appropriate since what was at stake for both the principal and the issuer was the trustworthiness and reliability of the second beneficiary with respect in particular to any documents to be presented in order to claim payment. It was emphasized that the revision of article 9 should take into account the revision of article 8—as regards the position of the principal—in accordance with the discussions and deliberations at the eighteenth session.

21. In line with the above prevailing view, the Working Group took the position that a main purpose of article 9 should be to provide a rule of interpretation as to whether an additional, specific consent was required for a transfer under a guaranty letter that was designated as transferable, but that contained no provisions as to the procedures to be followed in order to implement a transfer. It was noted that, while in practice a substantial portion of transferable stand-by letters of credit contained specific provisions on transfer procedures (which might be contractual variations of UCP), there were cases of transferable instruments that did not specify actual transfer procedures.

22. Accordingly, it was decided that the approach to consent that should be retained was the one embodied in variant Z of paragraph (3) of variant B. It was also decided that retention of variant A would be sufficient to cover cases in which the guaranty letter contained more than a mere designation "transferable", addressing also other procedural questions for the implementation of the transfer. A suggestion that the words, at the end of variant A, "in the guaranty letter" be deleted did not receive support; it was noted that the wording did not preclude the possibility that transferability could be agreed upon following the issuance of the guaranty letter by virtue of an amendment.

23. As regards paragraphs (1) and (2) of variant B, the Working Group decided that those provisions could be dispensed with since the situations referred to therein were provided for in variant A. The Working Group did not reach a final decision as to whether to retain in paragraph (3) of variant B the words in square brackets, "or contains words of similar import". In support of deletion, it was stated that the words could be removed since, according to the principle established in UCP, the use of terms intended to be synonymous with the word "transfer" would not be deemed to add any meaning. It was pointed out in response, however, that the function of the words in question in the context of article 9 was to ensure the application of article 9 when words synonymous to transfer were used to indicate the transferability of a guaranty letter. A decision was also not reached with respect to the retention, in paragraph (3) of variant B, of the words "or another authorized person".

24. In the course of the discussion of article 9, reference was made to a number of questions to which answers were not expressly given in the present draft. They included whether a transfer would automatically extinguish the right of the original beneficiary to draw under the guaranty letter; who would be entitled to exercise the rights of the beneficiary in the event of the death of the beneficiary or the cessation of its functioning by operation of law; whether a request for a transfer under a guaranty letter not designated as transferable would be treated under article 8; whether the issuer was entitled to pay the transferee even if the issuer was aware that the transfer was unauthorized; and when should the issuer's consent be required to be given.

Article 9 bis. Assignment of proceeds

25. The text of draft article 9 *bis* as considered by the Working Group was as follows:

"(1) The beneficiary may assign to another person any proceeds to which it may be [, or may become,] entitled under the guaranty letter.

(2) *Variant A:* If the issuer, or another person obliged to effect payment, has received a notice in a form referred to in paragraph (1) of article 7 of the beneficiary's [irrevocable] assignment, payment to the assignee discharges the obligor [, to the extent of its payment,] from its liability under the guaranty letter.

Variant B: An assignment obliges the issuer or other person authorized to effect payment to honour a demand made by the beneficiary in conformity with the terms and conditions of the guaranty letter by payment to the assignee, when the recipient of the demand acknowledges the [notified] assignment in a form referred to in paragraph (1) of article 7; the acknowledgement may be made dependent on an agreement with the beneficiary on procedural and similar points with a view to ensuring certainty of, and to preventing measures conflicting with, the assignment and its implementation.

(3) The issuer or other person effecting payment may

Variant X: exercise any right of set-off with a claim against the beneficiary within the limits of article 20.

Variant Y: invoke towards the assignee any right of set-off referred to in article 20."

Paragraph (1)

26. The Working Group discussed whether it was appropriate for the draft Convention to establish as a general principle that proceeds under a guaranty letter were assignable. The view was expressed that the matter should rather be addressed by national legislation in the general law of assignment. The prevailing view, however, was that paragraph (1) contained a useful statement of policy, in line with a principle already expressed in the UCP and in the Uniform Rules for Demand Guarantees (URDG) adopted by the International Chamber of Commerce.

27. A question was raised as to whether the general principle expressed in paragraph (1) should be interpreted as being mandatory. It was generally agreed that parties should be free to agree that proceeds would not be assignable or to lay down any procedures relating to the implementation of an assignment. As to possible conflicts between the draft Convention and national laws regulating the assignability of proceeds, differing views were expressed. Under one view, the rule established in the draft Convention regarding assignment should not affect the applicability of general rules on assignment, since such rules might involve public policy considerations. The prevailing view, however, was that it was useful to seek unification of the law of assignment with respect to guaranty letters. It was noted that the scope of the draft Convention did not encompass the general law of assignment. It was also noted that, in commercial law matters, there seemed to exist few examples of a legislation precluding the assignability of proceeds. The Working Group decided that the provision of paragraph (1) should prevail over contrary law, except for certain provisions of public policy.

28. After deliberation, the Working Group adopted paragraph (1), including the wording between square brackets, "or may become", to make the provision clearly applicable to assignments made before the beneficiary demanded payment.

Paragraph (2)

29. It was explained that variant A did not attempt to unify the disparate national laws on assignment, for example by making notice to the issuer a requirement of validity of the assignment. It rather limited itself to addressing the effect of an assignment known to the issuer by providing that payment to the assignee discharged the issuer's liability towards the beneficiary. Variant B, while touching upon issues regarding the law of assignment, constituted an attempt to take into account such questions as what would be the obligations of the issuer regarding payment upon receipt of several assignment notices exceeding the amount of the guaranty letter.

30. The view was expressed that variant B was preferable as it might better protect the issuer against forged assignments or other misuses of assignment. It was stated in reply that, while the rights of the issuer, principal and beneficiary needed to be protected, it was inappropriate to attempt to solve all private law issues connected with the general law

of assignment. It was also stated that the reference to article 7(1) gave sufficient protection to parties against fraud.

31. The prevailing view was that a more simple provision along the lines of variant A was preferable, since it would not interfere with general provisions on assignment that might already exist. In particular, it was noted that variant A would not attempt to answer the question whether payment to the original beneficiary would also operate to discharge the issuer's obligations.

32. It was noted that the text of variant A did not indicate by whom notice of the assignment should be given. While it was generally assumed that notice should be given to the issuer by the beneficiary, the view was expressed that notification by the assignee should also be possible in certain cases, particularly where the beneficiary was negligent. It was also stated that in certain cases, for example where the assignee held a copy of an authentic contract or another authentic title to the proceeds, it would seem appropriate to allow notification by the assignee. However, it was generally felt that, as a general rule, the obligations of the issuer should not be affected by notification from an assignee, since such person was not a beneficiary under the guaranty letter and only had a contingent right to the proceeds. The Working Group decided that the text should indicate more clearly that the notice should be given by the beneficiary.

33. With respect to the reference to the irrevocability of the assignment, it was noted that, under many national laws, irrevocability would be part of the nature of the assignment. The Working Group decided that the word between square brackets, "irrevocable", should be retained.

34. With respect to the reference to partial assignment, it was widely felt that the wording between square brackets, "to the extent of its payment", should be retained. The reference to the extent of the payment was designed to match the amount of the payment with the extent of the discharge. That reference would become relevant where the assigned proceeds were less than the amount available under the guaranty letter.

Paragraph (3)

35. The Working Group was agreed that the issue of set-off should be reconsidered in the context of the general debate on article 20.

Article 10. Cessation of effectiveness of guaranty letter

36. The text of draft article 10 as considered by the Working Group was as follows:

"(1) The guaranty letter ceases to be effective when:

(a) the issuer receives from the beneficiary a statement of release from liability in a form referred to in paragraph (1) of article 7;

(b) the beneficiary and the issuer agree on the termination of the guaranty letter [in a form referred to in paragraph (1) of article 7];

(c) *Variant A:* the issuer [, or other person authorized to effect payment,] pays the amount [available] [owed] under the guaranty letter; or

Variant B: the issuer pays

- (i) the maximum amount as stated in the guaranty letter or as reduced according to an express provision in the guaranty letter that sets forth a clear [and readily workable] method of reduction by a specified or determinable amount on a specified date or upon presentation to the issuer of a required document;
- (ii) if a part of the maximum amount has previously been paid, the remaining balance;
- (iii) if the beneficiary of a guaranty letter [that does not provide for partial demands] demands payment of only part of the maximum amount and consents to the release of the issuer from liability as to the remaining balance, the requested partial amount,

unless the guaranty letter provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness; or

(d) the validity period of the guaranty letter expires in accordance with the provisions of article 11.

(2) The provisions of paragraph (1) of this article apply irrespective of whether any document embodying the guaranty letter is returned to the issuer, and the retention of any such document by the beneficiary does not preserve any rights of the beneficiary under the guaranty letter, unless the guaranty letter stipulates [otherwise] [that it does not cease to be effective without the return of the document embodying it]."

Paragraph (1)

37. A question was raised as to the use of the expression "ceases to be effective" in the *chapeau*. It was suggested that the use instead of the term "termination" might be clearer. It was also suggested that the expression "cessation of effectiveness" should be clarified so as to make it clear that what would terminate is the ability of the beneficiary to make a drawing under the guaranty letter, but that the expression did not cover any rights or obligations of other persons (e.g., confirmer, adviser) according to the guaranty letter, and that it did not affect rights of the beneficiary accrued before the termination.

38. The Working Group considered at the outset a proposal to combine subparagraphs (a) and (b). This proposal was not accepted, in particular because the Working Group felt that the distinct character of the two methods of termination described therein would be made clearer through the use of separate provisions.

39. Differing viewpoints were expressed as to whether to retain the form requirement referred to at the end of subparagraph (b). On the one hand, support was expressed for retention of the form requirement, with a view to consistency with subparagraph (a), as well as with the approach in articles 7(1) and 8(1), and avoidance of unnecessary uncertainty and evidential problems. In response it

was pointed out that the purpose of subparagraph (b) was to establish a substantive rule of validity for a certain type of termination event, and not to set rules of evidence. It was said further that banks would continue to establish formalities felt to be required by practice. Other concerns were: that the form requirement might limit flexibility, for example by possibly precluding other grounds for termination, in particular tacit agreement and estoppel, though admittedly estoppel could properly be dealt with elsewhere in the Convention; that additional flexibility might be achieved by using instead an expression such as "a form consistent with international banking practice"; that the interests of the principal would not be served by the imposition of form requirements, since such requirements might delay the entry into effect of the termination agreement, while the costs of the guaranty letter being borne by the principal continued to accumulate; and that deletion of the form requirement might spawn the inclusion of non-documentary conditions in guaranty letters. It was stated that article 10(1)(b) was not intended to introduce non-documentary conditions. After deliberation, the Working Group decided to retain the form requirement in subparagraph (b) in square brackets pending further deliberations.

40. The Working Group had before it two variants with respect to subparagraph (c). Variant A, favoured by the Working Group, contained a simpler formulation than variant B, which described the payment situations giving rise to termination in greater detail. It was recognized that a detailed approach would usefully clarify the methods of reduction of the amount available under the guaranty letter. A concern was expressed, however, that a detailed listing rather than a general formulation would create an impression of completeness but might not cover all types of possible payment cases.

41. The Working Group was sensitive to a concern that the inclusion, in variant A, of the words "or other person authorized to effect payment" might generate more questions than it would answer. It was decided that it would be clearer to use a formulation along the lines of "when the amount is paid". It was further decided that the term "amount available" was preferable over the term "amount owed".

42. The view was expressed that the proviso at the end of subparagraph (c), which applied to both variants, was unnecessary since it reflected techniques rarely used in guarantee practice; in any event, article 10 should be regarded as non-mandatory. However, an objection was raised to the deletion of the proviso on the ground that it usefully recognized techniques used in stand-by letter of credit practice. The Working Group decided to retain the proviso.

Paragraph (2)

43. Differing views were expressed as to paragraph (2). One view was that the paragraph could be deleted in its entirety because it was redundant, in that the return of the guaranty instrument was not one of the required events for termination under paragraph (1). A second view was that the provision should be retained in its entirety, including the long version of the proviso permitting party autonomy, since it set forth a progressive general rule, which was at

the same time usefully made non-mandatory. The non-mandatory character of paragraph (2) was said to be necessary in order to take account of the fact that guaranty instruments would continue to be issued with clauses linking expiry to return of the instrument in countries that imposed a return requirement.

44. A third view, which received considerable support, was that paragraph (2) should be retained, but that the party-autonomy proviso should be deleted. Grounds cited for this proposal included: that non-effect of the return of the guaranty instrument should be a mandatory rule so as to resolve an issue that received different treatments in national laws and that created uncertainty in practice; that the proviso would leave the duration of the issuer's obligation to the exclusive wish of the beneficiary, thus raising the spectre of perpetual duration, and that a separate rule might therefore be needed for stand-by letters of credit mandatorily prohibiting perpetual undertakings. However, some proponents of the third view were not in favour of the mandatory character of the rule but merely wanted to make the non-mandatory character less apparent.

45. Considerable interest was generated in a fourth possible approach, which grew out of the above discussion. Under this approach, article 10 would establish the events referred to in paragraph (1) as grounds for termination and indicate that, as a general rule, non-return of the guaranty instrument would have no effect, including in the case where the guaranty letter contained no provision on the effect of non-return. At the same time, it would recognize that the parties may wish to agree that return of the guaranty instrument, either alone or in addition to the events referred to in paragraph (1)(a) or (b), would be required in order to terminate the guaranty letter. However, any such agreement would have no effect beyond the expiry date or, if no expiry date was stipulated, beyond the five-year period established in article 11(c).

46. After deliberation, the Working Group requested the Secretariat to present for its further consideration two variants of paragraph (2), taking into account the discussion that had taken place. One variant would delete the word "otherwise" and retain in square brackets the long version of the party-autonomy proviso, along the present lines. In this connection, a proposal had been made to broaden the formulation of the proviso so as to encompass the possibility of mechanisms equivalent to the return of the instruments for cases of guaranty letters issued in EDI form, as well as to accommodate the existing practice of concluding agreements on termination elsewhere than in the instrument itself. The other variant would be based on the approach described above in paragraph 45.

Article 11. Expiry

47. The text of draft article 11 as considered by the Working Group was as follows:

"The validity period of the guaranty letter expires:

(a) at the expiry date, which may be a specified calendar date or the last day of a fixed period of time

stipulated in the guaranty letter, provided that, if the expiry date is not a business day at the place of business of the issuer, expiry occurs on the first business day which follows;

(b) if expiry depends according to the guaranty letter on the occurrence of an event, when the guarantor receives confirmation that the event has occurred by presentation of the document specified for that purpose in the guaranty letter [or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event];

(c) *Variant A:* if the guaranty letter does not contain a provision on the time of expiry, when five years have elapsed from the date at which the guaranty letter had become effective.

Variant B: if the guaranty letter states neither an expiry date nor an expiry event, or if a stated expiry event has not yet been established by presentation of the required document, five years after the establishment of the guaranty letter, unless the guaranty letter [is issued in the form of a demand guarantee or bond and] contains an express stipulation of indefinite validity.”

Subparagraph (a)

48. The Working Group found the substance of the provision contained in subparagraph (a) to be generally acceptable. Several suggestions were made regarding possible refinements of the text.

49. A first suggestion was that subparagraph (a) should include a rule, as found in some countries, that would extend the validity period of counter-guaranty letters for a number of days (period of grace). The Working Group did not adopt that suggestion.

50. Another suggestion was to clarify in all language versions the meaning of the term “business day”, especially whether it referred to days that were not official holidays or whether it covered all days where business was in fact conducted. It was agreed that the matter should be dealt with by the Drafting Group with due regard to other texts elaborated by the Commission.

51. Another suggestion was that the text of subparagraph (a) should reflect the possibility that, as stated in article 14, a demand might not have to be made at the issuer’s place of business but, if so stipulated in the guaranty letter, the demand should be made with another person or at another place. The Working Group was agreed that such an addition would be useful. It was further agreed that the expiry date constituted the last day of the validity period.

52. Yet another suggestion was that, where the issuer is prohibited from paying the amount of the guaranty letter by a court, the expiry date of the guaranty letter should be extended until the prohibition is removed. In response to this suggestion, it was recalled that a provision to that effect had been suggested by the Secretariat in an earlier draft (article 22; A/CN.9/361, paras. 115 and 116) but that the Working Group had decided not to include rules of such procedural detail.

Subparagraph (b)

53. It was stated that, with respect to expiry events, bank guarantee practice differed from stand-by letter of credit practice. While stand-by letters of credit stipulated an expiry date (a practice reflected in article 42 of the draft UCP 500), expiry events were often found in demand guarantees (a practice reflected in article 22 of the URDG).

54. The discussion focused on the wording between square brackets, “or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event”. Differing views were expressed with regard to the proposition that a statement from the beneficiary as to the occurrence of the expiry event could be relied upon by the issuer when no document was specified. It was suggested that, since it could be assumed that the issuance of such a statement would not be in the interest of the beneficiary, the reference to the beneficiary’s statement was of limited value. It was also suggested that entrusting the beneficiary with the decision as to the expiry of the guaranty letter in such a manner would raise the possibility of a fraudulent call by a beneficiary that, rather than issuing the statement after the occurrence of the expiry event, made a demand for payment. In response to those observations, it was pointed out that, precisely because the expiry of the guaranty letter was not in the beneficiary’s interest, the beneficiary’s statement could be considered the most reliable evidence of the occurrence of the expiry event.

55. While doubts were expressed regarding the practical relevance of the wording between square brackets, it was generally felt that the whole of subparagraph (b) was acceptable, in view of the fact that subparagraph (c) established a five-year limit and that stand-by letters of credit would ordinarily be governed by the UCP, which did not permit expiry events.

Subparagraph (c)

56. There was general agreement with the basic proposition that the draft Convention should provide for a maximum period of validity of five years for guaranty letters that did not state an expiry date or event.

57. The discussion focused on the question as to whether the draft Convention should admit the possibility that certain guaranty letters could be of unlimited duration. The attention of the Working Group was drawn to the fact that there were cases in which the parties intended that a guarantee should be of indefinite duration, and that such arrangements were sometimes used in response to administrative requirements (see A/CN.9/358, para. 151). It was noted, however, that certain, but not all, legal systems empowered courts to relieve debtors of indefinite obligations.

58. The attention of the Working Group was also drawn to the fact that the possibility that an undertaking could be established for an indefinite period of time created the risk of perpetual undertakings, which would be contrary to stand-by letter of credit practice since no credit assessment was possible for such cases. It was stated in reply that the same problem existed in respect of bank guarantees. In that connection, it was recalled that there existed stand-by letters of credit containing “evergreen clauses”, which

provided, upon expiry, for the repeated, automatic extension of the period of validity, an indefinite number of times. However, such instruments stipulated that they could be terminated upon notice and were thus not to be confused with guarantees that contained no expiry provision.

59. Several suggestions were made, based on the text of variant B. One suggestion was to delete the reference to an express stipulation of indefinite validity at the end of the text. While support was expressed in favour of that suggestion, it was realized that the effect of the deletion was unclear. While some representatives concluded that this would disallow indefinite obligations, a result which was objected to by proponents of party autonomy, other representatives thought that deletion would merely make the possibility of indefinite validity less conspicuous and thus come close to the general solution suggested in variant A.

60. Another suggestion was to retain in the draft Convention the words between square brackets in variant B, "is issued in the form of a demand guarantee or bond and", which were designed to exclude stand-by letters of credit from the application of a proviso admitting the existence of perpetual instruments, as suggested at the sixteenth session (A/CN.9/358, para. 152). That suggestion was opposed to on the ground that the Working Group should attempt to promote, to the widest extent possible, a unified regime that would apply to both bank guarantees and stand-by letters of credit. In that connection, it was recalled that stand-by letters of credit were submitted to the UCP, which excluded the possibility that such instruments could be issued without an expiry date being stipulated. It was also suggested that the reference to the terms "demand guarantee" and "bond" was problematic as neither term had been defined in the Convention. A further concern was expressed that, should the draft Convention expressly mention instruments that might be stipulated with an indefinite validity period, the text might be misinterpreted as creating the possibility that instruments in the form of stand-by letters of credit could be issued with an indefinite validity period.

61. Yet another suggestion was to take the text of variant A and add to it the reference, contained in variant B, to an agreed expiry event that had not been established during the five-year time period. Support was expressed in favour of that suggestion, which was said to avoid the drawbacks of placing too much attention on instruments of indefinite validity and, at the same time, might avoid the need to create separate legal regimes for bank guarantees and stand-by letters of credit. However, a concern expressed in this context was that the parties may sometimes want to allow for an expiry event to take place after more than five years. The Working Group did not reach a consensus on the question.

62. After deliberation, the Secretariat was requested to prepare alternative drafts reflecting the two suggestions referred to in paragraphs 60 and 61.

Chapter IV. Rights, obligations and defences

Article 12. Determination of rights and obligations

63. The text of draft article 12 as considered by the Working Group was as follows:

"(1) Subject to the provisions of this Convention, the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, general conditions or usages [specifically] referred to therein.

(2) *Variant A:* The parties are considered, unless otherwise agreed, to have impliedly made applicable to [their relationship] [the guaranty letter] a usage of which the parties knew or ought to have known and which in international [trade and finance] [guarantee or stand-by letter of credit practice] is widely known to, and regularly observed by, parties to guaranty letters.

Variant B: [In interpreting terms and conditions of the guaranty letter and] in settling questions that are not addressed by the terms and conditions of the guaranty letter or by the provisions of this Convention, regard [may] [shall] be had to generally accepted international rules and usages of guarantee or stand-by letter of credit practice."

64. The view was expressed that the substance of what was currently contained in article 12 would be better placed before articles 8 to 11, since the rules set forth in article 12 would be used for interpreting articles 8 to 11.

Paragraph (1)

65. It was generally agreed that a provision along the lines of paragraph (1) should be included. However, a question was raised as to whether the meaning of the wording at the beginning of paragraph (1) might not be made clearer by substituting the words "*mandatory* provisions of this Convention" for the words "provisions of this Convention". In response to this suggestion, it was stated that what needed to be made clearer was that, as pointed out in remark 1 to article 12, in addition to the mandatory provisions of the Convention and to the terms of the guaranty letter, non-mandatory provisions of the Convention also applied. However, unlike mandatory provisions, non-mandatory provisions of the Convention would not prevail over party agreement. It was noted that a decision remained to be taken as to the mandatory or non-mandatory character of the provisions of the Convention.

66. It was stated that the meaning of the words "the parties" was not clear, in particular as to whether the expression referred only to the issuer (and confirmer) and the beneficiary, or also to the principal. The Working Group noted that, in the text before it, the answer to this question was given in a general manner in article 6; however, pursuant to a decision taken at the sixteenth session, the parties being referred to would be expressly designated in each relevant provision of the draft Convention (A/CN.9/372, para. 89).

67. The Working Group considered whether there was a need for the addition of the word "specifically" in order to make it clear that what was contemplated was reference by the parties to specific usages, not simply a general reference by them to usages. In this connection, a doubt was expressed as to whether it was appropriate at all to speak in terms of a "reference" to usages, if it were assumed that

the word "usages" meant unwritten customs, rather than written sets of rules. It was agreed that the matter could be addressed further at the drafting stage.

Paragraph (2)

68. A view was expressed that the Convention should support only usages expressly incorporated by the parties, rather than also providing for the applicability of usages not referred to by the parties. It was suggested that such a limited approach would create less uncertainty and would promote fairness, in particular in the case where the parties did not possess a similar degree of familiarity with trade usages. The widely prevailing view, however, was that some weight should be accorded to usages that were not specifically alluded to in the guaranty letter.

69. It was noted that paragraph (2) presented two variants. Variant A provided for the incorporation of such usages as implied terms of the guaranty letter. Variant A failed to attract wide support, in particular because it was felt to be inflexible and because of a concern that the reference in variant A to the knowledge of the parties might inject an undesirable degree of subjectivity. Variant B, however, did attract the support of the Working Group. It was felt that it assigned a more appropriate role to usages not expressly alluded to, namely, as a residual source in determining the rights and obligations of the parties, below the level of the suppletive provisions of the Convention.

70. After deliberation, the Working Group decided to retain variant B of paragraph (2), including the words "in interpreting terms and conditions of the guaranty letter and", which had been suggested as an addition to broaden the field of application of usages. It was also agreed that the words "regard shall be had" should be used instead of the words "regard may be had", since it was not intended to make optional the obligation to take account of generally accepted international rules and usages of guarantee or stand-by letter of credit practice. The Working Group based its decision on an understanding that the obligation to have regard was not equivalent to an obligation to apply and follow in every case and in all respects these rules and usages.

Article 13. Liability of issuer

71. The text of draft article 13 as considered by the Working Group was as follows:

"(1) The issuer shall act in good faith and exercise reasonable care [as required by good guarantee or stand-by letter of credit practice].

(2) *Variant A:* Issuers [and instructing parties] may not be exempted from liability for their failure to act in good faith or for any grossly negligent conduct.

Variant B: The issuer may not be exempted from liability [towards the beneficiary] for failing to discharge its obligations under the guaranty letter in good faith and [, subject to the provisions of paragraph (1) of article 16,] with reasonable care. However, the extent of liability may be limited to [the amount of the guaranty letter] [foreseeable damages]."

Paragraph (1)

72. The view was expressed that paragraph (1) was inappropriate because of its general and abstract nature and therefore should be deleted. However, the Working Group generally favoured the retention of a provision of the type found in paragraph (1). It was then suggested that paragraph (1) should be limited to a statement on good faith, and the reference to the exercise of reasonable care should be deleted. Instead, the application of a standard of reasonable care should be dealt with elsewhere in the Convention, linked to specific activities and relationships of the issuer, in particular those in articles 16 and 17, which could be expanded if necessary. It was suggested that, in implementing such an approach, the URDG and UCP might serve as useful models. In support of the suggestion it was asked whether, in fact, any duties of the issuer other than payment-related duties would be subject to a reasonable-care standard, and whether the standard would extend, for example, to assistance by banks given to principals in drafting the terms of the guaranty letter. Another example was that the reasonable-care standard could be applied to an issuer's payment to a place that had become unsafe, but was otherwise in accord with the guaranty letter. In response, it was stated that this illustrated problems that would arise with a reasonable-care standard. A concern was also voiced that the inclusion of a general standard of reasonable care would impede practice since in some cases circumstances necessitated party agreement to a lower standard of care in the examination of documents.

73. In response to the concerns raised about the reasonable-care standard, it was stated that such a standard was appropriate and necessary since the Convention, unlike the URDG and UCP, was a legal text at the level of statute and not contract rules; thus, it would be looked to as a source of rules for issues not effectively covered by the terms of the guaranty letter or by any associated contract rules. Contractual rules could not, for example, establish unbreakable liability provisions. As to the question of which activities were to be covered, it was pointed out that the premise behind the provision was that all typical activities of the issuer, not merely examination of documents, should be conducted with reasonable care; and that understanding might be clarified by including the reference currently found in variant B of paragraph (2) to the discharge of the issuer's obligations under the guaranty letter. Consideration should also be given to recognizing the autonomy of the parties to agree to lower the standard in specific instances. It was further noted that additional flexibility could be ensured by way of a rule in paragraph (2) permitting some degree of exemption and limitation of liability.

74. The Working Group also exchanged views on the wording in square brackets at the end of paragraph (1), which was intended to add more detail and objectivity by describing the standard of reasonable care in terms of good guarantee or stand-by letter of credit practice. Concerns were expressed that, at least as currently formulated, the wording might disproportionately elevate practice at the expense of judicial determination. It was also suggested that the reference to practice was superfluous because article 12 had already brought practice into play. If the reference to practice were to be kept, it should be clear that

practice was not the sole source of authority. The prevailing view was that wording of the type in the square brackets was desirable, though it could be made clearer by replacing the words "as required by good . . ." by wording such as "as determined with due regard to good . . .".

75. After deliberation, the Working Group decided to retain paragraph (1), containing a reference both to good faith and to reasonable care in the discharge of the issuer's obligations under the guaranty letter, and requiring due regard for practice. It was also decided that the applicability of the general standard of care set forth in paragraph (1) would have to be verified with respect to the individual provisions of the Convention.

Paragraph (2)

76. The Working Group had before it two variants in paragraph (2) concerning the extent to which exemption from liability would be permitted. While some support was expressed for variant B on the ground that the limitation on exemptions should conform with the statutory standard of liability and thus include ordinary negligence, the prevailing view was that variant A was preferable. Variant A was perceived to be clearer and simpler, and reflective of the generally accepted view that issuers should not be exempted for failure to act in good faith and for grossly negligent conduct. It was also felt that variant A would be more harmonious with the traditional working, pricing and risk assumptions of guarantee and stand-by letter of credit practice, in particular since it did not purport to restrict party autonomy with respect to lowering of the reasonable care standard. The Working Group did not accept the proposed addition at the beginning of variant A of the words "and instructing parties". It also noted that, in implementing variant A, it would be necessary to ensure harmony between paragraph (2) and article 16.

77. The Working Group considered whether it would be desirable or feasible to add to variant A a provision authorizing contractual limitation of liability. In this discussion the Working Group considered whether there would be any limitation permitted for acts of bad faith or gross negligence and, if so, whether that limitation would be the same as the limitation envisaged for ordinary negligence. It was suggested in this regard that the provisions might simply authorize contractual limitations of liability, leaving to the agreement of the parties and to the applicable law the exact level of the limitation, whether it should be set, for example, as the amount of the guaranty letter or as foreseeable damages. The Working Group concluded that a liability limitation should not be added to variant A since the Convention should not authorize limitation of liability for acts of bad faith and gross negligence. With such conduct excluded from its scope, the limitation provision could be dispensed with since it would relate only to areas where the parties were already authorized to go so far as to exempt liability totally.

Article 14. Demand

78. The text of draft article 14 as considered by the Working Group was as follows:

"Any demand [for payment] under the guaranty letter shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the guaranty letter. In particular, any certification or other document required by the guaranty letter [or this Convention] shall be presented, within the time of effectiveness of the guaranty letter, to the issuer at the place where the guaranty letter was issued, unless another person or another place has been stipulated in the guaranty letter. If no statement or document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that payment is due."

First sentence

79. A suggestion was made that the words between square brackets, "for payment", should be deleted since they insufficiently reflected the practice of stand-by letters of credit, which often involved acceptance of a bill of exchange (or "draft"). However, the attention of the Working Group was drawn to the fact that reference to "payment" was found in various other articles where it appeared to be necessary. It was suggested that the reference to "payment" could be retained in view of the decision made by the Working Group at its previous session to consider the possible inclusion, in article 2(2) or in article 6, of a definition of the notion of payment that would embrace the acceptance of a bill of exchange and other types of obligations of the issuer in terms of payment modalities (see A/CN.9/372, paras. 51-52). That suggestion was found to be generally acceptable. In connection with the above discussion, a view was expressed that the question as to whether the acceptance of a bill of exchange discharged the obligation of the issuer or whether dishonour of an accepted bill of exchange would result in a separate cause of action under the Convention might be considered at a later stage.

Second sentence

80. As regards the words between square brackets, "or this Convention", it was explained that those words had been introduced at a time when the draft text envisaged that possible non-documentary conditions should be treated as documentary conditions by means of a conversion mechanism. It was generally agreed that, in view of the decision made by the Working Group at its previous session that the draft Convention should not cover non-documentary conditions of payment (see A/CN.9/372, paras. 63-65), the words between square brackets should be deleted.

81. As regards the time of presentation of the demand for payment and the stipulated documents, a proposal was made that the draft Convention should establish as a rule that, while the demand itself should be presented before expiry of the validity period, the beneficiary should be allowed, even without stipulation to that effect in the guaranty letter, to present some or all of the stipulated documents at a later time. The Working Group did not adopt that proposal.

Third sentence

82. A suggestion was made that, where a demand for payment was made and no statement or other document

was required under the guaranty letter, the draft Convention should establish an obligation for the beneficiary to issue a statement indicating the reasons for which payment was due. While some support was expressed for the proposal, the prevailing view was that the suggestion would produce the undesirable result of prohibiting simple demand guarantees and clean stand-by letters of credit. It was recalled that the Working Group, at a previous session, had discussed extensively the manner in which guaranty letters payable on simple demand should be accommodated by the draft Convention and decided that it would not be appropriate for a legislative text such as the draft Convention to encourage or discourage the use of any specific type of guaranty letter. Instead, the draft Convention should take into account, and provide certainty for, all types of guarantees in use (see A/CN.9/361, paras. 20-21).

83. As regards the implied certification by the beneficiary that payment is due, it was recalled that the sentence was intended to clarify, especially in the case of a guaranty letter payable on simple demand, that any demand for payment implied the assertion that payment was due, as might, for example, be relevant in determining whether the demand was improper according to article 19. A concern was expressed that such certification, irrespective of its implied or express nature, might be interpreted as creating a cause of action not only for the principal who could request a court injunction restraining payment, based on an allegation that the beneficiary had issued a false certification, but also for the issuer and thus jeopardize the finality of payment.

84. It was suggested that the sentence should be deleted since it had been introduced for clarification purposes and was not intended to create any separate cause of action for the principal or the issuer. It was also stated that the sentence was redundant since, even without it, the very same implication would be drawn. In response it was stated that the above concern would not be met by deleting the sentence and that there was nothing peculiar about the sentence compared with the other references to certifications.

85. Another suggestion was to replace the words "payment is due" by a mention that the demand was not in bad faith or otherwise improper, thereby linking the proviso more closely with article 19. After discussion, the Working Group decided that the proviso should be redrafted along those lines.

Article 15. Notice of demand

86. The text of draft article 15 as considered by the Working Group was as follows:

"[Without delaying the fulfilment of its duties under articles 16 and 17, the issuer shall promptly upon receipt of the demand give notice thereof to the principal or, where applicable, its instructing party, unless otherwise agreed between the issuer and the principal. Failure to give notice does not deprive the issuer from its right to reimbursement but entitles the principal to recover from the issuer damages for any loss suffered as a consequence of that failure.]"

87. The Working Group noted that article 15, which was patterned on article 17 URDG, appeared in brackets as opinion had been divided at the previous sessions on whether the uniform law should impose an obligation on the issuer to give notice to the principal of a demand made by the beneficiary. At the current session, opinion was again divided as to the desirability of imposing such an obligation, mostly for reasons already expressed in detail at the seventeenth session (see A/CN.9/361, paras. 26-27).

88. In support of the deletion of article 15, it was stated that the imposition of a statutory duty to give notice to the principal would compromise the integrity, independence and reliability of the issuer's undertaking, in particular by facilitating the initiation by the principal of steps to block payment. It was also stated that, at least in certain countries, agreeing to give notice before deciding was a procedure that was foreign to stand-by letters of credit and might, in some jurisdictions, raise regulatory concerns. It was suggested that, in the event the Working Group decided to retain the provision, stand-by letters of credit would need to be exempted. However, it was noted that a similar result would obtain if the article were not retained since then notice would probably be required for bank guarantees (by virtue of the URDG) but not for stand-by letters of credit (by virtue of the UCP).

89. Support for retaining the obligation to give notice was expressed on the ground that notice to the principal was a common practice, not only with respect to bank guarantees but also with respect to stand-by letters of credit in certain countries. It was also stated that the giving of notice was a matter of fairness and did not compromise the independence of the issuer's undertaking because the obligation to give notice was not linked in terms of time to the duty of examining the claim and deciding about payment. The text made it clear that non-compliance with the duty of notification would not affect the effectiveness of payment and the issuer was not required to give notice before payment. The provision was further softened by the rule in the second sentence that the issuer would not be deprived of its right to reimbursement. A suggestion was made to delete the reference to damages and to leave that issue to the applicable general law.

90. The Working Group considered how some of the concerns that had been raised about article 15 might be addressed, short of deleting the provision. One suggestion was to redraft article 15 to the effect that, while the issuer would have to give notice of a demand for payment unless otherwise stipulated in the text of the guaranty letter or in any agreement concluded between the principal and the issuer, such a contrary stipulation would be implied from the mere reference to operational rules such as the UCP that do not foresee the issuance of a notice. A countervailing suggestion was to replace article 15 by the following text: "Where applicable international rules or practice permit or require, the issuer may or must give notice to the principal of its receipt of a demand as long as the notice does not delay the fulfilment of its duties under the guaranty letter."

91. Another suggestion was based on the view that divergencies in opinion regarding the appropriateness of the rule

expressed in article 15 were not purely linked to differences in existing practices regarding stand-by letters of credit and bank guarantees. Such divergencies rather reflected the different approaches taken by different national laws and banking practices with respect to the situations of the principal, the issuer and the beneficiary. It was suggested that the Working Group should consider the possibility that reservations to the applicability of article 15 could be made by States when the draft Convention was open for signature and ratification.

92. Since none of the above suggestions attracted sufficient support, the Working Group decided to postpone, pending further review, a final decision as to whether it would be desirable to retain a provision along the lines of article 15. It was therefore decided to retain the article in square brackets.

Article 16. Examination of demand and accompanying documents

93. The text of draft article 16 as considered by the Working Group was as follows:

“(1) *Variant A:* The issuer shall examine documents in accordance with the standard of conduct referred to in paragraph (1) of article 13 [, unless the principal has agreed to a lower standard]. In determining whether the documents are in facial conformity with the terms and conditions of the guaranty letter, the issuer shall observe the [pertinent] [applicable] standard of international guarantee or stand-by letter of credit practice.

Variant B: The issuer shall examine the demand and accompanying documents with the professional diligence required by international guarantee or stand-by letter of credit practice [, unless the principal has consented to a lesser duty of care,] to ascertain whether they appear on their face to conform with the terms and conditions of the guaranty letter and to be consistent with one another.

(2) Unless otherwise stipulated in the guaranty letter, the issuer shall have reasonable time, but not more than seven days, in which to examine the demand and accompanying documents and to decide whether or not to pay.”

Paragraph (1)

94. Two variants of paragraph (1) were presented. The Working Group noted that variant A embodied the division proposed at the seventeenth session between, on the one hand, the standard of care applicable to the examination of documents and, on the other hand, the test to be used in determining whether the submitted documents are in conformity with the terms of the guaranty letter. The question was asked why two possibly different standards were imposed in variant A. Another concern was that the reference to the standard of international practice was vague and would not provide sufficient guidance for the intended purpose. As a consequence it was suggested that the approach agreed upon for article 12(2) should be followed here as well, namely, to use wording such as “having due

regard to” the standard of international practice. Another suggestion was to follow the single-standard approach used in variant B.

95. The prevailing view, however, was that the two-pronged approach set forth in variant A should be retained. It was pointed out that variant A usefully distinguished between standards applicable to two distinct phases of the document examination process: the standard of good faith and reasonable care to be followed by the issuer in examining demands, i.e., in looking for any discrepancies; and the measure to be used in determining the weight or significance to be attached to certain minor discrepancies that may be found, i.e., whether the discrepancies should result in rejection of the demand. It was noted that this type of approach reflected practice, and was incorporated in article 13 of UCP 500.

96. The Working Group next turned its attention to the express reference in the first sentence of variant A to agreements between the issuer and the principal to lower the standard of care applicable to examination of the demand. It was noted that the purpose of the wording was to accommodate a practice reported to be relatively widespread in stand-by letter of credit practice, used when the principal wished to lower costs by reducing examination fees or when time was of the essence, and often in the context of longstanding relationships between the principal and the beneficiary. This type of lowering of the standard was usually not reflected in the terms of the instrument.

97. Divergent views were expressed as to the reference to lowering of the standard. One view was that the wording should be deleted because it was not appropriate to refer to the matter since it dealt with the issuer-principal relationship, a relationship on which it had been decided the Convention should not focus. It was further suggested that the lowering of the standard as described would as a rule not adversely affect the interests of the beneficiary since the lowering of the standard would make it more likely that a discrepant demand would be accepted. A second view, also favouring deletion of the wording, was that lowering the standard was a practice that should not be envisaged or encouraged in the Convention. Doubts were raised as to whether it could be justifiably assumed that a lowering of the standard would uniformly work to the advantage of beneficiaries, who were entitled to an expectation of reasonable care in the examination. A third view was that the practice was sufficiently significant to warrant treatment in the Convention and that the wording should therefore be retained. It was suggested that the provision might even be expanded to envisage the possibility of agreeing with the beneficiary on an even higher standard of examination.

98. After deliberation, the Working Group decided that the wording in question should be deleted, in particular since the general thrust of the Convention was to focus on the issuer-beneficiary relationship. It was stated that deletion of the wording should not be construed as preventing the principal and the issuer from establishing agreed standards. The Working Group based its decision on the understanding that such lowering of the standard of examination

should not be disadvantageous to the beneficiary and should not adversely affect the beneficiary without its consent.

99. The Working Group agreed that wording should be added to variant A to the effect that the issuer was also obligated to determine whether the documents were consistent with each other, a duty also imposed by the UCP. It was further decided that, in the second sentence, the expression "applicable standard" should be used rather than "pertinent standard" and that the words "shall observe" might be replaced by words such as "shall have due regard to".

Paragraph (2)

100. The Working Group noted that paragraph (2) combined approaches as suggested during the previous discussion of a rule on the time allowed for examination, namely, the notion of reasonable time with an outer limit. The Working Group, noting that this type of approach was also found in UCP 500, affirmed the basic thrust of paragraph (2).

101. Views were exchanged as to whether the outer limit should be expressed in terms of "days" (i.e., calendar days) or in terms of "business days". It was pointed out that the latter approach was followed in the UCP, while the more common practice in UNCITRAL legal texts was to express time periods of the length referred to in paragraph (2) (i.e., periods longer than a day or two) in terms of calendar days. After deliberation, the Working Group decided to retain subparagraph (2) in its current form.

Article 17. Payment or rejection of demand

102. The text of draft article 17 as considered by the Working Group was as follows:

"(1) The issuer shall pay against a demand

Variant A: in conformity with the terms and conditions of the guaranty letter.

Variant B: made by the beneficiary in accordance with the provisions of article 14.

(2) The issuer shall not make payment if

Variant X: it knows or ought to know that the demand is improper according to article 19.

Variant Y: the demand is manifestly and clearly improper according to the provisions of article 19.

(3) If the issuer decides to reject the demand [on any ground referred to in paragraphs (1) and (2) of this article], it shall promptly give notice thereof to the beneficiary by teletransmission or, if that is not possible, by other expeditious means. Unless otherwise stipulated in the guaranty letter, the notice shall

Variant A: indicate the reason for the rejection.

Variant B: , if non-conformity of documents with the terms and conditions of the guaranty letter constitutes the reason for the rejection, specify each discrepancy and, if the rejection is based on another ground, indicate that ground.

[(4) If the issuer fails to comply with the provisions of article 16 or of paragraph (3) of this article, it is precluded

Variant X: from claiming that the demand was not in conformity with the terms and conditions of the guaranty letter.

Variant Y: from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions.]"

Paragraph (1)

103. The Working Group expressed a general preference for the approach taken in variant B, which contained a general reference to the requirements set forth in article 14, including those relating to the form of the demand and the place of presentation. While the view was expressed that not all requirements set forth in article 14 were of equal importance, it was generally felt, consistent with a decision made by the Working Group at its seventeenth session, that the obligations of the issuer addressed in article 17 were to constitute a "mirror image" of the obligations of the beneficiary stated in article 14, which established as a general rule that a demand for payment had to conform with the terms of the guaranty letter (see A/CN.9/361, paras. 49-50).

104. The suggestion was made that the reference contained in variant B to a demand made "by the beneficiary" was inappropriate in view of the fact that a demand could be made not only by the beneficiary but also by one or several transferees or by any other person designated under the guaranty letter. Moreover, the reference might be misunderstood as attempting to provide a solution to the unsettled question of a demand made by an imposter. After discussion, the Working Group adopted the suggestion to delete those words.

105. It was noted that the text of paragraph (1) left open the question whether the issuer, in the exceptional case where it would not be obliged to pay, would have an obligation or a mere authorization to refuse payment. In that connection, the Working Group identified two distinct types of situations where the issuer would not be obliged to pay. One such situation was the case where the demand was improper under article 19. That situation was addressed in paragraph (2), which constituted an exception to the rule in paragraph (1). The other type of situation was the case where a demand, while not improper under article 19, did not conform with the terms and conditions of the guaranty letter or other requirements set forth in article 14.

106. It was suggested that, for the situation where a demand was not in conformity with the terms and conditions of the guaranty letter, the draft Convention should establish whether the issuer would be faced with an obligation not to pay or whether it could exercise its discretion. Differing views were expressed in respect of that issue. One view was that the draft Convention should avoid dealing with that issue, since the consequences of payment or non-payment under such a demand were of relevance only to the relationship between the issuer and the principal, which was not the focus of the draft Convention. Another view was that, where the demand did not conform with the terms

and conditions set forth in the guaranty letter, the issuer should be obliged not to pay since there would seem to exist no legal grounds on which payment could be based. Yet another view was that the issuer should be free to decide as to whether it would pay under a non-conforming demand, and it might do so, for example, if it considered payment necessary to preserve its international reputation as a reliable paymaster. It was stated that the only implication of a decision by the issuer to pay under a non-conforming demand was with respect to the reimbursement obligation of the principal. Another statement was made, to the effect that whatever would be the solution for non-conforming demands it should be the same as the solution for improper demands.

107. After deliberation, the Working Group was agreed that, where a demand was neither improper nor in conformity with the terms and conditions of the guaranty letter, the issuer would be free to exercise its discretion in deciding whether or not to pay. However, where the issuer chose to pay upon such a demand, payment should not prejudice the rights of the principal. The Secretariat was requested to prepare a draft provision to that effect for consideration by the Working Group at its next session.

Paragraph (2)

108. Some support was expressed in favour of variant X, which was said to place appropriate focus on the particular issuer by requiring it to reject the demand if it knew, or should have known, that the demand was improper. It was stated that it would be inappropriate to impose on the issuer an obligation to refuse payment without requiring that it knew, or without deeming that it should have known, of the impropriety of the demand. It was said to be particularly important to disallow any act of wilful blindness by which the issuer might choose to ignore the impropriety of the demand.

109. Considerable support was expressed, however, in favour of variant Y, which was said to set forth an objective criterion on which to base rejection of the demand. It was stated that the concept of knowledge of a person or institution, as embodied in variant X, created difficulties of proof because of its subjective character. Moreover, the reference in variant X to what the issuer ought to know might be misinterpreted as requiring investigations on the part of the issuer to determine whether the demand was improper, which would be contrary to the independent and documentary nature of the undertaking.

110. The view was expressed that variant Y was inappropriate, particularly because the general reference to a "manifestly and clearly improper" demand did not establish clearly that the determination of the "manifestly and clearly improper" character of the demand should be made by the issuer. It was stated that it should not be assumed that determination of the "manifestly and clearly improper" character of the demand would be of the type made by an ordinary person, but that it should be made by the issuer as a professional person. A suggestion was made to replace the current text of paragraph (2) by wording based on the text of variant A of draft article 19(1), as follows:

"The issuer shall not make payment if, having due regard to the independent and documentary character of

the undertaking, it is clear and beyond doubt to the issuer that the demand is improper according to article 19."

111. In response to that suggestion, a concern was expressed that, by linking the determination of the improper character to the person of the issuer, the text could be misunderstood as inviting the issuer to exercise its discretion when assessing the improper nature of the demand, thereby allowing for imprudent or unscrupulous behaviour by the issuer. It was stated that a more objective standard was needed.

112. With a view to achieving objectivity in the standard and, at the same time, to maintaining a reference to the need for the issuer to know that the demand was improper, a number of other suggestions were made, for example: to inject the concept of knowledge by the issuer that the demand was improper into the text of variant Y; to add to the text of variant X the opening words "having due regard to the documentary and independent character of the undertaking"; to delete the words "manifestly and clearly" from the text of variant Y; to replace the text of the variants by the words "the issuer has a well-founded reason to believe that the demand is improper" or "the issuer ascertains that the demand is improper".

113. During the discussion, it was realized that the concerns expressed related to two different aspects of the rule. It was generally felt that it would be useful to distinguish analytically between, on the one hand, the facts, usually apparent from documents, that constituted the basis for a legal determination as to the impropriety of a demand and, on the other hand, the making of that very determination. It was agreed that, as to the facts, it was necessary that the issuer be aware of them or that they be within the issuer's sphere of awareness, and that it was not sufficient that only other persons knew about them. However, the second aspect, namely the drawing of the conclusion that those facts amounted to an impropriety of the demand, should not be left to the exclusive judgement of the issuer; the drawing of such a conclusion should be based on whether such facts would be generally considered to be a case of manifest impropriety. In the light of that realization, it was suggested and agreed to use the following wording:

"(2) The issuer shall not make payment if it is shown facts that make the demand manifestly and clearly improper according to article 19."

Paragraphs (3) and (4)

114. The Working Group reaffirmed its support for the inclusion of a requirement of notice to the beneficiary of a rejection of the demand. Views were exchanged, however, as to whether the notice requirement should apply only when the ground for rejection was discrepancies in the documents, or whether the notice requirement should be broader, and be applicable even in cases of improper demand.

115. One view was that the notice requirement, which included an obligation to indicate to the beneficiary the reasons for the rejection, should be limited to cases of discrepant documents. The particular concern underlying that view was that application of the preclusion rule set forth in

paragraph (4) to a failure by the issuer to give notice of impropriety as grounds for rejection would have the unintended effect of aiding those engaging in fraud, or simply attempting to obtain payment under guaranty letters that were invalid or non-existent. It was suggested that imposing the obligation without providing in the Convention for preclusion in such instances would not necessarily deter a court from imposing a sanction such as preclusion.

116. The prevailing view, however, was that the notice requirement should apply to all situations of rejection of the demand, including non-compliance with article 16(2) or invalidity or non-existence of the guaranty letter. It was stated that, even for the case of impropriety, one could not assume that the beneficiary would, as a general rule, have no legitimate interest in being informed of the ground for the rejection, since in some cases the beneficiary might itself be a victim of the fraud. It was suggested that the application of the preclusion rule could be limited to discrepant documents so as to address the concerns that had been raised. The Working Group noted that the extent of the notice requirement was closely linked to the scope of any preclusion requirement agreed in paragraph (4).

117. Before it moved on to the discussion of paragraph (4), the Working Group considered a number of observations concerning other aspects of paragraph (3). One was that in revising the text harmony should be sought between the first sentence in paragraph (3) and the deadline set in article 16(2). In that light the question was raised as to whether the word "promptly" was sufficiently clear. Other questions were whether notice was required when the ground for rejection was the passing of the expiry date, and whether the Convention should include a provision obligating the issuer to hold the documents at the disposal of the beneficiary in case of rejection. As regards the alternative formulations in paragraph (3), both of which required the notice to set forth the reasons for rejection, there was a preference for the simpler approach in variant A. The Working Group agreed to a suggestion to replace the words "decides to reject" by the word "rejects", as the former formulation might be interpreted as suggesting an undue degree of discretion for the issuer.

118. As regards paragraph (4), differing views were expressed as to whether to retain the preclusion rule envisaged therein. One view was that the paragraph should be deleted, since the matter of sanctions could be sufficiently addressed under national law, where the beneficiary would find remedies, and that mention of the preclusion rule was therefore unnecessary in the Convention. A second view, also accepting deletion, was that, while the preclusion rule was necessary in particular for stand-by letter of credit practice, mention of the rule could be removed from the Convention without harming practice since the preclusion rule would apply to stand-by letters of credit by virtue of the UCP. A third view was that, both in the case of violations of article 16(2) and in the case of violations of article 17(3), the Convention should not contain a preclusion rule but should instead provide for damages.

119. A fourth view, one that attracted wide support, was that mention needed to be made of the preclusion rule since

this was a linchpin provision that gave meaning to the obligations imposed on the issuer. It was suggested that failure to include the provision would leave a serious gap in the Convention. However, the Working Group recognized that paragraph (4) should not be drawn so broadly as to apply the preclusion rule to failure to give notice of impropriety or invalidity. It was generally agreed that such a result was not intended or desired and that it should be made clear that the preclusion rule was not meant to apply to such cases. It was also agreed that the provision should be made clearer by referring specifically to paragraph (2) of article 16.

120. Different possible approaches were considered as to how to treat the question of sanctions for any notification duties not made subject to the preclusion rule. One approach was simply to leave the matter to national law, where the beneficiary might be able to obtain the remedies of damages and interest (for example, the amount of the guaranty letter and interest for failure to give notice of defects that might have been cured). That approach was criticized on the ground that it would do relatively little to achieve certainty, since this was an area not specifically addressed in the laws of many countries, and that uniformity of law should be achieved on this important point. Another approach, one that attracted the support of the Working Group, was to consider including in the Convention a provision on sanctions covering those aspects of the notice requirement not covered by the preclusion rule.

121. After deliberation, the Working Group made the following decisions with respect to paragraphs (3) and (4). It was agreed that in paragraph (3) the issuer should be required to give notice of all grounds for rejection, not merely notice of any discrepancies that may have been found in the documents. The Working Group, subject to further consideration, tentatively affirmed that a preclusion rule should be included, but that it should apply only to discrepant documents and to non-compliance with article 16(2). So as to facilitate further deliberations by the Working Group, the Secretariat was requested to prepare a draft provision concerning damages as an alternative provision to the preclusion rule as well as a provision on sanctions for those aspects of the notice requirement not subject to the preclusion rule.

122. The Secretariat was further requested to prepare a tentative version of a provision concerning the time when payment of the guaranty letter was due. It was suggested that such a provision could usefully make it clear that the obligation of the issuer involved prompt payment, not merely a timely decision as to whether to accept the demand for payment. It could further provide clarity as to the use of deferred payment in stand-by letter of credit practice, since that technique was still unfamiliar in a number of countries. The Secretariat was similarly requested to prepare for consideration by the Working Group a provision concerning the obligation of the issuer to pay despite the insolvency of the principal, and despite similar circumstances that might arise affecting the security of the issuer such as failure on the part of the principal to pay the commission.

III. FUTURE WORK

123. The Working Group decided, subject to approval by the Commission, that the next session would be held from 22 November to 3 December 1993 at Vienna.

124. The Working Group noted that it was the intent of the Secretariat to prepare a revised version of draft articles 1 through 17, taking into account the discussion and deliberations at the eighteenth and nineteenth sessions, and that the revised text would be available for the twentieth session. It was agreed that the Working Group, at that session, would first consider articles 18 through 27 as set forth in

A/CN.9/WG.II/WP.76 and Add.1, and thereafter review revised draft articles 1 through 17.

[A/CN.9/374/Corr.1]

Corrigendum

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Paragraph 85 *should read*

85. Another suggestion was to replace the words "payment is due" by a mention that the demand was not in bad faith or otherwise improper thereby linking the proviso more closely with article 19. After discussion, the Working Group decided that the proviso should be re-drafted along those lines.

D. Working papers submitted to the Working Group on International Contract Practices at its nineteenth session

1. *Independent guarantees and stand-by letters of credit: revised articles of draft Convention on international guaranty letters (A/CN.9/WG.II/WP.76 and Add.1) [Original: English]*

2. *Independent guarantees and stand-by letters of credit: proposal of the United States of America (A/CN.9/WG.II/WP.77) [Original: English]*

The two working papers, which had already been submitted to the eighteenth session of the Working Group, are reproduced in this *Yearbook*, part two, II, B.1 and 2.

III. ELECTRONIC DATA INTERCHANGE (EDI)

- A. Report of the Working Group on Electronic Data Interchange (EDI)
on the work of its twenty-fifth session
(New York 4-15 January 1993) (A/CN.9/373)
[Original: English]**

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INTRODUCTION

1. At its twenty-fourth session (1991), the Commission was agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. The Commission was agreed that the matter needed detailed consideration by a Working Group.¹

2. Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI. The report of that session of the Working Group suggested that the review of legal issues arising out of the increased use of EDI had demonstrated that among those issues some would most appropriately be dealt with in the form of statutory provisions (A/CN.9/360, para. 129). As regards the possible preparation of a standard communication agreement for world-wide use in international trade, the Working Group was agreed that, at least currently, it was not necessary for the Commission to develop a standard communication agreement. However, the Working Group noted that, in line with the flexible approach recommended to the Commission concerning the form of the final instrument, situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (*ibid.*, para. 132). The Working Group reaffirmed the need for close cooperation between all international organizations active in the field. It was agreed that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role in that respect (*ibid.*, para. 133).

3. At its twenty-fifth session (1992), the Commission considered the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission was agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed, along the lines suggested by the Working Group, that, while some issues would most appropriately be dealt with in the

form of statutory provisions, other issues might more appropriately be dealt with through model contractual clauses. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (A/CN.9/360, paras. 129-133), reaffirmed the need for active cooperation between all international organizations active in the field, and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.²

4. The Working Group on Electronic Data Interchange, which was composed of all States members of the Commission, held its twenty-fifth session in New York, from 4 to 15 January 1993. The session was attended by representatives of the following States members of the Working Group: Austria, Bulgaria, Cameroon, Canada, China, Costa Rica, Denmark, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Nigeria, Russian Federation, Saudi Arabia, Singapore, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

5. The session was attended by observers from the following States: Australia, Bolivia, Brazil, Côte d'Ivoire, Finland, Indonesia, Israel, Micronesia (Federated States of), Pakistan, Philippines, Romania, Sweden, Switzerland and Venezuela.

6. The session was attended by observers from the following international organizations: Economic Commission for Europe (ECE), United Nations Conference on Trade and Development (UNCTAD), European Community (EC), Hague Conference on Private International Law, Cairo Centre for International Commercial Arbitration, European Banking Federation, International Association of Ports and Harbors (IAPH), International Chamber of Commerce (ICC), Society for Worldwide Interbank Financial Telecommunications S.C. (SWIFT) and World Assembly of Small and Medium Enterprises (WASME).

7. The Working Group elected the following officers:

Chairman: Mr. José-María Abascal Zamora (Mexico)
Rapporteur: Mr. Essam Ramadan (Egypt)

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session, *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17)*, paras. 314-317.

²Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, paras. 140-148.

8. The Working Group had before it a note by the Secretariat containing an outline of possible rules on the legal aspects of electronic data interchange (EDI) (A/CN.9/WG.IV/WP.55).

9. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Outline of possible rules on the legal aspects of electronic data interchange (EDI).
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

10. The Working Group considered the issues discussed in the note by the Secretariat (A/CN.9/WG.IV/WP.55). The deliberations and conclusions of the Working Group are set forth below in chapters II to VIII. The Secretariat was requested to prepare, on the basis of those deliberations and conclusions, a first draft set of articles, with possible variants, on the issues discussed.

II. SCOPE AND FORM OF UNIFORM RULES

A. Substantive scope of application

1. *Notion of EDI*

11. The Working Group resumed its general discussion of the notion of EDI, a discussion which, for lack of time, it could not complete at its previous session, after it ended its first review of the legal issues involved.

12. At the outset, the Working Group confirmed the decision made at its previous session that, in addressing the subject matter before it, it would have in mind a broad notion of EDI, covering a variety of trade-related uses of EDI that might be referred to broadly under the rubric of "electronic commerce" (see A/CN.9/360, paras. 28-29), although other descriptive terms were also proposed. It was recalled that among the means of communication encompassed in the notion of "electronic commerce" were the following modes of transmission based on the use of electronic techniques: communication by means of EDI defined narrowly as the computer-to-computer transmission of data in a standardized format; transmission of electronic messages involving the use of either publicly available standards or proprietary standards; transmission by electronic means of free-formatted text. It was also noted that, in certain circumstances, the notion of "electronic commerce" might cover the use of techniques such as telex and telecopy.

13. Examples were given of situations where digitalized information initially dispatched in the form of a standardized EDI message might, at some point in the communication chain between the sender and the recipient, be forwarded in the form of a computer-generated telex or in the form of a telecopy of a computer print-out. It was generally

agreed that such situations should be covered by the uniform rules, based on a consideration of the users' need for a consistent set of rules to govern a variety of communication techniques that might be used interchangeably. More generally, it was agreed that, as a matter of principle, no communication technique should be excluded from the scope of the uniform rules since future technical developments might need to be accommodated.

14. Differing views were expressed as to whether the Working Group should attempt, prior to discussing the content of the uniform rules, to define more expressly the scope of the uniform rules and whether, for that purpose, it should attempt to define the term "EDI". One view was that such an exercise was necessary to set forth the working assumptions for the continuation of deliberations by the Working Group. It was stated that a definition of EDI would usefully set out the scope of the uniform rules since it might not be immediately clear whether certain modes of communication which combined the electronic transmission of dematerialized data and a reliance on paper (e.g., telex and telecopy) were to be considered as falling in all instances within the notion of EDI. Support was expressed in favour of adopting as a working assumption a definition of EDI that would expressly encompass telex and telecopy.

15. Another view was that expressly including telex and telecopy in the scope of the uniform rules was inappropriate since those means of communication relied in part on the use of paper. It was stated that the Working Group should primarily focus its work on establishing rules for the particular legal issues that derived from the use of computer technology. It was generally agreed that the preparation of the uniform rules should not lead the Working Group into engaging in an overall revision of the numerous rules established by national legal systems in the context of the use of paper.

16. It was noted that participants in international trade increasingly used the technique of telecopy (referred to also as telefax) to transmit images of paper documents. It was also noted that, as a result of technical differences between telecopy and the sending of digital data over computer-to-computer links, there were differences between the two techniques as regards, for example, authentication methods and the ability to discover errors in transmission. In view of those differences, it was suggested that there might be a need for special rules applicable to telecopy. The Secretariat was requested to study, in preparing draft provisions of the uniform rules, whether any special provisions were necessary to address particular features of telecopy.

17. With respect to the scope of the uniform rules, it was also suggested that the Working Group should not focus its work on the various communication techniques that might be included in a definition of EDI. Instead, it should focus on the functions performed through the use of paper or of a medium other than traditional paper, irrespective of whether the data were sent as a message or stored as a computer record, and establish the conditions under which data recorded on a medium other than paper would be given the same legal value as that of data imposed on a traditional paper document. It was generally felt that focus-

ing on the functions rather than attempting to list and define the various techniques used for transmitting and storing the data would be more in line with the need to provide uniform rules that were not tied to a specific stage of technical development. The uniform rules might thus be described as "media-neutral".

18. After discussion, the Working Group was agreed that, having the above-mentioned general notion of EDI or "electronic commerce" in mind for the purpose of establishing the scope of the Working Group's task and the substance of the uniform rules, it would leave the matter of a specific definition of EDI to be reconsidered at a later stage.

19. As regards the terminology to be used in the preparation of the uniform rules, it was felt that the Working Group should attempt to identify a common denominator to be used in the general description of the various communication techniques that might be covered by the uniform rules. It was suggested that, in view of the adoption of the broad notion of "electronic commerce", it might be misleading to continue making reference to the term "EDI". It was recalled that almost all definitions of EDI currently in use, or suggested for use, among EDI users (see A/CN.9/WG.IV/WP.55, para. 9) somehow limited the scope of EDI to computer-to-computer communications and to data transmitted in a standardized format. A new terminology might thus reflect more accurately the extensive scope and the various layers of issues to be addressed in the uniform rules.

20. Various suggestions were made as to possible substitutes for the term "EDI". Support was expressed in favour of a suggestion to use the term "electronic commerce", which was described as sufficiently broad to encompass all existing communication techniques. However, it was stated that a reference to "electronic" techniques might be overly restrictive in view of possible future technical developments involving optical or other non-electronic means of transmission. Support was also expressed in favour of a suggestion to include a reference to "digital information". However, the view was expressed that such a reference might be overly comprehensive since telephone communications might also be described as the transmission of digital information. Support was also expressed in favour of other suggestions to adopt wording mentioning "paper-less trade" or otherwise referring to the "dematerialization" of the data. However, it was noted that the current practice of EDI seemed unlikely to result in complete disappearance of paper-based documents. It was generally felt that it might be inappropriate to deviate from the use of the term "EDI", which had become the term commonly used to describe the use of computers for the movement of business information by telecommunications, irrespective of whether narrower technical definitions of EDI were also in use.

2. Domestic and international transactions

21. The Working Group considered the question whether the uniform rules should be limited in scope to international cases or whether they should cover both international and domestic cases.

22. According to one view, the uniform rules should not be limited to international cases. One reason given was that policy considerations underlying the need to prepare the uniform rules and their content were the same in international as well as domestic cases. In particular, the purpose of the uniform rules was to provide legal certainty to parties that chose to keep their records in electronic form and there was no reason to limit that legal certainty only to records relating to international trade. Enterprises using EDI tended to use the same technical equipment and procedures for creating, transmitting and storing information in domestic as well as international trade; it was thus in the interest of those enterprises that all information be treated the same manner. Furthermore, it would be difficult to establish a clear and workable criterion for distinguishing domestic cases from the international ones. For example, an EDI record might be considered domestic on the ground that it was generated, transmitted and stored within one State; yet, if such a record became relevant in dispute-settlement proceedings in a foreign State, the inapplicability of uniform rules to such a record might create difficulties in using the record in that foreign State. It was suggested that the existence of two sets of rules for international and domestic electronic commerce would create barriers to international trade by introducing great uncertainty for users. It was added that, if the uniform rules were cast in the form of a model law, a State would be free to restrict the applicability of individual uniform provisions to international cases if that was considered appropriate.

23. According to another view, the uniform rules should be limited to international cases since the purpose of the uniform rules was to facilitate international trade. It was said that national laws on certain issues relating to EDI (e.g., evidentiary issues) were too diverse to allow for a total unification of law and that States would be more likely to accept unified solutions if those solutions did not entirely replace rules governing domestic relations. It was stated in reply that a conflict between the uniform rules and national rules on domestic EDI was unlikely to arise since few States had developed rules on EDI. It was pointed out that, if the uniform rules were cast in the form of a model law dealing with international trade, they could also be implemented domestically if States so wished.

24. To the extent that legislative policies underlying international EDI overlapped with such policies underlying domestic EDI, the Working Group provisionally considered it more prudent, once unified rules on international EDI were established and had proven themselves in practice, to leave it up to the States to extend the unified regime also to domestic EDI. Furthermore, it was pointed out that the Commission had traditionally focused on rules facilitating international trade, and that the current project should follow that tradition.

25. As to the criterion for defining international cases, some support was expressed for a solution according to which a case would be treated as international if the originator and the recipient of the message were in different States. Another possible solution was a flexible formula according to which a case would be treated as international if the EDI message or its subject-matter related to more than one country or if the EDI message affected interna-

tional trade; the Working Group was reminded that such a flexible solution was adopted in some States for distinguishing between international and domestic arbitrations.

Message as primary subject-matter of uniform rules

26. In the context of the discussion on international and domestic EDI, the Working Group discussed the question of the subject-matter of the uniform rules. The Working Group was generally agreed that the initial focus of the uniform rules should be EDI messages and not transactions or contracts that resulted from the exchange of EDI messages, except as necessary at that stage. Dealing in the uniform rules with transactions or contracts would result in the creation of special contract rules alongside traditional contract law, which would be an undesirable result. Nevertheless, it was noted that, to the extent the uniform rules would deal with the use of EDI for the purpose of contract formation, it might be necessary for the uniform rules to touch upon issues relating to transactions to which messages were related.

27. As to the EDI messages to be addressed by the uniform rules, several suggestions were made. EDI messages should be understood as a broad concept that included, in addition to communications transmitted between parties, also records created by a party but not transmitted to another party, for example because there was an error or breakdown in telecommunications or because the record was intended to remain within the sphere of the party that created the record. It was suggested that, in view of that broader notion of message, it might be more appropriate to use in the uniform rules the term "records", a term that covered both messages and data that had not been transmitted between parties.

28. As to the types of messages to be covered, it was suggested that the uniform rules should not be restricted to validating EDI messages that expressed a will of the party to be bound, but should include a wide variety of messages that might become legally relevant between parties. Such legally relevant messages included, for example, pre-contractual communications, various types of notifications or requests made during the performance of contracts, and claims arising from the breach of contracts.

3. Consumer transactions

29. There was general agreement in the Working Group that the uniform rules should not address special issues relating to the protection of consumers.

30. According to one view the uniform rules might provide that they did not apply to messages that originated from a party operating otherwise than in the course of a business or to messages addressed to a person for a purpose other than the business of the addressee.

31. The prevailing view, however, was that the uniform rules should apply to all messages, including messages to or from consumers, but that it should be made clear that the uniform rules were not intended to override any consumer-protection law. It was pointed out that the uniform rules themselves were likely to improve the position of consumers by increasing legal certainty in their transactions, and

that, in addition to that improvement, the uniform rules should open the way for the legislators to provide special protection to consumers.

32. The proponents of the prevailing view considered that the uniform rules should not provide a definition of consumer transactions. Setting forth such a definition would not be appropriate in view of the decision that the uniform rules should focus on EDI messages or records and not on the underlying contracts or other obligations for the purposes of which the messages were issued or the data were stored. As to whether the indication that the uniform rules were not intended to override any consumer-protection law should be given in the body of the uniform rules or in a footnote appended to the uniform rules, it was generally felt that, in view of the absence of a definition of consumer transactions, the matter would be better dealt with in a footnote.

33. It was observed that it might be appropriate to bear in mind a likely interest of commercial parties in having a degree of certainty as to when a given EDI message or transaction was subject to special consumer-protection law. Another observation was that special laws relating to consumers might provide not only for special rights of consumers but also for special duties or standards of behaviour.

B. Form of uniform rules

34. The Working Group was agreed that it should proceed with its work on the assumption that the uniform rules should be prepared in the form of statutory rules. The Working Group, however, deferred a final decision as to the specific form that those statutory rules should take.

III. DEFINITIONS AND GENERAL PROVISIONS

A. Definitions

1. Parties to an EDI transaction

35. It was considered that, in view of the focus of the uniform rules on EDI messages, the uniform rules might have to contain a definition of the sender and the receiver of the message and, depending on the content of the rules to be prepared, possibly also other parties such as the party who created or stored a message or a third party who provided value-added services regarding the message. As to third-party service providers, it was observed that the types of services provided by them varied greatly and that, as a consequence, any definition of third-party service providers would have to be very general, which would reduce its usefulness.

2. EDI, EDI messages and other terms

36. The Working Group recalled its deferral of a final decision as to the definition of EDI (see paragraph 18 above). It was also agreed that the introduction of definitions of other terms in the uniform rules might need to be considered in due course.

B. General provisions

1. Party autonomy under the uniform rules

37. The Working Group was generally agreed that the uniform rules should contain a general recognition of party autonomy. However, it was also agreed that in formulating individual provisions of the uniform rules the Working Group would, in accordance with public policies and with the need to maintain fair relations in EDI, consider the need for limiting the freedom of parties to deviate by agreement from a provision. It was pointed out that, to the extent the uniform rules would deal with the relationship between EDI networks and users of their services, there might be a need to protect the interests of parties that were in a weaker bargaining position.

2. Interpretation of the uniform rules

38. The Working Group discussed the question whether the uniform rules should contain a rule, modelled on article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the United Nations Sales Convention), according to which, in the interpretation of the uniform rules, regard should be had to the international character of the uniform rules and to the need to promote uniformity in the application of the uniform rules, and a rule, modelled on article 7(2) of that Convention, according to which matters governed by the uniform rules but not expressly settled in them should be settled in conformity with the general principles on which the uniform rules were based.

39. Views were expressed that provisions along the lines of article 7 of the United Nations Sales Convention would be useful if the uniform rules were to be cast in the form of a convention. For the case, however, that the uniform rules were to take the form of a model law, there was considerable support for not including such provisions. It was said that a model law assumed a degree of flexibility in the enactment of its provisions and that the discussed interpretation rules would be inconsistent with such flexibility.

40. Another view was that the purpose of a model law in the area of EDI was to unify and harmonize national laws and that, in order to underscore that purpose, it would be useful to remind the users of laws based on the model law of its international origin and the desirability of uniformity in its interpretation. It was added that the interpretation rule could be drafted in such a manner that it would take account of the possibility that a State might decide to deviate from the text of the model law.

41. The Working Group also discussed the question whether the uniform rules should provide standards by which acts or declarations by participants in EDI were to be interpreted. The suggested standards, modelled on article 8 of the United Nations Sales Convention, that the Working Group considered were: (1) the intent of the party where the other party knew or could not have been unaware of what the intent was; and (2) the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

42. Opposition was expressed to the inclusion of such standards of interpretation in the uniform rules on the ground that they would give rise to uncertainties and difficulties in application. In particular, it was stated that a rule on interpretation of the intent of a party might raise difficulties in connection with the expression of intent by means of a computer or other automatic device operating without direct human intervention. Other views were that the Working Group should consider such standards of interpretation at a later stage if it were to be decided that the uniform rules should deal with the question of formation of contracts through EDI.

3. Arbitration and conflict of laws

43. The Working Group agreed to reconsider those issues at a later stage of its deliberations.

IV. FORM REQUIREMENTS

A. Preliminary discussion

44. Prior to engaging in a general discussion of the way in which applicable form requirements could be made compatible with the use of EDI, the Working Group considered specific questions that might affect the scope of the uniform rules.

1. Relationships between EDI users and public authorities

45. The Working Group discussed a possible distinction between the admissibility of EDI messages in commercial arbitration or judicial proceedings and the acceptance and use of such messages by administrative authorities.

46. In favour of adopting such a distinction, the view was expressed that the uniform rules should not deal with the mandatory form requirements that might be imposed on corporations and individuals for regulatory or other administrative purpose (e.g., tax and securities laws, banking supervisory regulations). It was recalled that the Working Group, at its previous session, had decided that recommending changes in administrative rules at the national level would not be an appropriate focus of work by the Commission. At the same time, it was recognized that recommendations that were made with respect to the removal of obstacles to the use of EDI at the international level might help to foster the removal of such obstacles in the administrative sphere (A/CN.9/360, para. 52).

47. Another view was that it would be inappropriate to draw a general distinction between form requirements established for the admissibility of EDI messages in commercial arbitration or judicial proceedings and form requirements established for the acceptance and use of such messages in the administrative sphere. It was stated that, in a number of cases, the two types of requirements served similar purposes. For example, requirements regarding the use of computer records as evidence by public authorities for accounting and tax purposes should not be artificially

distinguished from requirements regarding the acceptability of computer records as evidence by courts. It was stated that, consistent with the "functional approach" agreed upon at the previous session, the uniform rules should establish the conditions under which computer data could be safely used as a substitute for data recorded on paper. In that respect, there seemed to exist no difficulty in recognizing that such a functional equivalent to paper could be used not only between private EDI users and for litigation purposes but also in the relationships between EDI users and public authorities.

48. After discussion, the Working Group was agreed that the various views expressed were not mutually incompatible. It was agreed that, while the uniform rules should not expressly deal with the situations where a form requirement was prescribed by an administration for reasons of public policy, the sphere of relationships between EDI users and public authorities should not be excluded from the scope of the uniform rules. However, it was also agreed that the adoption of such an integrated approach to the admissibility of computerized data as evidence should not create the assumption that public authorities would implement and maintain EDI technology at a cost that they might not be prepared to incur.

2. Transactions involving special form requirements

49. The Working Group was agreed that the purpose of the uniform rules was not to deal with transactions for which, in a number of countries, some form of public authentication or registration was required. Examples of such transactions involved the sale of real estate and the sale of registered moveables such as aircrafts and vessels. It was agreed that the uniform rules should focus on commercial relationships related to the trading of goods and services.

B. Functional equivalent for "writing"

1. Mandatory requirement of a writing

50. The Working Group was agreed that a "functional equivalent" approach should be taken with respect to existing requirements that data be presented in written form. The view was expressed that the Working Group should identify the essential functions that were traditionally fulfilled by writing, with a view to establishing the conditions under which EDI messages would be deemed to fulfil those functions and thereby receive the same legal recognition as paper documents.

51. It was recalled that the Working Group, at its previous session, had considered that a writing served the following functions: (1) to provide that a document would be legible by all; (2) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (3) to allow for the reproduction of a document so that each party would hold a copy of the same data; (4) to allow for the authentication of data by means of a signature; and (5) to provide that a document would be in a form acceptable to public authorities and courts (see A/CN.9/360, para. 42). In addition, the following functions were

suggested as characteristics of writing: (6) to finalize the intent of the author of the writing and provide a record of that intent; (7) to allow for the easy storage of data in a tangible form; (8) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (9) to help the parties be aware of the consequences of their entering into a contract; (10) to facilitate control and subsequent audit for accounting, tax or regulatory purposes; and (11) to bring legal rights and obligations into existence in those cases where a writing was required for validity purposes.

52. In view of the above-mentioned suggestions, a note of caution was struck about adopting an overly comprehensive notion of the functions performed by writing. It was stated that the existing requirements that data be presented in written form, though generally not focusing on the functions to be performed by a writing, often combined the requirement of a writing with concepts distinct from writing, such as signature. It was generally agreed that, when adopting a functional approach, attention should be given to the fact that the requirement of a writing should be considered as the lowest layer in a hierarchy of form requirements, which provided distinct levels of reliability, traceability and unalterability with respect to paper-based documents. The requirement that data be presented in written form (which was described as a "threshold requirement") should thus not be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act". For example, a written document that was neither dated nor signed, and the author of which either was not identified in the written document or was identified by a mere letterhead, would be regarded as a writing although it might be of little evidential weight in the absence of other evidence (e.g., testimony) regarding the authorship of the document. It was also pointed out that the notion of unalterability should not be considered as built into the concept of writing as an absolute requirement since a writing in pencil might still be considered a writing under certain existing legal definitions. In general, it was felt that notions such as "evidence" and "intent of the parties to bind themselves" were to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of a "writing". In addition, questions were raised as to whether intention should be a focus of the uniform rules. It was also generally felt that a distinction needed to be made between the acceptability of data as evidence and the evidential value, or weight, carried by such data.

53. In that connection, it was noted that certain electronic techniques were capable of performing certain functions of paper-based documents with a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data. However, it was generally agreed that the adoption of the functional-equivalent approach should not result in imposing on EDI users more stringent standards of security (and the related costs) than in a paper-based environment.

54. As regards the method to be used for defining a functional equivalent to paper-based documents, two possible approaches were suggested. One approach relied on an extension of the definition of "writing" to encompass EDI

techniques. It was proposed that a definition of writing along the following lines might be used as a basis for discussion:

“Writing includes but is not limited to a telegram, telex and any other telecommunication which preserves a record of the information contained therein and is capable of being reproduced in tangible form.”

55. Support was expressed in favour of the adoption of such a definition, with possible refinements regarding the capability of the data of being reproduced in human-readable form or in any manner that would be required by applicable law.

56. The view was expressed, however, that it might be inappropriate to adopt for general use a definition of “writing” that might overly stretch the common understanding as to what “writing” consisted of. The view was expressed that such an extended definition might lead to the undesirable result of validating the dematerialization of instruments for which States might wish to maintain the paper-based form. Examples were given regarding the use of paper in the area of cheques and securities. It was thus suggested that several definitions might need to be considered, based on a case-by-case review of the individual situations where a rule of law required the presentation of data in written form. It was noted that such an approach might encounter practical difficulties in view of the large number of situations where such rules existed.

57. Another approach relied on the introduction of a new concept that would state the conditions under which, where applicable law required data to be presented in writing, the requirement would be deemed to be fulfilled. The following proposal was made:

“In legal situations where ‘writing’ is required, that term shall be taken to mean any entry on any medium able to transmit *in toto* the data in the entry, which must be capable of being reproduced in human-readable form.”

58. Support was expressed in favour of the proposal. It was suggested that the text should be refined by mentioning that the data should be intentionally recorded or transmitted. It was also suggested that the reference to “any medium” should be qualified to exclude paper and that the provision should require that the relevant computer systems should be maintained properly.

59. Another proposal was to provide that, unless otherwise agreed by the parties, any form of electronic recording of information would be deemed to be functionally equivalent to writing, provided it could be reproduced in visible and intelligible form (or tangible and readable form), and provided it was preserved as a record.

60. Yet another proposal was made to adopt the following provisions:

“(1) In this article, the following expressions have the following meanings:

(a) ‘an information system’ means any computer or other technology by means of which information may be recorded, processed or communicated;

(b) ‘The originator of the information’ means the person by whom the record of the information was authenticated, or, where the record is not authenticated,

(i) in the case of a record composed on behalf of any person, the person on whose behalf the record was composed, and

(ii) in any other case, the person by whom the record was composed; and

(c) ‘a relevant rule of law’ means a rule of law (including a contractual provision) which

(i) regulates the manner in which a communication may be made between persons in different States, the nature of a record of any such communication or the conditions in which any such record may be kept; or

(ii) provides for certain consequences conditional upon the manner in which any such communication is made, the nature of any such record or the conditions in which any such record is kept.

(2) For the purpose of any relevant rule of law which requires a document in writing, or a document which is in writing and signed under hand (or otherwise authenticated), or provides for certain consequences conditional upon the existence of such a document, a record which, although not in writing and not signed under hand, purports to be a true and complete representation of the information which the written document (if it existed) would contain, shall be sufficient, if the conditions specified in paragraph (3) below are satisfied.

(3) The conditions referred to in paragraph (2) above are:

(a) that the originator of all the information of which the record is composed is the person by whom the written document would have been authenticated, or by whom or on whose behalf the written document would have been composed;

(b) that the identity of the originator of the information is properly authenticated;

(c) that the information of which the record is composed was registered and stored by an information system which:

(i) records the date on which and the sequence in which it registers such information;

(ii) is capable of producing a legible statement recording that date and sequence; and

(iii) was operating properly at the time at which the information is purported to have been registered and stored;

(d) that the legible statement of the date on which and sequence in which the information was registered:

(i) is certified by the person responsible for causing the statement to be produced as being an accurate statement of the date and sequence recorded by the information system; and

(ii) corresponds to the time at which the written document, to which the record is pur-

ported to correspond, would have been created or (if later) would have been signed or otherwise authenticated;

(e) that all appropriate steps have been taken by the originator of the information, and by the person or persons responsible for the operation of the information system which registered it, to ensure that the information has at all times been secure against alteration in the course of transmission or recording or subsequently; and

(f) that the information system which registered the information is capable of producing a legible statement of the information contained in the record, which records the authentication of the identity of the originator of that information.

(4) For the purpose of paragraph (3)(b) above, the identity of the originator of the information is properly authenticated if the manner of authentication complies with any procedures which are sufficient in the circumstances to enable the authentication to be absolutely or substantially relied upon.

(5) Where any rule of law referred to in paragraph (2) above derives solely from a contractual provision, the parties to the contract may by agreement substitute a different standard of authentication from that referred to in paragraph (4) above, for the purpose of the legal relations between themselves.

(6) For the purpose of paragraph (3)(c)(iii) above, the information system is to be presumed to have been operating properly at the relevant time unless the contrary is shown.

(7) Subject to the preceding paragraphs of this article, for the purpose of any rule of law which requires information to be communicated or recorded in legible form, or provides for certain consequences conditional upon information being so communicated or recorded, it shall be sufficient if a legible statement of the information is capable of being produced by the information system to which the information was communicated or by which it was recorded.

(8) This article does not affect any rule of law which:

(a) relates to the creation or disposition of title to any property (whether movable or immovable and whether tangible or intangible) or any interest therein; or

(b) requires, or provides for certain consequences conditional upon, compliance with any formalities additional to those referred to in paragraph (1) above."

the evidential weight and evidential admissibility of EDI messages should be dealt with in other provisions of the uniform rules.

2. Contractual definition of a writing

62. It was generally agreed that the uniform rules should contain a provision designed to eliminate the doubts that might exist in some legal systems as to the validity of privately-agreed definitions of "writing". However, it was also agreed that such validation of private agreements should be so drafted that States could limit the freedom of parties for certain specific types of documents. The view was also expressed that, since the aim of the uniform rules was to provide statutory rules that would validate the use of EDI, the need for privately-agreed definitions of "writing" should decrease with the adoption of the uniform rules.

C. Authentication of EDI messages

63. With a view to determining whether a functional equivalent of a signature requirement could be established in an electronic environment, the Working Group engaged in a review of the functions performed by a signature in a paper-based environment. It was generally agreed that among the functions of a handwritten signature were the following: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text; the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

64. It was noted that, alongside the traditional handwritten signature, there existed various types of procedures, sometimes also referred to as "signatures", which provided various levels of certainty. For example, in some countries, there existed a general requirement that contracts for the sale of goods above a certain amount should be "signed" in order to be enforceable. However, the concept of a signature adopted in that context was such that a stamp, a type-written signature or a printed letterhead might be regarded as sufficient to fulfil the signature requirement. At the other end of the spectrum, there existed requirements that combined the traditional handwritten signature with additional security procedures such as the confirmation of the signature by witnesses.

65. The view was expressed that it might be desirable to develop functional equivalents for the various types and levels of signature requirements in existence. Such an approach would increase the level of certainty as to the degree of legal recognition that could be expected from the use of the various means of authentication used in EDI practice as substitutes for "signatures". However, it was widely felt that the notion of signature was intimately linked to the use

61. Support was expressed in favour of the general approach taken in the proposal, under which, rather than attempting to provide a general definition of a writing, the uniform rules would describe the conditions under which computer data would carry legal significance. However, it was stated that the definition was too complex and dealt with issues that went beyond the definition of a functional equivalent of a writing. The view was also expressed that the proposal would result in establishing too stringent requirements that might inhibit the use of EDI. It was stated that a provision defining the functional equivalent of a "writing" should be concise and that additional rules as to

of paper and that there might exist no technical solutions for accommodating all existing types and uses of "signature" in a dematerialized environment. Furthermore, it was noted that any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of "signatures" might create the risk of tying the uniform rules to a given state of technical development.

66. A more comprehensive approach that was suggested was to include in the uniform rules a provision that would state the general conditions under which EDI messages would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements which currently presented barriers to electronic commerce. Various suggestions were made as to possible distinctions to be borne in mind when preparing such a general provision. It was further suggested that the Working Group deal with the issue of authentication separately from signature requirements.

67. A suggestion was to distinguish between the situation in which EDI users were linked by a communication agreement and the situation in which parties had no prior contractual relationship regarding the use of EDI. Where parties were linked by a communication agreement, messages should be regarded as authentic provided that the parties had agreed on a commercially reasonable method of authentication and they had complied with that method. In the absence of a communication agreement between the parties, a message should be regarded as authentic provided that it was authenticated by a method that was commercially reasonable under the circumstances. In determining whether a method of authentication was commercially reasonable, factors to be taken into account might include the following: (1) the status and relative economic size of the parties; (2) the nature of their trade activity; (3) the frequency at which commercial transactions took place between the parties; (4) the kind and size of the transaction; (5) the status and function of signature in a given statutory and regulatory environment; (6) the capability of the communication systems; (7) the authentication procedures set forth by communication system operators; and (8) any other relevant factors.

68. Support was expressed in favour of that suggestion, which was said to provide authentication criteria that would be sufficiently flexible to meet the needs of practitioners. However, the view was expressed that it would be inappropriate to limit the contractual freedom of the parties to agree on any method of authentication, even though that method might be considered unreasonable by reference to objective criteria. The view was also expressed that, in most practical situations, the matter of authentication was dealt with in the context of the relationship between EDI users and third-party service providers, who placed various possible levels of authentication at the disposal of users. It was stated in reply that the notion of "commercial reasonableness" was useful in that it provided a minimum standard of authentication to be complied with in the absence of other requirements resulting from contractual arrangements or regulatory requirements. At the same time, the view was expressed that such a minimum standard should not impinge on the discretion of the States to establish mandatory form requirements for certain specified types of transactions.

69. As regards the reference to "commercial reasonableness", examples were given of situations (involving either commercial partners engaged in a continuous trading relationship or parties that had no prior contractual relationship) where the methods of authentication used in practice might be considered as unreasonable from an objective perspective. It was pointed out that, similarly, in a paper-based environment, certain methods of authentication currently used might be regarded as commercially unreasonable. The view was expressed that the uniform rules, while they should be drafted so as to encourage general use of authentication procedures in EDI practice, should avoid creating authentication requirements more stringent than those at play in a paper-based environment.

70. The objectiveness of a criterion based on "commercial reasonableness" was also said to be questionable. It was stated that the use of such a notion might result in increased uncertainty as to what methods of authentication would be regarded as acceptable in any given jurisdiction. Furthermore, it was stated that the use of the word "commercial" might create an undesirable dichotomy between the "commercial" uses of EDI and other business uses of EDI involving parties that might, in certain jurisdictions, not be regarded as conducting a "commercial" activity (e.g., certain categories of professionals).

71. After discussion, the Working Group was generally agreed that a message that was required to be authenticated should not be denied legal value for the sole reason that it was not authenticated in a manner peculiar to paper documents. As regards the issues of evidence, it was also agreed that the probative value of a message might result not only from compliance with a given method of authentication but also from other elements (e.g., testimonial evidence).

72. The view was expressed that it would be useful to establish a minimum standard of authentication for EDI messages that might be exchanged in the absence of a prior contractual relationship. It was also stated that, even if the parties used EDI communications in the context of a communication agreement, it might be useful to provide guidance in the uniform rules as to what might constitute an appropriate method of authentication. However, the view was also expressed that the question of authentication should be left entirely to the discretion of the parties.

73. As to whether the uniform rules should state the consequences of following the prescribed or agreed form of authentication, various suggestions were made. One suggestion was that, in the case where a reasonable method of authentication had been applied, the message would be regarded as binding upon the purported sender. Another suggestion was that, unless otherwise agreed by the parties or provided by law, an authenticated message would constitute *prima facie* evidence as to the authenticity of its content. Those suggestions were objected to on the ground that they might overburden the purported sender of a message, who should neither be bound by the content of a forged message nor obliged to prove that it had not sent that message.

74. It was suggested that, in the preparation of uniform rules on the issue of authentication, it might be useful to

bear in mind a distinction between the authentication of a message with respect to its source (i.e., the identity of its sender) and the authentication with respect to the content of a message.

75. Various suggestions were made in connection with a possible definition of "authentication". It was suggested that authentication could be defined as "the process of proving the source and content of the message". Another suggestion was to define authentication as "the process by which an intention is confined in a message".

76. Yet another suggestion was to provide that:

"(1) Where the signature of any person is necessary for the purpose of any rule of law, any method of authentication which purports to have been used by or on behalf of that person shall be a sufficient authentication for that purpose in place of signature if it is of a kind sufficient to constitute evidence of substantial probative value that that person intended to approve the content of the information to which it has been applied.

(2) Where the signature of any person is necessary for any purpose other than for the purpose of any rule of law (whether or not it is required by any agreement), any method of authentication which purports to have been used by or on behalf of that person in place of signature shall be treated as a sufficient authentication for that purpose if it is of a kind capable of constituting evidence of a probative value sufficient in all the circumstances relevant to recording or communicating the information to which it has been applied, that that person intended to approve the content of that information.

(3) The operation of paragraph (2) above may be excluded by any legally enforceable undertaking or agreement."

The view was expressed that that suggestion did not deal with formal requirements of signatures.

D. Requirement of an original

1. *Functional equivalent*

77. The Working Group noted that a number of national laws required, in different contexts, the presentation of a paper document in its original and that such requirements constituted an obstacle to the use of EDI.

78. During the consideration of possible solutions addressing that obstacle, the Working Group made a distinction between two types of requirements of an original. The first one was a requirement contained in rules of evidence according to which, when a writing was to be presented in support of a claim, the original document was required as the best evidence. In the same group were also requirements according to which, for reasons of administrative supervision, certain documents (e.g., invoices) were to be kept and presented in the original. The second type of requirement concerned documents that incorporated a right or title (e.g., bills of lading, warehouse receipts and negotiable instruments); in order to obtain or transfer the right

or title incorporated in such a document it was necessary to obtain or transfer the possession of the original document.

79. The Working Group agreed that these two types of requirements presented different kinds of obstacles to the use of EDI and that any statutory provisions addressing those obstacles should treat them separately. The Working Group concentrated its discussion on the first type of requirement. As to the second type of requirement, it was necessary to study further the possibilities and the need for statutory solutions.

80. A proposal was made to address the question of an original by a provision along the following lines:

"A message sent electronically on any medium shall be considered to be an original with the same evidential value as if it had been drafted on paper, provided that the following conditions are met: originality is attributed to the message by the originator of the information; the message is signed and bears the time and date; it is accepted as an original, implicitly or explicitly, through the addressee's acknowledgement of receipt . . .".

81. Various comments were made regarding the proposed provision. One comment was that the scope of the provision, which was limited to messages, should be expanded to cover records irrespective of whether a record had been communicated between parties.

82. While it was noted that it was preferable not to link the provision to any particular technique or medium, the expression "any medium" was questioned as being too broad and as encompassing, for example, also voice telephony.

83. Another comment, which concerned the term "signed", was that the technique of "signing" records in a computer environment was fundamentally different from paper-based signatures, that the level of security provided by a computer authentication depended on the method used and that the provision gave no guidance as to the level of security to be provided by the computer authentication. It was noted that certain forms of computer authentication gave at least the same if not better security than paper-based signatures.

84. It was noted that the proposed text did not resolve the question of when or how the attribution of originality was to be made, in particular in a situation where a message or a record was subsequently amended and only the amended version was designated as an original.

85. It was also said that the expression "acknowledgement of receipt" should not be confounded with the addressee's agreement with the content of the message. It was suggested that it would be clearer to speak of the addressee's acknowledgement of the character of originality instead of the acknowledgement of receipt. The view was also expressed that the legal recognition of an EDI message as an equivalent for a paper original should not be made generally dependent upon acceptance by the addressee.

86. Another comment made was that the requirement contained in the proposed provision was more onerous than

for paper-based communications since it required the functional equivalents of signature, timing, dating and receipt as well as originality.

87. It was suggested that the concept of originality was a concept limited to traditional paper-based documents and that, in view of the manner in which computer records were created, maintained and communicated, it was impossible to speak of original computer records. On the basis of this observation, it was suggested that the uniform rules should, instead of establishing a fiction that a computer record was to be considered an original, provide that any legal requirement for a document to be presented in the original was satisfied if certain conditions were met. Another suggestion was to provide that EDI records were not barred from being presented in evidence solely as a result of the application of a requirement that a document had to be presented in the original. It was observed that such a provision addressing the admissibility of computer records would not deal with the evidential weight of the EDI records.

88. It was suggested that the concept of originality was linked to the reliability of the information contained in the original document and that therefore the rule establishing a functional equivalent of an original should also address the reliability and management of the computer system used in creating and communicating the message. In that connection it was proposed to include in the uniform rules a provision that the requirement of an original was satisfied if the following conditions were met: (a) there was a reliable identification of the originator of the message and (b) there existed reliable assurance as to the integrity of the content of the message as sent and received.

89. It was observed that in paper-based communications national laws might recognize as acceptable also unsigned and undated documents, and that introducing such requirements for EDI messages might mean imposing additional and unnecessary burdens upon participants in EDI.

90. It was noted that in practice parties might authenticate and designate as originals two or more copies of a given document and that it would be useful to allow such practice also in EDI. It was said that an original was usually the earliest record in time and that the earliest record which could reasonably be expected to be available in view of the use of EDI technology should satisfy the originality requirement.

91. Another suggestion was to provide that:

“(1) Where it is necessary for the purpose of any rule of law or for the purpose of any question of evidence that a record be an original document,

(a) as between two records containing identical information and properly authenticated by the same person, the record first created and authenticated shall be presumed to be a relevant record; and

(b) as between two records authenticated by the same person but containing information which differs in any respect, each shall be presumed to be a relevant record of the information it contains.

(2) A relevant record for the purpose of paragraph (1) above shall be deemed to satisfy the requirements of the

rule of law in question and to have equivalent evidential weight to an original record.

(3) Paragraph (1) above shall not apply if it is shown that another record containing identical information and properly authenticated by the same person was the original or was created and authenticated at an earlier date.”

2. Contractual rules

92. There was wide support in the Working Group for expressly validating in the uniform rules agreements by parties declaring that an EDI message was to be considered an original or that an EDI message was to be admissible in evidence despite any requirement for an original. It was considered, however, that such provisions on party autonomy should not deal with the requirements for an original in the case where a document incorporated a right or a title and where that right or title had been acquired and transferred by acquiring and transferring the possession of the original document (see paragraphs 2 and 3 above).

93. Views were expressed that, while the recognition of party autonomy was useful, it was still desirable to provide clear statutory rules that would reduce the need for parties to deal with the requirement for an original by way of private agreements.

94. It was suggested that parties should be able to include such agreements concerning the requirement of originality either in the communication agreement, which addressed the method of electronic communication between the parties, or in the record embodying the contract entered into through EDI.

95. The Working Group considered the question of the effect of an agreement of parties regarding the requirement of originality on a third party who did not participate in the agreement. It was suggested that, while such an agreement was in principle effective only as regards the parties to the agreement, third parties should not be prevented from relying on the agreement for the purpose of having an EDI message admitted in evidence. On the other hand, it was considered that such an agreement could not be invoked against a third party who chose to rely on the statutory requirement that the message had to be presented in the original.

96. It was suggested that the provision recognizing party autonomy should be drafted in such a way that it would not impinge upon the general limits to party autonomy that existed in national laws.

E. Evidential value of EDI messages

1. Admissibility of EDI-generated evidence

97. The Working Group, recalling the considerations at its twenty-fourth session (A/CN.9/360, paras. 44-52), noted that in some jurisdictions there existed no legal obstacles to the admissibility of EDI records in evidence and that those

jurisdictions saw no need for rules on admissibility of EDI-generated evidence. The Working Group, however, also noted that in a number of jurisdictions there existed legal obstacles to the admissibility of computer records in judicial or arbitral proceedings. A prominent example of such an obstacle was the "hearsay" rule found in common-law countries (*ibid.*, para. 46).

98. Strong support was expressed for including in the uniform rules a provision declaring EDI records to be admissible evidence in order to eliminate barriers such as those found in the hearsay rule. It was considered that such barriers constituted an undesirable and unnecessary obstacle to the use of EDI in international trade. A suggestion was made that the proposed provision should make it clear that computer-generated evidence, in order to be presented in evidence, had to be in a "tangible" or "human-readable" form.

99. Another view was that an EDI record should be declared admissible evidence subject to showing that the record had been generated and stored in a reliable manner. Yet another view was that admissibility of evidence, a question limited to one group of legal systems, had been addressed and solved in various manners in those legal systems, and that those solutions did not lend themselves to being unified. Instead, countries where there were restrictions on the admissibility of computer-generated evidence should be left to modify those restrictions in the light of developments in the definition of functional equivalents to writing and signature. A concern was expressed that this latter approach would not remove the perceived barriers to electronic commerce.

100. It was observed that particular questions had arisen as to the admissibility of EDI records generated in a network of computers, in particular if computer processing units forming part of the network were located in different States. It was said that, if it were to be necessary, for the admissibility of records processed in a network, to demonstrate by testimony the integrity and reliability of all processing units in the network, it might be difficult or costly to establish admissibility of such records.

101. The Working Group agreed, provisionally, that any rule establishing admissibility of EDI records should not modify existing rules concerning the burden of proof or affect the requirement that a record adduced in evidence should be relevant evidence.

2. Weight of EDI-generated records

102. It was generally considered that it was neither possible nor desirable to establish detailed statutory rules for weighing the probative value of EDI records. It was considered most appropriate to leave the question of weight of evidence to the discretion of the trier of fact. It was, however, considered useful to include in the uniform rules factors or guidelines to be taken into account in evaluating computer-generated evidence. The purpose of these factors or guidelines would be to assist the trier of fact in the taking of evidence and to increase the level of certainty in the use of EDI records, without thereby eliminating the

principle that it was up to the trier of fact to evaluate evidence taking into account all relevant circumstances. The following factors were mentioned as suitable for inclusion in the uniform rules: method of recording data; adequacy of measures protecting against alteration of data; proper maintenance of data carriers; and methods used for authentication of EDI messages.

3. Contractual rules

103. It was observed that a number of international and national organizations had prepared or were preparing model EDI agreements that addressed, *inter alia*, the question of admissibility and weight of EDI-generated evidence. Support was expressed for validating such agreements by a provision in the uniform rules.

104. While the Working Group agreed that party autonomy in the area of evidence should be recognized, it was noted that party autonomy in that area was subject to limits. Those limits concerned, for example, the need to respect the principle of equality of parties, the right of courts to have a degree of initiative in establishing the facts relevant to the dispute and the principle that an agreement between the parties should not adversely affect third persons.

105. One view was that such limits, the extent of which might vary among legal systems, were inherent to the concept of party autonomy and that there was no need for the uniform rules to express or unify them.

106. Another view was that, since the law of evidence reflected fundamental concepts of justice and public policy, it was necessary to state expressly in the uniform rules that party autonomy was subject to the rules of public policy.

107. Yet another view was that a degree of certainty as to the limits to party autonomy was desirable in the uniform rules, and that a mere reference to public policy did not provide sufficient certainty. It was also stated that it was important to distinguish admissibility of evidence as against third parties.

108. A further view, the motivation of which was to enable the courts and arbitral tribunals to validate the use of EDI systems created by private agreements, was that the uniform rules should provide that party autonomy in the area of evidence was recognized to the maximum extent possible under the applicable law. The need to promote international trade and the desirability to foster uniform interpretation of the uniform rules were mentioned in support of the latter view.

V. OBLIGATIONS OF PARTIES

A. Obligations of the sender of a message

109. The Working Group discussed the need to include in the uniform rules a provision determining the conditions under which the sender of an EDI message was bound by the content of the message.

110. In discussing that question, reference was made to article 5, paragraphs (1) to (4), of the UNCITRAL Model Law on International Credit Transfers, which specified the cases in which a sender was bound by a payment order issued by or on behalf of the sender. The text of article 5(1) to (4) reads as follows:

*“Article 5
Obligations of sender*

“(1) A sender is bound by a payment order or an amendment or revocation of a payment order if it was issued by the sender or by another person who had the authority to bind the sender.

(2) When a payment order or an amendment or revocation of a payment order is subject to authentication other than by means of a mere comparison of signature, a purported sender who is not bound under paragraph (1) is nevertheless bound if

(a) the authentication is in the circumstances a commercially reasonable method of security against unauthorized payment orders; and

(b) the receiving bank complied with the authentication.

(3) The parties are not permitted to agree that a purported sender is bound under paragraph (2) if the authentication is not commercially reasonable in the circumstances.

(4) A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than

(a) a present or former employee of the purported sender, or

(b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

The preceding sentence does not apply if the receiving bank proves that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.”

111. One view was that there existed good reasons for resolving in the uniform rules the question of when the sender or a purported sender would be bound by the content of a message. A suggestion was made to include in the uniform rules a provision, inspired by article 5(1) of the Model Law, to the effect that, if the rules on the authentication of messages had been complied with, a sender would be bound by the content of a message if the message was sent by the sender or by another person who had the authority to bind the sender. Additional provisions, the content of which remained to be considered, should address the question when should the recipient of a message who had no reason to doubt the authenticity of the message be able to regard the message as binding on the purported sender.

112. It was stated that, while many EDI messages were not intended to obligate the sender contractually, numerous

other EDI messages were intended to establish a binding obligation on the sender, and that, as to the latter type of message, it was necessary to give to the receiver a degree of certainty that the received message could be relied and acted upon. It was further suggested that the discussed provision, which was intimately linked with authentication and security procedures, would stimulate participants in EDI to observe and improve those procedures. It was added that, in providing that certainty, appropriate attention had to be paid to duties of the receiver of the message and of any third party that provided services in the transmission of the message.

113. Another view was that the question whether a sender or a purported sender was bound by a message fell outside the focus of the uniform rules since it was a question pertaining to the underlying transaction rather than the question of the communication procedures. It was said that the existence of a provision on that question in the Model Law on Credit Transfers was not dispositive as regards the inclusion of a similar provision in the uniform rules, because those two legal texts covered different subject-matters. The Model Law dealt with contracts for the transfer of credits irrespective of the method used in transmitting payment orders, whereas the uniform rules focused on EDI as a particular method of communication irrespective of whether the EDI messages were intended to create contractual obligations.

114. It was observed that, while binding EDI messages might sometimes be sent between parties in the absence of an agreement on the interchange of messages, EDI messages intended to be binding were usually transmitted between parties that had entered into a previous agreement for the conclusion of contracts by EDI. It was suggested that there was little need for the discussed provision to cover messages sent in the framework of a previous agreement, since the answer to the question of the allocation of risk for unauthorized messages could be arrived at on the basis of the agreement and on the basis of the law applicable to that agreement. In opposition to that suggestion, it was said that the answer might not follow clearly from the agreement and that the applicable law on the issue might not be clear or internationally unified; thus, there was a need to solve the question by a harmonized provision in the uniform rules. As to messages sent between parties without a previous agreement between the parties, it was suggested that the appropriate solution was the general principle that a person could be bound by a message only if the message was sent or authorized by that person.

115. It was suggested that, in view of the different possible purposes that an EDI message might have, the uniform rules should perhaps not speak of a message being binding, but should rather merely refer to the purported sender as being deemed to be the sender of the message if specified conditions were met. It was suggested that the problem was essentially one of security and use of techniques such as functional acknowledgement. Another suggestion was that, in view of the fact that not all messages were intended to create an obligation, the provision might be restricted to messages whose purpose was to obligate the sender. A further suggestion was that, when the receiver of a message complied with authentication and security procedures and

had no reason to doubt the authenticity of the message, the uniform rules should establish a presumption that the message stemmed from the purported sender, but that the purported sender should have a possibility to rebut that presumption.

B. Obligations subsequent to transmission

1. *Functional acknowledgement*

116. It was generally agreed that a possible rule should make it clear that a functional acknowledgement, the purpose of which was merely to indicate that a message had been received, was not intended to carry any legal effect as to the possible formation of contracts by means of EDI communications. In no instance, unless expressly agreed otherwise by the parties, should an acknowledgement of receipt be confused with any decision on the part of the receiving party to agree with the content of the message.

117. Various views were expressed as to whether the uniform rules should establish a statutory duty to issue functional acknowledgements in the absence of an agreement by the parties. Support was expressed in favour of the view that, as a matter of principle, the uniform rules should not impose acknowledgement requirements any more than they should impose the use of any more sophisticated security procedure. It was noted that the use of functional acknowledgements was essentially a business decision to be made by the parties to an EDI transaction. In that connection, it was suggested that functional acknowledgements were comparable to registered mail. It was noted that, with respect to certain classes of messages, the use of even the simple and relatively inexpensive procedure of a functional acknowledgement might be regarded as excessively burdensome and costly.

118. Another view was that the uniform rules should establish a duty to issue functional acknowledgements with respect to all received messages, subject to express agreement of the parties to the contrary. It was stated that an important feature of the uniform rules would be to induce parties to take advantage of the unique capability of EDI to provide immediate certainty as to the receipt of a message. It was also stated that mechanisms providing for automatic acknowledgements of receipt of messages were generally built into EDI systems, thus providing for acknowledgement of receipt at high speed and low cost.

119. The Working Group discussed the possible content of a legal regime of functional acknowledgements. The view was expressed that, irrespective of whether the uniform rules established statutory duties, default rules were needed to deal with the situation where functional acknowledgements were requested in individual messages exchanged between parties that were not linked by a communication agreement, or in situations where verifications were sent, even if not requested. The Working Group considered the following proposal as a basis for discussion:

“Unless otherwise agreed by the parties,

(1) Any party may request the acknowledgement of receipt of the message from the receiver;

(2) Acknowledgement of receipt should be given without undue delay, and at the latest within one business day following the day of receipt of the message to be acknowledged;

(3) The receiver of such a request is not entitled to act upon the received message until an acknowledgement has been given;

(4) When the sender does not receive the acknowledgement of receipt within the time limit, he is entitled to consider the message null and void on so advising the receiver.”

120. As regards the consequences of a failure to issue a requested acknowledgement, support was expressed in favour of the above-mentioned proposal. It was stated that the proposal appropriately preserved the possibility that receipt of a message could be evidenced by means other than a functional acknowledgement. It was also stated that the proposal also established a balance between the rights and obligations of the sender and of the recipient. However, a concern was expressed that a provision along the lines of the proposed text might lead to undesirable results, for example if it were misinterpreted as implying that a message containing the acceptance of an offer could be revoked after it had been received, or as implying that a message could not be revoked regardless of the fact that an acknowledgement had been received. Another concern was that such a provision might provide the basis for a claim regarding consequential damages that might result from a failure to issue a functional acknowledgement.

121. A suggestion was made that, instead of focusing on the failure to issue a requested acknowledgement, the uniform rules should state the consequences of proper acknowledgement, for example by establishing that the issuance of a functional acknowledgement would constitute conclusive or presumptive evidence that the message had been received. However, it was observed that such a rule might affect rules regarding the burden of proof. Another suggestion was to provide that the receiver was not obliged to acknowledge a message, but was not, however, entitled to act on the message if an acknowledgement was requested. A further suggestion was to provide that failure to send an acknowledgement might be taken into account in determining whether a recipient was entitled to rely on a message; but such a provision would not prevent the sender from stipulating, or the parties from agreeing, that a message would have no effect until an acknowledgement had been received.

122. As regards the time within which acknowledgement of receipt should be given, it was generally agreed that, in consideration of the various expectations of the parties, various business practices and various possible technical solutions, it would be inappropriate to establish a specific time-limit for the sending of the acknowledgement. A mere indication that the acknowledgement should be given without undue delay was considered appropriate.

2. *Record of transactions*

123. It was proposed to include in the uniform rules a provision that would recognize the acceptability of storage

of EDI records in forms other than paper. It was suggested that the uniform rules might provide that storage of data by means other than paper or microfiche should be considered equivalent to storage in the form of paper or microfiche, provided that, as appropriate, the functions of unalterability, durability and permanent readability were fulfilled.

124. Some opposition was expressed against such a provision on the ground that it would unduly interfere with national rules on keeping of records. The prevailing view, however, was that it would be desirable to have a such rule, which should be restricted to validating storage of records in electronic or similar form, since the rule would increase opportunities for reducing the cost of storage of records. In the context of the prevailing view, it was suggested that it was necessary to consider, from the viewpoint of supervisory authorities, the question of the cost of equipment needed to make the data stored readable in a human language.

125. Another proposal was to provide in the uniform rules that the obligation to maintain archives, for contract or other legal purposes, had to be standardized on the basis of an irreducible period of time of six years. At the end of that period, evidence of the archived messages could be provided by any means. No support was expressed for such a rule, which would deal with the questions of which records had to be stored and for how long they had to be stored. Those questions concerned activities of national supervisory bodies, which were not considered a proper subject-matter for the uniform rules.

VI. FORMATION OF CONTRACTS

A. Consent, offer and acceptance

126. It was observed that parties that exchanged trade messages by EDI usually entered into a "master agreement" in which they dealt with various issues relating to the conclusion of contracts, including the form of contract and the elements required for the expression of consent by the parties. Those issues could be dealt with in master agreements with a view to eliminating any uncertainty the parties might perceive as arising from the application of general rules of contract law in the EDI context.

127. It was suggested that one purpose of the uniform rules would be to validate the practice of concluding such master agreements, to the extent they were compatible with principles of public policy in the relevant State.

128. As to clauses in master agreements on the form of contract, the Working Group recalled its discussion on contractual definitions of writing (see paragraph 62 above). The Working Group recognized that, while it was desirable in principle to validate such clauses, States might not wish to allow full party autonomy as to the form of certain kinds of contracts and that, therefore, the provision in the uniform rules validating those clauses should be made subject to mandatory rules or public policy in the relevant State. It was observed, however, that merely making party autonomy in this respect subject to mandatory law or public policy would not provide sufficient certainty as to the validity of those clauses and that the limits of party autonomy in that area should be formulated more precisely.

129. As to clauses in master agreements governing the consent necessary for the formation of contracts, the Working Group considered cases in which the process of sending contract offers and accepting those offers was automated by appropriate programming of computers of the parties. The Working Group also recalled its discussion of such "automated" contracting at its previous session (A/CN.9/360, paras. 83-85).

130. Views were expressed that under existing rules of contract law parties were free to use such automated messages for the purpose of concluding contracts, and that within those existing rules parties were also free to deal in a master agreement with questions such as when a contract would be deemed concluded. It was suggested that there was no need for a provision on such automated formation of contracts.

131. Another view was that, to the extent any doubts existed as to the legal effects of automated formation of contracts, it would be useful to eliminate those doubts by an express provision in the uniform rules. This view was shared also by some of those who considered that, since computers programmed to automatically trigger contract offers and acceptances were carrying out conscious decisions of humans, such use of computers should normally be acceptable.

132. For a situation in which a computer, for example as a result of an unintended mistake in the computer program, generated a message that was in fact not intended, the consequences of the message should be borne by the party or parties responsible for the programming of the computer.

133. However, a view was also expressed that it was risky to allow full freedom to program computers to trigger contract offers and acceptances automatically and that, in the understanding of some national laws, ultimate human approval was necessary for a contract to be concluded.

B. Time of formation of contract

134. Support was expressed for the inclusion in the uniform rules of a provision relating to the time of formation of contracts by EDI messages.

135. One view was that such a provision should be restricted to defining the time when EDI messages should become effective or the time when the message should be deemed received. That approach, where the message in question was an acceptance of a contract offer, would provide a basis for determining the time of conclusion of the contract by reference to general rules on contract formation. The advantage of that approach was said to be that it did not interfere with, or duplicate, general rules of contract law. Another advantage was that the provision would provide welcome clarity for all EDI messages and not only for messages that constituted acceptance of a contract offer.

136. Another view was that the uniform rules should provide a direct answer to the question of when a contract made by EDI should be deemed concluded. Such an ap-

proach was said to be needed in order to provide certainty on one of the most crucial questions of EDI.

137. As to the time when a message becomes effective (or is deemed received), or as to the time when a contract made by EDI is deemed to be concluded, several possible points of time were mentioned: when the message (or acceptance of a contract offer) enters the computer system of the receiver; when the message (or acceptance) is made available to the information system; when the message (or acceptance) reaches the information system; when the message (or acceptance) enters, and is recorded by, the computer system of the receiver; when the message (or acceptance) is made available to the receiver's information system interpreting and processing the message; when the message (or acceptance) is recorded on the computer system directly controlled by the receiver in such a way that it could be retrieved; or when the message (or acceptance) reaches the receiver.

138. The concept of "availability" of the message containing the acceptance of a contract offer was criticized as unclear. Another criticism was that the concept appeared to be different from the rule applicable in general contract law, most notably the rule in article 18(2) of the United Nations Sales Convention, according to which an acceptance of an offer became effective at the moment the indication of assent reached the offeror. It was pointed out that some of the EDI situations dealt with by the uniform rules would also be covered by the United Nations Sales Convention and different rules on formation of contracts could create uncertainty.

139. As to the expressions "enters" or "reaches the computer or information system" or expressions of similar meaning, it was observed that, when the receiver did not receive the messages individually but in batches ("batch processing"), there existed a hiatus between the time of entry of data in the information system of the receiver and the time when the receiver could in fact act upon the information.

Non-mandatory nature of the provision

140. The Working Group agreed that provisions on the effectiveness of an EDI message and on the time of acceptance of a contract offer should not be made mandatory.

141. Different views were expressed as to how the non-mandatory nature of the provision should be expressed. One view was that the uniform rules should expressly provide that the provision was subject to rules of industry practice or trade usages. That approach might also be implemented by including in the uniform rules a definition of "agreement by the parties", with appropriate reference to the possibility that such an agreement might be implied from a course of dealing, practice or usage of trade.

142. That view was opposed on the ground that it was not for the uniform rules to resolve the question of the applicability of trade usages or of rules of industry practice. The preferable approach was said to be to make it clear that the provision in question was subject to party autonomy by using an expression along the lines of "unless otherwise agreed by the parties" or by a reference to "trade usages

accepted by the parties", which would make the applicability of trade usages or practices a matter of interpretation.

143. It was observed that the question of the applicability of usages was dealt with in article 9 of the United Nations Sales Convention. It was also observed that it was widely accepted in legal systems that a party should be permitted to give evidence that a particular usage or practice existed in order to displace any contrary non-mandatory rule.

C. Place of formation of contract

144. One view was that there was no need for the uniform rules to deal with the question of the place at which a contract was deemed to be concluded. It was said that the question was one pertaining to the law governing the underlying transaction and that the uniform rules should not interfere with that law. It was also said that, to the extent the uniform rules were to contain the receipt-rule for determining the time of the formation of the contract (see A/CN.9/WG.IV/XXV/CRP.1/Add.10, paras. 1-10), the receipt-rule would provide a sufficient basis for interpreting where the contract was deemed to be concluded.

145. Another opinion was that, in view of possible implications that might follow from the place of contract formation (e.g., court or regulatory jurisdiction, duty to pay taxes, or the applicable law), it was desirable for the uniform rules to provide clarity on the question. It was suggested that in preparing the provision a review should be made of trade practices and of solutions adopted in agreements for the interchange of EDI information.

146. It was agreed that any provision on the place of contract conclusion should be subject to party autonomy. As to the content of the provision, one suggestion was that the relevant place was the place where the offeror's computer system received the acceptance of the contract offer. Reservations were expressed with respect to that suggestion on the ground that parties might have their computer systems installed in States that were not their places of business, and that contracts might have no relation to the State where computer systems were located. Another suggestion was that the contract was deemed to be concluded at the place where the party receiving the acceptance of the contract offer had its place of business. That suggestion was questioned as being uncertain, since a party might have several places of business, and it might not be clear which was the relevant place of business.

D. General conditions

147. The Working Group decided to reconsider the issue at a later stage of its deliberations (see A/CN.9/WG.IV/WP.55. paras. 109-113).

VII. LIABILITY AND RISK OF A PARTY

148. The view was expressed that, when dealing with the issues of liability and risk, special weight should be given to the principle of party autonomy. In particular, the uni-

form rules should ensure that, as between themselves, parties relying on the use of EDI were free to allocate the risks and to agree on a limitation of their liability with respect to either direct or indirect damages that might result from the use of EDI.

149. Another view was that mandatory rules on the allocation of risks and liabilities should be included in the uniform rules to limit the validity of possibly abusive exculpatory clauses that might be imposed, in the context of a trading-partner agreement, by parties with stronger technical know-how and bargaining power upon weaker EDI users. Views were expressed that the issue of exculpatory clauses might be more relevant in the context of agreements concluded with third-party service providers than in the context of trading-partner agreements.

150. As to the possible content of rules on liability in the uniform rules, a concern was expressed that, in dealing with liability in connection with communication issues (e.g., liability for failure or error in the transmission of a message), the uniform rules should not affect the legal regime applicable to the commercial transaction for the implementation of which EDI would be used.

151. It was suggested that, in determining possible rules on the allocation of liability and risk, a distinction should

be drawn between the situations where no party was at fault and the situations where a party was in breach of its obligations.

152. It was widely felt that, prior to discussing the possible content of rules on liability and risk, the Working Group should identify the various risks that might be faced by parties to an EDI transaction and consider factors that might be taken into account in allocating liability and risk. It was suggested that the risks to be considered included the following: failure in communication; alteration of the content of a message; delayed communication; communication of data to the wrong addressee; divulging of confidential data; repudiation of the original message; temporary or permanent unavailability of EDI services.

VIII. FURTHER ISSUES POSSIBLY TO BE DEALT WITH

153. For lack of time, the Working Group did not discuss the liability of third-party service providers (see A/CN.9/WP.IV/WP.55, paras. 124-134) and documents of title and securities (see A/CN.9/WP.IV/WP.55, paras. 135-136). It was agreed that these issues would be considered at a later session.

B. Working paper submitted to the Working Group on Electronic Data Interchange (EDI) at its twenty-fifth session: electronic data interchange: outline of possible uniform rules on the legal aspects of electronic data interchange (EDI): note by the Secretariat (A/CN.9/WG.IV/WP.55) [Original: English]

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INTRODUCTION

1. At its twenty-fourth session, in 1991, the Commission was agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field.¹ The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a Working Group. Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI.

2. At its twenty-fifth session, in 1992, the Commission had before it the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission was agreed that there existed a

need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed that, while no decision should be made at that early stage as to the final form or the final content of the legal rules to be prepared, the Commission should aim at providing the greatest possible degree of certainty and harmonization.

3. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (*ibid.*, paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.²

4. This note has been drafted with a view to facilitating the continuation of the debate initiated by the Working Group at its previous session on some of the issues that might be included in a set of uniform rules on the use of EDI in international trade. The note was prepared subse-

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session, *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17)*, paras. 306-317.

²Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, paras. 140-148.

quent to the meeting of a group of experts convened by the Secretariat and it reflects the deliberations of that group of experts. The list of issues in this note is based on the list of legal issues discussed by the Working Group at its previous session. It was felt by the Secretariat that, in view of the remaining decisions to be made by the Working Group as to the nature and scope of the uniform rules, it was premature to prepare draft provisions for discussion at the twenty-fifth session of the Working Group. However, in order to ensure that a first set of draft provisions can be prepared for discussion by the Working Group at its twenty-sixth session, this note presents to the Working Group, on a number of issues, various provisions in draft or final form, of a contractual or statutory nature, that were prepared by other bodies interested in the legal issues of EDI. Some of the ideas expressed in this note were also drawn from the discussion of the issues of electronic funds transfers as they were considered by the Commission and the Working Group in the early stage of the process that culminated in the adoption by the Commission, at its twenty-fifth session, of the UNCITRAL Model Law on International Credit Transfers.

5. With respect to electronic funds transfers, the Commission decided in 1986 that, by addressing the relevant issues and suggesting possible solutions at an early stage of implementation of a newly developed technique such as electronic funds transfers, model rules could influence the development of and help prevent disparities in national practices and laws.³ Similarly with respect to EDI, it may be noted that several countries have started to consider whether and to what extent the existing law should be modified. It could be expected that in the near future other countries will embark on a review of the adequacy of the existing law in this area. Coordination of these national efforts may be expected to reduce the likelihood of incompatible legal regimes.

6. With a view to overcoming the difficulties that might stem from an attempt to prepare uniform rules at an early stage of technical or commercial development, the Commission decided in 1986 that the rules should be flexible and should be drafted in such a way that they did not depend upon specific technology.⁴ It is suggested that a similar approach might be taken by the Working Group with regard to the issues of EDI.

I. SCOPE AND FORM OF UNIFORM RULES

A. Substantive scope of application

1. Notion of EDI

7. The issue has been examined in a previous note by the Secretariat (see A/CN.9/WG.IV/WP.53, paras. 25-33). It also formed part of the preliminary discussion of the legal

issues of EDI at the previous session of the Working Group (see A/CN.9/360, paras. 29-31).

8. At its previous session, the Working Group was generally agreed that, in addressing the subject matter before it, the Working Group would not have in mind a notion of EDI that was limited to the electronic exchange of information between closed networks of users that had become party to a communication agreement in which they had agreed on the manner in which they would communicate by means of EDI. Rather, the Working Group would have in mind a notion of EDI encompassing also open networks that allowed EDI users to communicate without having previously adhered to a communication agreement, thus covering a variety of trade-related EDI uses that might be referred to broadly under the rubric of "electronic commerce" (see A/CN.9/360, para. 28). It was decided to leave the matter of a specific definition of EDI to a later stage because a panoramic view of the issues involved would place the Working Group in a better position to consider a definition of EDI (see A/CN.9/360, para. 29). In view of the remaining uncertainties as to the content of the notion of EDI, the Working Group may find it appropriate to resume its discussion of the definition of EDI, a discussion which, for lack of time, it could not complete at its previous session, after it ended its general review of the legal issues involved.

9. It may be recalled that almost all definitions of EDI currently in use, or suggested for use, among EDI users (see A/CN.9/WG.II/WP.53, paras. 26-32) somehow limit the scope of EDI to computer-to-computer communications and to data transmitted in a standardized format. Such narrow definitions of EDI would probably not cover situations where the exchange of information did not involve computers only but also involved, at least at one end of the transmission, direct intervention by a human operator. Another consequence of the adoption of a narrow definition of EDI might be to exclude from the scope of "EDI" the exchange of freely formatted data, for example data transmitted by means of a telecopier or electronic mail.

10. Such a restrictive approach to EDI is found in a regulation adopted in France for the application of a 1990 statute that validates, under certain conditions, the use of electronic invoices (see A/CN.9/350, para. 56 and footnote 14). That regulation interprets the statute as excluding from its sphere of application the use of telex and telecopies.⁵

11. A more comprehensive approach, apparently favoured by the Working Group at its previous session, is based on consideration of the users' need for a consistent set of rules to govern various communication techniques that might, in practice, be used interchangeably (e.g., narrowly defined EDI and electronic mail). Thus, while encouraging the use of modern technology, the legal rules to be prepared should not attempt to impose specific communication techniques but rather to accommodate them all. Under such an approach, which may be described as "media-neutral", differences in rules governing different communication techniques would mainly be justified by possible differences in the reliability of the various techniques.

³Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, para. 230.

⁴*Ibid.*, para. 231.

⁵See "Instruction du 27 décembre 1991 sur la télétransmission des factures", *Bulletin officiel de la Direction générale des impôts (BOI)*, 10 January 1992, p. 6.

12. With such a broad notion of the issues to be covered, the Secretariat suggests that, as regards terminology, it might be misleading to continue making reference to the term "EDI". The Working Group may wish to consider whether new terminology might be adopted that would reflect more accurately the extensive scope and the various layers of issues currently considered under the term "EDI". It is submitted that wording mentioning "paper-less trade" might be more appropriate, although the current practice of EDI seems unlikely to result in complete disappearance of paper-based documents.

13. As regards the scope of the legal rules to be prepared by the Commission, it may be noted that commercial law issues arising in the context of EDI can be divided into three categories: those that are common to all forms of electronic data transfer (e.g., proof of transactions), those that are unique to narrowly defined EDI (e.g., formation of contracts by means of interactive EDI) and those general commercial law issues that are as relevant in paper-based exchange of data as they are in EDI (e.g., time and place of formation of contracts where the contracting parties are not in each other's presence). The Working Group may wish to consider that different types of rules may be appropriate for each of the three categories, thus suggesting a distinction between the issues of narrowly defined EDI and other issues of telecommunications. It may be recalled that, for the purpose of devising adequate technical standards, such a distinction was introduced in the ISO/IEC Open-edi Model developed within the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). That model relies on distinctions drawn between such terms as "EDI", "edi" and "Open-edi" (see A/CN.9/WG.IV/WP.53, para. 32). In that connection, it may be noted that in the ISO/IEC Model "Open-edi" is "open" in the sense that all the requirements for inter-working among enterprises world-wide across industry sectors are governed by publicly available, non-proprietary standards and rules. The Working Group may wish to clarify whether the ISO/IEC definition of "Open-edi" matches the concept of "Open networks" that was envisaged by the Working Group at its previous session (see above, paragraph 8).

14. It may be noted that the terminology that will eventually be retained by the Working Group may have an impact not only on the scope but also on the substance of the uniform rules. In a letter received by the Secretariat containing comments by one of the authors of the ISO/IEC Open-edi Model on the Report of the Working Group on the work of its twenty-fourth session, it was suggested that the legal issues pertaining to open-edi might be much easier to address and resolve than those of electronic data in general. As an example of such difficulties, rules may have to be prepared for the case where information transmitted to the end recipient through a chain of intermediaries was not transmitted in the form of a narrowly defined EDI message along the entire chain. While rules confined to narrow EDI might address the segments of the chain where the information was transmitted by means of a standardized message only, additional rules might be needed to address the segments of the chain where the transmission was effected, for example, by means of telecopy of a computer printout made by a human operator.

2. Domestic and international transactions

15. At its previous session, the Working Group briefly addressed the question whether possible uniform rules on EDI should be limited in scope to international transactions. The Working Group decided that the focus of its work should be on legal issues raised by the use of EDI in international trade, in line with the approach taken in previous work by the Commission. It was noted that such a focus, depending upon the form of work, might entail the need to establish a test for internationality and would not exclude the possibility of use in a domestic environment of any rules prepared by the Commission (see A/CN.9/360, para. 25).

16. A legislative technique limiting the scope of a legal regime to international transactions works best when such transactions can be clearly distinguished from domestic transactions. In some cases certain domestic aspects of an international transaction cannot be ignored. If a special international legal regime is desired, that legal regime will nevertheless have to include the domestic aspects of the transaction that cannot be ignored. The alternative is to adopt harmonized or unified rules governing all transactions of the type in question, whether domestic or international.

17. In the case of international trade transactions involving the use of EDI, it would not be possible, in many cases, to construct a legal regime that addresses the relationship between the originator or the final recipient of an EDI message and any communication network operator processing the message, without including some domestic elements. As a result it may be thought that the preparation of the uniform rules, while focusing on the legal issues of EDI in international trade, might proceed on the assumption that they will apply to both domestic and international trade transactions involving the use of EDI.

3. Consumer transactions

18. At its previous session, without attempting to define EDI, the Working Group adopted a broad notion of EDI and discussed whether that notion should be interpreted as encompassing consumer transactions. After discussion, the Working Group was agreed that issues of consumer law should be expressly excluded from the scope of uniform rules on EDI. In the same vein, it was stated that the reference to "open networks" should not be interpreted as covering systems open to the public for consumer transactions, such as point-of-sale systems (see A/CN.9/360, para. 31).

19. If consumer transactions are to be excluded from the scope of the legal rules to be prepared, the Working Group may feel that a definition of a "consumer transaction" would have to be given. The definition could be based on the characterization of the originator or of the recipient of an EDI message, e.g., only a party who was characterized as a commercial party or as an agency of the State might be considered to make commercial use of EDI. The definition could also be based on the purpose of the transaction involving the use of EDI, as it was in the United Nations

Convention on Contracts for the International Sale of Goods (hereinafter referred to as the United Nations Sales Convention), where sales of goods for personal, family or household use were excluded.

20. Alternatively, the Working Group may feel that it would be inappropriate to embark on defining a consumer transaction. If this were the case, the Working Group might adopt the approach already taken in the UNCITRAL Model Law on International Credit Transfers, where consumer transactions are dealt with by means of a footnote to article 1 (Sphere of application). The footnote reads as follows:

"This law does not deal with issues related to the protection of consumers."

B. Form of uniform rules

21. The need for, and the substance of, a number of rules to be considered for possible inclusion in the uniform rules depend in part on the future form of the uniform rules. In making the necessary working assumptions, it may be borne in mind that the Commission endorsed the recommendation made by the Working Group that the aim of the Commission with respect to the legal issues of EDI should be to provide the greatest possible degree of certainty and harmonization (see above, paragraph 2). It is therefore suggested that the Working Group might proceed on the working assumption that the uniform rules will be in the form of statutory provisions. When reviewing each specific legal issue of EDI, the Working Group may wish to discuss whether that issue lends itself to the preparation of a statutory provision. It may also wish to discuss whether, as an alternative for, or in addition to, such a statutory provision, another type of provision would be desirable. Other possible types of provisions might include guidelines for legislators, rules for optional use by EDI users or model contractual clauses.

22. As to whether the statutory provisions to be prepared should be embodied in a model law or in an international convention, it is further suggested that the Working Group might adopt as a temporary working assumption that the form of a model law would be preferable, as the form best suited to preserve the necessary degree of flexibility. That assumption might need to be revised if any provision contained in the uniform rules were to conflict with an existing international convention, for example the United Nations Sales Convention.

II. DEFINITIONS AND GENERAL PROVISIONS

A. Definitions

23. Definitions of certain terms will be necessary, especially since there may be a discrepancy in the terms used for both legal purposes and telecommunication purposes in different countries. Important policy choices are often reflected in the terms chosen and the definitions given to those terms. The following are terms and types of terms that might be defined.

1. Parties to an EDI transaction

24. The principal variables to be considered in choosing the terms to be used in describing the parties to an EDI transaction include: (1) whether the parties are to be described in terms of the content of EDI messages (e.g., offeror, offeree) or in terms of the flow or the order of EDI messages (e.g., originator, recipient of the data); (2) whether the parties are to be described in terms of the entire communication process or in terms of a particular segment of the transmission chain (e.g., sender, recipient of an EDI message). It may be noted that the terminology adopted in the UNCITRAL Model Law on International Credit Transfers is based on a distinction between the credit transfer and the series of payment orders that constitute the credit transfer.

25. The number of terms used should be kept to a minimum consistent with clarity, particularly in view of the fact that the same party may be described by several terms depending on the point of view (i.e. the first recipient of an EDI message might be the sender of a message to the second recipient). This may make it more difficult to know which party is being referred to. However, it may make it easier to state legal rules governing all parties who act in a similar way. For example, a "sending party" may be required to take certain precautions whether that party is the originator of the communication process, a network operator or any other third-party service provider.

2. EDI, EDI message and other terms

26. As was suggested in a previous part of this note (see paragraphs 7-14), the definition of EDI and EDI message would be an important factor in the determination of the sphere of application of the uniform rules. In addition, depending on the decisions that will be made as to the content of the uniform rules, definitions of such terms as "to send", "to receive", "to give notice" and other paper-based terms might be needed for the purposes of the uniform rules. Should the uniform rules address the legal situation of third parties providing communication facilities or value-added services, definitions of those terms would also be necessary.

B. General provisions

1. Party autonomy under the uniform rules

27. Under the approach taken in recent years by EDI users in most countries, solutions to the legal difficulties raised by the use of EDI have been sought mostly within contracts (see A/CN.9/WG.IV/WP.53, paras. 93-96). No matter how detailed the uniform rules, or specific national legislation, might be, many questions arising in the use of EDI will continue to be governed by contracts between trading partners and network operators and between the trading partners themselves. A number of public and private bodies have developed models for such contracts, thus contributing to a proliferation of model interchange agreements. However, it may be pointed out that one difficulty inherent in the use of communication agreements results from uncertainty as to the weight that would be carried by

some contractual stipulations in case of litigation. The general discussion carried out by the Working Group at its previous session makes it clear that one purpose of uniform rules on EDI would be to enable potential EDI users to establish a valid and secure EDI relationship by way of a communication agreement within a closed network.

28. The existence of these contracts raises several questions that might be considered in the uniform rules. The uniform rules might state to what extent the uniform rules themselves are intended to be mandatory (if adopted by a State) and to what extent they could be varied by contract. Pursuant to the approach taken by the Working Group at its previous session, the uniform rules might contain a general recognition of party autonomy. Such a provision is contained in article 4 of the UNCITRAL Model Law on International Credit Transfers, which reads as follows:

"Variation by agreement

Except as otherwise provided in this law, the rights and obligations of parties to a credit transfer may be varied by their agreement".

29. However, since contracts between network operators and their customers are almost always prepared by the network operators and, with rare exceptions involving large customers, the network operators will not negotiate special terms with their customers, these contracts present a classic example of contracts of adhesion. The uniform rules might, therefore, provide for some means of ascertaining the fairness of the contract terms and the extent to which they would be enforceable. Such a means might be specific to the uniform rules or might partake of more general means of controlling contracts of adhesion.

2. Interpretation of the uniform rules

30. Rules of interpretation can be of several types. A standard provision in recent conventions on international trade law calls for regard to be given to the international character of the convention and the need to promote uniformity in its application. Furthermore, along the lines of article 7 of the United Nations Sales Convention, a rule may be included to provide that matters governed by the convention but not expressly settled by the convention are to be settled in conformity with the general principles on which the convention is based. However, decisions to be taken as to the content of a possible rule of interpretation may depend upon the final form of the uniform rules. The inclusion of such a rule of interpretation might be considered less appropriate if the uniform rules were in the form of a model law.

31. Another question to be discussed with respect to interpretation is whether the uniform rules should provide standards by which to interpret individual acts or declarations by the parties to an EDI transaction. In that connection, it may be recalled that article 8 of the United Nations Sales Convention provides for standards by which to interpret statements made by a party. Such standards include: (1) the intent of the party where the other party knew or could not have been unaware what the intent was; (2) the understanding that a reasonable person of the same kind as

the other party would have had in the same circumstances. It is submitted that such standards may be particularly needed in the context of EDI relationships.

3. Arbitration

32. At its previous session, the Working Group was agreed that further consideration should be given to facilitating the access of parties to arbitration in the context of trade relationships involving the use of EDI. In particular, it was suggested that consideration should be given to EDI procedures for concluding arbitration agreements and to statutory provisions supporting the validity of such arbitration agreements.

4. Conflict of laws

33. EDI messages may traverse communication networks in several countries, particularly in view of the practice of multinational companies to use central computer facilities in a country that may have no connection with the place of business of any of the parties to a given commercial transaction or with any other factor relevant to that commercial transaction.

34. At its previous session, the Working Group was agreed that, in the context of the preparation of a future instrument on the legal issues of EDI, attention should be given by the Commission to the questions of the law applicable to EDI relationships (see A/CN.9/360, para. 126). In this regard, it was suggested that parties to an EDI relationship should have complete freedom to determine the law applicable to that relationship. The view was expressed, however, that party autonomy in this regard should be limited by considerations of international public order so that a choice-of-law clause should not be used as a means of avoiding application of fundamental legal principles. Another suggestion was to establish a conflict-of-laws rule providing that, in the absence of a contrary agreement, one national law would be applicable to various segments of an EDI transaction and providing a method for the determination of that law.

35. It may be recalled that the solution adopted in article Y appended to the UNCITRAL Model Law on International Credit Transfers relies on a distinction between the credit transfer as a whole and the individual payment orders issued for the purpose of the credit transfer. Under that article, the law of the State of the receiving bank applies to the payment order unless otherwise agreed by the parties. As a consequence, the laws applicable may differ from one payment order to another. The Working Group may wish to discuss whether, in the context of EDI communications, the same distinction should apply or whether a more unitary approach would be acceptable.

III. FORM REQUIREMENTS

A. General remarks

36. Specific questions, which might affect the scope of the uniform rules, should be raised in the context of a discussion on the way in which applicable form requirements can be made compatible with the use of EDI.

37. A first question relates to a possible distinction to be drawn between the admissibility of EDI messages in commercial arbitration or judicial proceedings and the acceptance and use of such messages by administrative authorities. A brief discussion of the issue by the Working Group at its previous session revealed that applicable rules and approaches employed in the two types of fora tended to differ. In the administrative sphere, the focus tended to be on the gathering of information and greater discretion on the part of the administrative authority, with generally less emphasis than in the sphere of judicial or arbitration proceedings on evidentiary rules and procedures. At the same time, there were instances in which administrative and regulatory statutes (e.g. tax and securities laws) imposed particular requirements that had potential evidentiary implications. Among the requirements of this type that were most prevalent were obligations imposed on commercial entities to maintain business records for accounting and tax purposes. In some countries the use of EDI for such purposes was expressly sanctioned, subject to conditions such as the intelligibility and unalterability of electronic records. In the legislation of other countries, however, permission to use EDI was specifically tied to the eventual production of paper documents (see A/CN.9/360, para. 47). The Working Group was agreed that recommending changes in administrative rules at the national level would not be an appropriate focus of work by the Commission. At the same time, it was recognized that recommendations that were made with respect to the removal of obstacles to the use of EDI at the international level might help to foster the removal of such obstacles in the administrative sphere. The Working Group may thus wish to discuss whether a specific provision is needed to limit the scope of the uniform rules regarding admissibility of data presented in the form of EDI messages to commercial arbitration and judicial proceedings. Such a limitation would exclude relationships involving public authorities. It is submitted that the Working Group may also wish to discuss a possible alternative approach, relying on a more integrated concept of admissibility and aimed at providing standards applicable also in the context of relationships involving public authorities. Such an integrated approach, while implying consideration of administrative regulations, might be necessary to overcome form requirements imposed by public authorities, which were identified as one of the main obstacles to the increased use of EDI (see A/CN.9/333, paras. 38-41).

38. A second question is whether the uniform rules should expressly limit their scope of application to commercial relationships established for the trade of goods and services, to the exclusion of transactions for which, in a number of countries, some form of public authentication or registration is required. Examples of such transactions involve, for example, the sale of real estate and registered moveables such as aircrafts and vessels. It is suggested that it might be inappropriate for the uniform rules to attempt regulating transactions involving such procedures, for the purpose of which no EDI practice seems likely to develop in the foreseeable future.

B. Functional equivalent for "writing"

39. The issue has been addressed in previous reports and notes prepared by the Secretariat (see A/CN.9/333, paras.

20-28; A/CN.9/350, paras. 68-78 and A/CN.9/WG.IV/WP.53, paras. 37-45). It also formed part of the preliminary discussion of the legal issues of EDI at the previous session of the Working Group (see A/CN.9/360, paras. 32-43).

1. Mandatory requirement of a writing

40. At its previous session, the Working Group recognized that, when dealing with possible impediments to the use of EDI posed by writing requirements found in national laws, it might be appropriate to extend the definition of "writing" to encompass EDI techniques, thereby facilitating the fulfilment of those requirements through the use of electronic means. The aim of this approach, sometimes referred to as a "functional-equivalent approach", should be to enable and validate, rather than to impose, the use of EDI (see above, paragraph 11). It was proposed that a definition of writing along the following lines should be considered:

"Writing includes but is not limited to a telegram, telex and any other telecommunication which preserves a record of the information contained therein and is capable of being reproduced in tangible form."

41. An extended definition of "writing" would still rely on an analogy between EDI messages and written documents and it would not create the entirely new concept that is sometimes said to be needed to accommodate the most advanced uses of EDI. However, such an extended definition would not preclude further investigation to determine which new concept might be appropriate. It may also be noted that an extended definition of "writing" would help to address the wide variety of situations where EDI relationships remain comparable to paper-based relationships.

42. The purpose of an extended definition of "writing" is to validate the use of any means of telecommunication to the only exclusion of purely oral communication. It is submitted that, in the proposed definition, the requirement that a "writing" should be capable of being reproduced in tangible form may not be needed since the requirement that a record of the information be preserved would seem to fulfil the purpose of the definition. Furthermore, in the proposed definition, the word "tangible" might be susceptible to such a narrow construction that a text displayed on a visual screen might not be considered as "writing". For that reason, it might be preferable to use words such as "human readable". A "human readable" reproduction of a computer record, while capable of being observed by human eyes, might be in the form of codes, symbols or data that would not be directly understandable to non-specialists. Such forms should not constitute an obstacle to the validation of computer records insofar as they were capable of being interpreted, for example by application of the procedures already used when documents written in a foreign language are introduced in court proceedings.

43. In that connection, the Working Group might wish to discuss a definition of the word "document", part of which was mentioned and noted with interest by the Working Group at its previous session (see A/CN.9/360, para. 48). The definition, prepared for use by Australian federal courts reads as follows:

“Document” includes:

- (a) any of, or any part of, the following things:
 - (i) any paper or other material on which there is writing;
 - (ii) a map, plan, drawing or photograph;
 - (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
 - (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;
 - (v) any article on which information has been stored or recorded, either mechanically or electronically;
 - (vi) any other record of information; or
- (b) any copy, reproduction or duplicate of such a thing; or
- (c) any part of such a copy, reproduction or duplicate.”

44. It is submitted, however, that, consistent with a “media-neutral” approach, the Working Group might avoid focusing on the definition of the concept of “writing” or related concepts such as “document” (see A/CN.9/360, para. 49). Instead, it might consider stating the conditions under which, where applicable law requires any data to be presented in “writing” or in the form of a “document”, the requirement shall be deemed to be fulfilled.

45. The extended definition of “writing” proposed at the previous session of the Working Group is inspired by many other existing definitions of “writing” (see A/CN.9/333, paras. 13-14), which list means of communication capable of producing acceptable equivalents to paper or the corresponding acceptable physical mediums supporting the data. The Working Group may wish to discuss whether such an approach should be retained, particularly in view of the concern expressed at the previous session that the definition should not be drafted narrowly, thereby possibly excluding future advances in technology not currently envisaged (see A/CN.9/360, para. 37). Should EDI messages be included in such a list, a definition of an “EDI message” might be needed (see above, paragraph 26).

46. A solution to the problem of foreclosing advances in technology, in line with the “functional approach” recommended by the Working Group at its previous session, may be to avoid focusing in the provision on particular modes of communication and, instead, to focus on the essential functions that were traditionally fulfilled by writing but could now be fulfilled through the use of EDI techniques. In that connection, it may be recalled that among the reasons for the requirement of a writing, for example in the context of the conclusion of a contract, are a desire (1) to reduce disputes by ensuring that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (2) to help the parties be aware of the consequences of their entering into a contract; (3) to allow for the reproduction of a document so that each party would hold a copy of the same data; (4) to allow for the

authentication of data by means of a signature; (5) to permit third party reliance on a document that would be legible to all; (6) to facilitate subsequent audit for accounting, tax or regulatory purposes.

47. The Working Group may wish to consider whether it would be appropriate to develop a concept based on such an approach. A concept of that type is currently under study within the Subcommittee on Electronic Commercial Practices of the American Bar Association. The work of the Subcommittee is not aimed at amending any existing definitions of “writing”. Instead, it develops a different concept (temporarily labeled “X”) that would encompass writing and other media. The definition under study reads as follows:

- “X” is (1) intentionally created
- (2) symbolic representation
- (3) of information
- (4) in objectively observable form or susceptible to reduction to objectively observable form
- (5) with potential to last indefinitely.”

48. The reference to “intentional creation” might be misinterpreted as an attempt to introduce in the definition of an equivalent for “writing” an element of certainty as to the intent of the issuer to be bound by the content of the message. When addressing that issue, it is submitted that a clear distinction should be drawn between the “intentional creation” of an equivalent to “writing” and the intention of the sender of an EDI message to be bound by the content of the message. A useful reference for the determination of the conditions under which the sender of an EDI message is bound by the content of the message may be found in article 5 of the UNCITRAL Model Law on International Credit Transfers, which sets forth the obligations of the sender of a payment order (see below, paragraphs 82-86).

2. Contractual definition of a writing

49. The Working Group may wish to discuss whether, in addition to a general provision on party autonomy (see above, paragraph 28), it would be useful to envisage a statutory provision to the effect of eliminating the doubts that might exist in some legal systems as to the validity of privately agreed definitions of “writing”.

C. Authentication of EDI messages

50. The issue has been addressed in previous reports and notes prepared by the Secretariat (see A/CN.9/265, paras. 49-58; A/CN.9/333, paras. 50-59; A/CN.9/350, paras. 86-89; and A/CN.9/WG.IV/WP.53, paras. 61-66). It also formed part of the preliminary discussion of the legal issues of EDI at the previous session of the Working Group (see A/CN.9/360, paras. 71-75).

51. The Working Group may wish to discuss whether the uniform rules should require EDI messages to be authenticated. It may be thought appropriate to require by law, for

example, that EDI messages intended to carry out the same functions as paper originals be authenticated. However, it may be noted that in the context of EDI communication as in the context of paper-based communication, commercial partners should be free to exchange information that is not authenticated but merely bears an indication of origin (e.g., a letterhead). As regards the messages or types of messages that should be authenticated, the Working Group may wish to discuss whether the uniform rules should set forth mandatory or acceptable forms of authentication.

52. Additional issues to be discussed with respect to the requirement, or use, of authentication procedures are: whether the uniform rules should state the consequences of not following the prescribed or agreed form of authentication; what those consequences should be with respect to the legally binding effect of the message; and what the consequences of use of a fraudulent or forged authentication should be (see below, paragraphs 82-86).

53. While it might be thought appropriate to require by law that certain EDI messages be authenticated, it may be thought less appropriate for the form of the authentication to be specified, as signature has often been specified in the past, since there are many possible means to authenticate an EDI message and new means will evolve in the future. Consideration might be given as to whether it would be possible and appropriate to provide criteria by which to measure the adequacy of the form of authentication used. The identification of uniform criteria is particularly needed in view of the possibility that national authorities might provide different types of authentication procedures or different criteria by which to measure the adequacy of each type of authentication of EDI messages in use.

54. It may be noted that a number of recent international instruments envisage functional equivalents to the handwritten signature to be used in the context of electronic transmissions. Those provisions generally provide an extended definition of "signature", such as the following definition found in article 5(k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes:

" 'Signature' means a handwritten signature, its facsimile or an equivalent authentication effected by any other means."

However, other instruments such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards rely on the concept of "agreement in writing", being defined as an agreement "signed by the parties or contained in an exchange of letters or telegrams" (article II).

55. At the previous session of the Working Group, the discussion focused on the functions traditionally performed by a handwritten signature on a paper document. It was observed that one function of a signature was to indicate to the recipient of the document and to third parties the source of the document. A second function of a signature was to indicate that the authenticating party approved the content of the document in the form in which it was issued and intended to be bound by the content of the document.

56. Various techniques (e.g., "digital signature") have been developed to authenticate electronically transmitted

documents. Certain encryption techniques can authenticate the source of a message, and also verify the integrity of the content of the message. In choosing among such authentication methods, attention is to be paid to the costs involved, which might vary considerably according to the extent of computer processing that is required. Such costs need to be weighed against the presumed benefits in choosing the appropriate mode of authentication and different levels of authentication would probably need to be considered by EDI users for different types of transmissions.

57. At its previous session, the Working Group was generally agreed that there existed a need to eliminate the mandatory requirements of signatures in EDI communications. It was also agreed that there existed a need to promote the use of electronic authentication procedures regarding the source and the content of EDI messages, and that such procedures should be adapted to the nature of the message. Parties should be allowed to determine the nature of such authentication procedures within the realm of commercial reasonableness. Wide support was given to the idea that legislative provisions might be needed to establish the principle of "commercial reasonableness".

Commercially reasonable standard of authentication

58. It may be noted that article 5 of the UNCITRAL Model Law on International Credit Transfers relies on the concept of "authentication" or "commercially reasonable authentication" and provides that the purported sender of a payment order would normally be bound by the payment order if the agreed authentication procedures had been complied with.

59. When establishing a "commercially reasonable" standard of authentication, a number of elements are to be borne in mind. The commercial reasonableness of a given standard of security applied for the authentication of a given EDI message may vary considerably depending on (1) the existence and nature of contractual relationships between the parties; (2) the status and size of the parties; (3) the nature of their trade activity; (4) the frequency at which commercial transactions take place between the parties; (5) the kind and size of the transaction; (6) the status and function of signature in a given statutory and regulatory environment; (7) the capability of the communication systems and (8) the authentication procedures set forth by communication system operators.

60. A study was recently mandated by the French government to compare the levels of security afforded by traditional paper-based signature and by authentication techniques used in an electronic environment. The study concluded that the most sophisticated authentication techniques available in the context of EDI (e.g., techniques based on public-key cryptography) which authenticate the source of a message and also verify the integrity of the content of the message, perform functions equivalent to the functions of the procedures regarded as the most secure in the context of manual signature requirements (e.g., certified or other forms of registered signature), whether the manual signature be required for validity purposes or for evidentiary purposes. At the opposite end of the spectrum, the study suggested that techniques used with a low level

of security in an electronic environment (e.g., authentication by means of a personal identification number ["PIN"]), perform functions equivalent to those of procedures used with a low level of security in a paper-based environment (e.g., signatures reproduced by stamp, symbol, printing, facsimile, perforation or other mechanical devices). Such low-level authentication techniques identify the origin of a message but do not secure personal identification of the sender or verification of the content of the message. The study concluded that any attempt to regulate authentication in an electronic environment should be based on a hierarchy of the various levels of "electronic signature". While the most secure procedures might be regarded as an equivalent for the handwritten signature, the least secure might be regarded as creating a rebuttable presumption that the message is authentic.⁶

61. It is submitted that it might be inappropriate for the Working Group to attempt defining the "commercial reasonableness" of an authentication procedure by reference to any specific technique. In that connection, it is also submitted that, when dealing with the issue of authentication in general, the Working Group should not assume that all EDI users will use techniques relying on some form of public or private trusted third party or central registry. While parties to an EDI relationship should be free to use any third-party provider of authentication services, it might be considered inappropriate for the uniform rules to encourage the use of such methods of authentication for the reason that, in a number of factual situations, the intervention of a third party for the sole purpose of authenticating EDI messages might be seen as the unjustified addition of a layer or requirements and of related costs to the transaction chain. Furthermore, in certain cases involving public registry systems, such authentication techniques might be regarded as creating unjustified trade barriers.

62. The Working Group may find it appropriate, however, to state in a provision of the uniform rules that the existing requirements that documents be signed or authenticated are deemed to be fulfilled if the purported sender or recipient of a message complies with the security procedures which are: agreed upon by the parties; set up by applicable communication system rules; or commercially reasonable under the circumstances. A provision might also state that, in determining whether security procedures are commercially reasonable under the circumstances, factors to be considered include: compliance with applicable system rules; size and sophistication of the parties; type of data being exchanged; the reasons why a signature requirement is imposed by law; the magnitude of any transaction resulting of the interchange; the availability and cost of security techniques.

63. As regards widely used means of communication that inherently provide a low level of authentication (e.g., telecopy), it may be noted that, in some countries, information transmitted through such media, while not generally accepted as equivalent to the communication of a paper original, might still carry legal effect such as interrupting a

prescription or other time period provided that authentication of the information is subsequently given to the recipient. The Working Group may wish to discuss whether receipt of a telecopy should be considered as creating a presumption that the original information was received, subject to later confirmation of the communication in a properly authenticated manner.

D. Requirement of an original

64. The issue has been addressed in previous reports and notes prepared by the Secretariat (see A/CN.9/265, paras. 43-48; A/CN.9/350, paras. 84-85; and A/CN.9/WG.IV/WP.53, paras. 56-60). It also formed part of the preliminary discussion of the legal issues of EDI at the previous session of the Working Group (see A/CN.9/360, paras. 60-70).

65. At the previous session of the Working Group, it was generally agreed that the notion of an original was of little relevance in the EDI context. It was felt that the more appropriate notion was that of a "record" that could be translated into readable form. A "functional-equivalent" approach was taken to the purposes and functions of the traditional paper original with a view to determining how those purposes or functions could be fulfilled through EDI techniques.

1. Functional equivalent

66. The traditional purposes and functions of originals are centered around the notion that a party bringing suit or otherwise asserting rights based on an underlying document must have the original, or sufficient reason for loss of the original, so as to ensure that that party was indeed endowed with the rights being asserted. Other purposes include ensuring the availability of the best possible evidence, and authentication of transactions. There are also cases in which the original could not be found. For such cases, legal systems often provide ways to recreate the original, thus demonstrating that the need for an original is not absolute.

67. It is submitted that the function of an original is to ensure the highest possible level of authenticity of the information and that, for the purpose of establishing a functional equivalent that would be relevant in an EDI environment, the requirement of an original may be considered as a variant of a requirement that the data be properly authenticated.

68. The uniform rules might thus provide that the requirement for an original (other than an original document of title or negotiable instrument) is satisfied where evidence is given that the EDI message or message printout reproduces the message as sent, as received or as stored. Such a functional equivalent should set standards to ensure that the means of authentication in use ascertain that an EDI message that is received is the same message that was sent, verifies the integrity of the message, and ensures non-repudiation of the message by the sender. A key measure in this regard is the "digital signature" (see above, paragraph 56). This technique involves the partial or total encryption of a

⁶A copy of the study by M. Devys, entitled "Du sceau numérique ... à la signature numérique", was communicated to the Secretariat. The study is to be published in *Actualité juridique—Droit administratif*, November 1992.

message in order to verify that it is from the purported sender and that it has not been altered, and could be used by the recipient to prevent the sender from denying transmission of the message.

69. In addition, the uniform rules might provide that such authenticated messages should be protected against alteration after receipt and storage. A priority rule might be needed to solve the situation where conflicting versions of a message (i.e., the message as sent, as received or as stored) would be presented. Such a rule might need to establish a distinction between the case where the information is to be submitted or maintained in original form. An issue to be addressed in that connection is the possibility that regulatory authorities would require maintenance of the necessary software to interpret the documents filed.

2. Contractual rules

70. Under some national laws, doubts may exist as to whether a contractual definition of an "original" could validly deviate from a statutory provision listing a limited number of circumstances where a copy could be substituted for the normally required original with the same evidential value. The Working Group may thus wish to discuss whether, in addition to a general provision on party autonomy (see above, paragraph 28), it would be useful to envisage a statutory provision validating privately agreed definitions of "original".

E. Evidential value of EDI messages

71. The issues of the admissibility and weight of computer-generated evidence have been addressed in previous reports and notes prepared by the Secretariat (see A/CN.9/265, paras. 27-48; A/CN.9/333, paras. 29-41; A/CN.9/350, paras. 79-83; and A/CN.9/WG.IV/WP.53, paras. 46-55). They also formed part of the preliminary discussion of the legal issues of EDI at the previous session of the Working Group (see A/CN.9/360, paras. 44-59).

72. While the issues of the admissibility and weight of computer-generated evidence may be raised in the context of both arbitral and judicial proceedings, it may be noted that the problem is more acute in the judicial sphere than in arbitration, where the powers conferred upon the arbitral tribunal often include the power to determine the admissibility and weight of any evidence.

1. Admissibility of EDI-generated evidence

73. In some legal systems where there are, in principle, obstacles to the admissibility of computer records as evidence in judicial proceedings, such obstacles stem from an exhaustive list of acceptable evidence, which may exclude computer records totally or provide that a computer record may be relied upon only as a rebuttable presumption as to the facts in the case. In common law countries, obstacles to the admissibility of computer records stem from the fact that, in principle, a court cannot receive "hearsay evidence" as evidence. However, some common law countries have

accepted computer print-outs as falling within the business records exception to the hearsay-evidence rule.

74. In view of the complexity and possible uncertainty that might result from the above-mentioned legal requirements on evidence, the uniform rules might contain a general provision establishing that computer-generated evidence is admissible in the same way as information embodied in paper documents. Such a general provision might expressly exclude EDI messages from the scope of application of existing requirements regarding the "written" or "original" form of admissible evidence or prohibitions of "hearsay evidence".

2. Weight of EDI-generated evidence

75. It was generally felt by the Working Group, at its previous session, that, while an agreement could probably be reached as to admissibility of evidence in a strict sense (i.e., the right of parties to produce electronic records in the context of trials or administrative procedures), difficulties would remain as to the criteria to be applied in the weighing of the evidential value of such records by courts or administrative authorities (see A/CN.9/360, para. 50).

76. In some countries where parties to commercial disputes are generally permitted to submit any type of evidence that is relevant to the dispute, specific rules have been established governing the introduction of electronic evidence. Such requirements are aimed at establishing the intelligibility, reliability and credibility of the evidence, focusing specifically on the method of entry of the information and the adequacy of protection against alteration. In quite a number of countries in this group, should a question arise as to the accuracy or value of the electronic evidence, it is left to the court to weigh the extent to which the evidence should be relied upon. Such an assessment of the quality of electronic-based evidence may either be left entirely to the discretion of the court or based on factors including the degree of security in the system that produced the evidence, its management and organization, whether it is operating properly and any other factors deemed relevant to the reliability of the evidence.

77. In those countries in which reliance on computer-generated evidence might only be possible by way of the "business records" exception to the hearsay rule, the proponent of the evidence would typically have to demonstrate that the information was compiled in the normal course of business and would have to describe the chain of events involving the compilation of the information and leading up to the point when the evidence assumed its current form, so as to ascertain the integrity and reliability of the system producing the evidence. In some cases the testimony of an expert might have to be tendered to certify the reliability of the evidence.

78. It is submitted that the approach taken in all the above-mentioned legal systems focuses on the reliability of the computer systems and on the reliability of the data. At its previous session, the Working Group held that, in view of the significant diversity in national legal approaches to questions of evidence, it would not be advisable to attempt

to enunciate detailed models for statutory provisions. Rather, it would be preferable to recommend that, to the degree possible, obstacles to the admission of EDI evidence should be removed. At the same time, the concern was voiced that, in order to be effective in providing guidance, such a recommendation should not be overly general (see A/CN.9/360, para. 50).

79. As to the specific content of a recommendation, a question to be considered by the Working Group is whether it is desirable to embark on the setting of general requirements as to the proper maintenance and reliability of computer systems. As to the reliability of the data contained in a given message, it is suggested that the issue may appropriately be dealt with within the rules on the level of security and authentication to be met by legally binding messages. A minimum standard of security may be particularly helpful as regards the issues of evidence. In view of the costs often involved by expert certification as referred to above, the Working Group might wish to establish a presumption of admissibility and validity of EDI messages where evidence would be given that the prescribed security procedures were complied with.

80. The Working Group may also envisage the desirability to link the evidential questions with the ultimate question of fact being put to the trier of fact as was suggested at the previous session (see A/CN.9/360, para. 51). For example, if the sole issue was whether a party had received notice, the inquiry would be limited to whether the EDI message had been received; if the question was whether the sender was binding itself through the message, the questions of authenticity and verification would have to be considered.

3. Contractual rules

81. In view of the possibility that private agreements on the form of evidence might still be invalid in some countries, the Working Group may wish to discuss whether, in addition to a general provision on party autonomy (see above, paragraph 28), it would be useful to envisage a statutory provision to the effect of eliminating the doubts that might exist in some legal systems as to the validity of privately agreed rules on acceptable means of evidence.

IV. OBLIGATIONS OF PARTIES

A. Obligations of the sender of a message

82. The Working Group may wish to base its discussion on the text of the UNCITRAL Model Law on International Credit Transfers. The basic rule in article 5(1) is that

“A sender is bound by a payment order or an amendment or revocation of a payment order if it was issued by the sender or by another person who had the authority to bind the sender”.

83. The Model Law does not attempt to determine the circumstances under which another person would have authority to bind the sender. That question must be answered under the otherwise applicable law. The converse

of the rule stated in article 5(1) is that the purported sender is not bound by a payment order that was not sent by the purported sender or by a person who had the authority to bind the purported sender. That remains the rule under the Model Law where the authentication procedure used is the “mere comparison of signature”. In such a case the traditional rule prevails that the receiving bank bears the risk of forgery. The provision leaves open the question as to when a “mere comparison of signature” becomes something more, thereby bringing the authentication procedure under the rules in the Model Law that were developed for authentication of electronic payment orders. The receiving bank also bears the risk that a payment order is unauthorized in the unlikely case that no authentication procedure has been agreed between the bank and its customer.

84. The most important situation considered in preparing that article of the Model Law was in respect of unauthorized electronic payment orders. When the authentication procedure gives the proper result, the receiving bank cannot distinguish between an authorized payment order and one that is not authorized. Article 5(2) provides that, where the authentication procedure is something other than the “mere comparison of signature”, the purported sender is bound by the payment order, even though the payment order was not sent by, or by a person who had the authority to bind, the purported sender if

“(a) the authentication is in the circumstances a commercially reasonable method of security against unauthorized payment orders, and

“(b) the receiving bank complied with the authentication.”

85. The Model Law does not attempt to delineate what would be a commercially reasonable method of security against unauthorized payment orders (see above, paragraphs 58-63).

86. Where the unauthorized payment order is the result of the actions of a person who was associated with either the sender or the receiving bank, article 5(4) goes on to allocate the loss to that entity. Article 5(4) reads as follows:

“(4) A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than

(a) a present or former employee of the purported sender, or

(b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

The preceding sentence does not apply if the receiving bank proves that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.”

B. Obligations subsequent to the transmission

87. The issue has been examined in previous reports (see A/CN.9/333, paras. 48-49; A/CN.9/350, para. 92 and A/

CN.9/WG.IV/WP.53, paras. 80-81). At its previous session, the Working Group agreed to include the legal issues of communication on the list of possible future work (see A/CN.9/360, para. 125).

1. Functional acknowledgement

88. Several of the rules and model communication agreements recently developed include special provisions encouraging systematic use of "functional acknowledgements" and verification procedures. An acknowledgement of receipt helps to eliminate a number of problems regarding ambiguities or misunderstandings, as well as errors in the communication process. Communication agreements often differ concerning the characteristics of the functional acknowledgement they require. Furthermore, they differ concerning the consequences they attach to the sending of an acknowledgement or to the failure to acknowledge.

89. It is submitted that the use of functional acknowledgements is a business decision and that the uniform rules should not impose any acknowledgement requirement any more than it should impose the use of a given security procedure. However, it may be noted that, in the perspective of EDI communications being carried out in an open environment, default rules on acknowledgement might be necessary.

90. In that connection, it should be made clear that the mere acknowledgement of receipt of a message does not in itself bind the party that acknowledges, unless otherwise agreed between the parties. Acknowledgement of receipt of a message merely indicates that a message has been received and should not be confused with any decision on the part of the receiving party as to agreement with the content of the message. If an acknowledgement is sent, however, it can be expected to create a presumption that a message was received, and received without defects such as omissions or errors in format or syntax.

91. When discussing the possible preparation of default rules on acknowledgement, the Working Group might base its discussion on article 3(4) to 3(8) of the draft "Computer code" (hereinafter referred to as the draft NRCCL Computer code) prepared within the Norwegian Research Center for Computers and Law (NRCCL). The article reads as follows:

"Article 3. Contract Formation

- (4) Any party may request the acknowledgement of receipt of the message from the receiver.
- (5) Acknowledgement of receipt should be given without undue delay, and at the latest within one business day following the day of receipt of the message to be acknowledged.
- (6) The receiver of such a request is not entitled to act upon the received message, until an acknowledgement has been given.
- (7) If the message is an offer, the acceptance should also be regarded an acknowledgement, when given without undue delay.

(8) When the sender does not receive the acknowledgement of receipt within the time limit, he is entitled to consider the message null and void on so advising the receiver."⁷

92. It is submitted that draft article 3(7) may constitute too strict a rule since there seems to be no reason to preclude certain forms of delayed acceptance from producing legal effect. For example, as the case is envisaged in article 18(3) of the United Nations Sales Convention, practices which the parties may have established between themselves or usage may provide that, in a contract for the sale of goods, an offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or the payment of the price without notice to the offeror.

93. Draft article 3(8) is intended to address the situation where the computer of the recipient of a message did not acknowledge receipt and the recipient was unaware of that situation. The receipt of a notice would inform it of the situation. Upon notification that a message is considered to be null and void, the sender should not be liable for any reliance on the message by the recipient. Such a rule might be needed to avoid a situation where a message would be considered null and void in all cases where timely acknowledgement was not received by the sender. Should a message be null and void in all such cases, a party might be discouraged to use EDI for the sending of any message it had an obligation to send under a contractual or other relationship. In such a case, the recipient, by deciding to send or not to send an acknowledgement of receipt, would be in a position to affect the legal situation of the sender. The merit of the rule suggested in draft article 3(8) is that the absence of an acknowledgement does not delay the legal effectiveness of the message. The rule preserves the rights of the sender if, by means other than an acknowledgement of receipt, the sender can prove that the message was received.

2. Record of transactions

94. Whether or not to keep records of transactions is a business decision to be made within the limits set forth by the requirements of national law. However, it is submitted that a basic rule might be needed to ensure that electronic keeping of records is admitted in the same way as paper records.

V. FORMATION OF CONTRACTS

95. The issues of contract formation have been examined in previous reports (see A/CN.9/333, paras. 60-75, A/CN.9/350, paras. 93-108 and A/CN.9/WG.IV/WP.53, paras. 67-78). They also formed part of the preliminary discussion of the legal issues of EDI at the previous session of the Working Group (see A/CN.9/360, paras. 76-95).

⁷Rolf Riisnaes, "EDI and National Legislation—Teresa (86)", International Chamber of Commerce, document No. 460-10/Int.43 (14 February 1992).

A. Consent, offer and acceptance

96. At its previous session, the Working Group focused its discussion of the topic on the situation where parties were bound by an agreement that was concluded prior to the establishment of an EDI relationship and that expressly allowed them to conclude future contracts through the exchange of EDI messages (see A/CN.9/360, para. 76). It is thus submitted that the Working Group might envisage the preparation of a uniform statutory provision to ensure that in all legal systems parties would be allowed to agree validly on the establishment of such master agreements.

97. The Working Group was also agreed that future work was needed to determine the scope and content of a possible set of legal rules to be applied in the absence of an agreement by the parties (e.g., a bilateral agreement or general rules set forth by a network operator). It was agreed that particular consideration in this respect should be given to the fact that EDI users needed certainty as to applicable legal rules and that the need to rely on interpretation of traditional rules on paper-based transactions might not be satisfactory in that respect (see A/CN.9/360, para. 86). The uniform rules might contain a general provision to validate contracts formed through paper-less means of communication. Such a rule might state that contracts can validly be concluded by any means including but not limited to electronic or optical means of transmission.

98. It is commonly admitted that the questions of offer and acceptance might be of particular importance in an EDI context since EDI creates new opportunities for the automation of the decision-making process leading to the formation of a contract. Such automation might increase the possibility that, due to the lack of a direct control by the owners of the computer, a message would be sent, and a contract formed, that did not reflect the actual intent of one or more parties at the time when the contract was formed. Automation also increases the possibility that, where a message was generated that did not reflect the sender's intent, the error would remain unperceived both by the sender and by the receiver until the mistaken contract had been acted upon. The consequences of such an error in the generation of a message might be greater with EDI than with traditional means of communication, in view of the possibility that the mistaken contract would be automatically executed.

99. At the previous session of the Working Group, examples were given of situations where contracts might be formed through EDI without human intervention (see A/CN.9/360, paras. 83-85). It was suggested that a person having, or deemed to have, final control over the computer application should be deemed to have approved the sending of all messages dispatched by that application. Another suggestion was that, irrespective of whether consent to the formation of a given contract had in effect been expressed, all consequences of the operation of a computer system should be borne by the person who had taken the risk of operating that system (see A/CN.9/360, para. 81). It was suggested that the computer that had been programmed to react automatically to an offer by an act of acceptance was not, in fact, consenting to the formation of the contract but merely establishing that the will of the offering party had

meshed with the will of the accepting party. It was noted that the offeror whose offer had apparently been accepted had no way of knowing whether the apparent acceptance resulted from human or automatic intervention. More generally, it was stated that both parties should be able to rely on the apparent offer and the apparent acceptance that had been exchanged between their computers. It was suggested that a rule might be elaborated to that effect (see A/CN.9/360, para. 84).

100. It was also agreed that there might be a need to state in the uniform rules that, unless otherwise agreed, when a contract was formed as a result of the operation of a computer program, a party that executed the contract should give express notice of the formation of the contract to the other party (see A/CN.9/360, paras. 85-86).

101. As regards the content of the above-suggested rules, attention may be given to the approach taken in the draft "Principles for International Commercial Contracts" prepared by the Institute for the Unification of Private Law (hereinafter referred to as the UNIDROIT Principles), which read as follows:

"Article 2.16 (Form of the contract)

(1) Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses.

Article 3.1 (Validity of mere agreement)

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement."

102. In the same vein, the draft NRCCL Computer code reads as follows:

"Article 3. Contract Formation

1. Contracts can validly be concluded and proven by any means.

2. An offer or a response to an offer, made by EDI, becomes effective when it is made available to the information system of the other party.

3. A contract made by EDI will be considered to be concluded at the time and at the place where the message constituting the acceptance of an offer is made available to the information system of the receiver.

If the message is temporarily stored in, or occasionally passes through, a facility in a third country, the location of the information system interpreting and processing the message should be regarded as the place of contract conclusion."

B. Time of formation

103. It may be recalled that, when dealing with the issue of time of formation of contracts in the context of EDI relationships, two solutions are most commonly found in legal systems (see A/CN.9/333, paras. 72-74): the receipt rule and the dispatch rule. According to the dispatch rule a contract is formed at the moment when the declaration of

acceptance of an offer is sent by the offeree to the offeror. According to the receipt rule, a contract is formed at the moment when the acceptance by the offeree is received by the offeror. At its previous session, the Working Group noted that that question was one of the important issues that could be settled in a communication agreement, in the absence of mandatory provisions of statutory law. As an example of such a contractual provision, article 9.2 of the "TEDIS European Model EDI Agreement" prepared by the Commission of the European Communities (May 1991) reads as follows:

"Unless otherwise agreed, a contract made by EDI will be considered to be concluded at the time and the place where the EDI message constituting the acceptance of an offer is made available to the information system of the receiver."

104. It may also be recalled that a study entitled "La formation des contrats par échange de données informatisées" recently prepared for the Commission of the European Communities within the TEDIS programme contains a chapter on the issues of time and place of formation of contracts. The conclusions of that study are that the receipt rule should be promoted as particularly suitable for EDI. The receipt rule is in line with articles 15(1), 18(2) and 23 of the United Nations Sales Convention, with the draft UNIDROIT Principles and with national legislation in a number of States.

105. At its previous session, the Working Group was agreed that any rules on the time of the formation of contracts in an electronic environment should be based on the principle of party autonomy. As to the definition of a possible rule to be applied in the absence of a prior agreement between the parties, it was agreed that the main purpose of such a rule should be to provide certainty to all parties involved.

106. There seems to be no disadvantage to adopting a rule to the effect that an EDI message becomes effective when it is made available to the information system of the recipient. According to such a rule, a contract would be formed at the moment when the acceptance of an offer became effective. Such a rule would also apply to determine the time of effectiveness of EDI messages such as shipping notices and invoices, which are not sent for the purpose of concluding a contract. It is submitted that, should such a rule be adopted, the terms "available to the information system of the recipient" should be defined in a restrictive way to ensure that only the information system directly under the control of the recipient would be covered, to the exclusion of any third-party service provider that could not be regarded as an agent of the recipient.

C. Place of formation

107. The place of formation of a contract may be of relevance for certain legal purposes. For example, it might be relevant for taxation or registration requirements, and it might constitute a factor for establishing court jurisdiction or for determining the law applicable to the contract or its required form.

108. The determination of the place of formation of a contract may raise particular difficulties in situations involving the use of EDI. The transmission of EDI messages might be initiated in different places, such as a place of business of the sender, or the place where the sender held its computers, or any place from where the sender might operate, for example, by means of a portable computer. During the transmission process, particularly where third-party service providers are involved, EDI messages might travel through places that are irrelevant to the underlying commercial contract. At the last session of the Working Group, it was suggested that only the place where the message had been placed at the disposal of the recipient was sufficiently predictable to provide legal certainty as to the place of formation of a contract (see A/CN.9/360, para. 88). However, it was noted that devising the rule might be difficult in view of the possible involvement of several commercial parties and several third-party service providers, each of which might operate computers from different places. It was agreed that exceptions would probably need to be made to the receipt rule for those cases where the place of receipt was not objectively determinable by the parties at the moment when the contract was formed and for those cases where the place of receipt might have no relevance to the underlying transaction. It was suggested that the place of formation of a contract might be determined by reference to an objective event so as to avoid being linked inappropriately to, for example, the place where computers were located. In view of the possible unpredictability regarding the place of operation of the computer facilities of the recipient, the Working Group may wish to consider whether the place of business of the recipient would not be a more relevant and more predictable place for the formation of a contract.

D. General conditions

109. The main problem regarding general conditions in a contract is to know to what extent they could be asserted by one party against the other contracting party (see A/CN.9/333, paras. 65-68). In many countries, the courts would consider whether it could reasonably be inferred from the context that the party against whom general conditions were asserted had had an opportunity to be informed of their content or whether it could be assumed that the party had expressly or implicitly agreed not to oppose all or part of their application.

110. EDI is not, at least not at the current time, technically equipped, or even intended, to transmit all the legal terms of the general conditions that are printed on the backs of purchase orders, acknowledgements and other paper documents traditionally used by trading partners. A practical solution may be to incorporate the general conditions in a communication agreement concluded between the trading partners. However, some model agreements expressly exclude coverage of general conditions, based on the principle expressed in article 1 of the UNCID Rules (see A/CN.9/WG.IV/WP.53, annex) that the interchange agreement should relate only to the interchange of data, and not to the substance of the transfer, which might involve consideration of various underlying commercial or contractual obligations of the parties.

111. At the previous session, various methods were mentioned of ensuring the applicability of general conditions to the contract formed by EDI messages, while not detracting from the cost effectiveness of EDI (see A/CN.9/360, para. 93). It was observed that the techniques used would have to ensure that the parties were aware of, or at least had the opportunity to familiarize themselves with, the content of the general conditions, that the principle of freedom of contract should be maintained, that the solutions needed to be simple so as not to aggravate "battle-of-forms" problems through the use of EDI, and that, at least until such time as technical obstacles to the use of standardized messages for the transmission of general conditions had been overcome, to some extent a hybrid system might have to be envisaged in which paper documents remained the repository of general conditions.

112. While the observation was made that the question of general conditions was a source of some uncertainty as regards the wider use of EDI and that consequently the development of rules in that area might at some future time be usefully considered, the Working Group took the view, subject to further developments in practice, that the question of general conditions was primarily a matter of the rights and obligations agreed upon by the parties.

113. It is submitted that no attempt should be made by the Working Group to solve, in the context of uniform rules on EDI, such questions as the "battle of forms", a question that is not typical of paper-based or any other specific means of communication. However, the Working Group might consider including in the uniform rules a provision to the effect that, where applicable law requires special acceptance of general conditions before a contracting party becomes bound, such an acceptance must be given in the prescribed form before a contract is concluded by EDI means.

VI. LIABILITY AND RISK OF A PARTY

114. The issue has been examined in previous reports (see A/CN.9/333, para. 76; A/CN.9/350, paras. 101-103 and A/CN.9/WG.IV/WP.53, paras. 82-83). It also formed part of the preliminary discussion of the legal issues of EDI at the previous session of the Working Group (see A/CN.9/360, paras. 97-103).

115. At its previous session, the Working Group was generally agreed that statutory provisions were needed with respect to the legal consequences of a failure or error in EDI communications, either as fall-back solutions when agreements by parties did not resolve a question or as statutory provisions protecting legitimate interests of parties. It was pointed out that it might be advisable to define such terms as "damages", "direct damages" and "indirect damages", and to examine further what kind of damages should be addressed in those statutory provisions.

116. The Working Group engaged in a discussion of two related questions that might arise when a message was delayed or not transmitted properly (see A/CN.9/360, paras. 97-103). One question concerned the liability for damages of a party who caused a failure or error in communication. The other question was which party was to

bear the risk of loss resulting from a failure or error in communication. Views were expressed that in devising a statutory provision on those questions, appropriate weight should be given to the principle of freedom of contract.

117. A suggestion was made that the question of liability and risk might be addressed by a provision along the following lines:

"Subject to the agreed procedures for authentication or verification, the risk and liability for any faulty transmission and resulting damage rests with the sender".

By way of explanation, it was added that the purpose of the opening phrase in the suggested provision was to make it clear that the provision addressed the situation where security procedures had been agreed upon and the recipient of the message observed those procedures.

118. It may be noted, however, that in certain cases it might be inappropriate to emphasize the liability of the sender, since loss could be caused not only by negligence of the sender, but instead in full or in part by negligence of the recipient, by concurrent negligence of both of the sender and the recipient, or by a third person, for example in the case where the parties communicated through a value-added communication network.

119. A suggestion made at the previous session was to distinguish the question of liability for loss from the question of which party bore the risk of loss where nobody was liable for the loss. In this light, a provision on liability might be broadly modelled on the approach adopted in article 12 of the draft TEDIS Model Agreement (see A/CN.9/350, para. 103), which reads as follows:

"Each party shall be liable for any direct damage arising from or as a result of any deliberate breach of this agreement or any failure, delay or error in sending, receiving or acting on any message. Neither party shall be liable to the other for any incidental or consequential damage arising from or as a result of any such breach, failure, delay or error.

The obligations of each party imposed by this EDI agreement shall be suspended during the time and to the extent that a party is prevented from or delayed in complying with that obligation by *force majeure*.

Upon becoming aware of any circumstance resulting in failure, delay or error, each party shall immediately inform the other party(ies) hereto and use their best endeavours to communicate by alternative means."

120. Also mentioned as a possible model for a provision on liability was article 16 of the draft SITPROSA Model Agreement (see A/CN.9/350, para. 103), which reads as follows:

"16.1 The risk and liability for any faulty transmission and the resulting damages rests with the Sender:

- a. subject to the exceptions described in clause 16.2; and
- b. subject to the condition that the Sender will not be liable for any consequential damages other than those for which he would be liable in the case of a breach of contract in terms of the Main Contract or which have been specifically agreed to.

16.2 Although the Sender is responsible and liable for the completeness and accuracy of the TDM [Trade Data Message], the Sender will not be liable for the consequences arising from reliance on a TDM where:

- a. the error is reasonably obvious and should have been detected by the Recipient;
- b. the agreed procedures for authentication or verification have not been complied with."

121. It may be noted that the issue of liability is closely linked to the observance of commercially reasonable procedures for verification and security of communication. The view was expressed at the previous session that any statutory rule that might be prepared by the Commission should be more specific concerning those procedures. Articles 6, 7 and 8 of UNCID Rules were mentioned as citing the duty to observe such commercially reasonable procedures (see above, paragraphs 58-63).

122. The Working Group might wish to consider another approach, based on the UNCITRAL Model Law on International Credit Transfers. Bearing in mind the need to apply checking procedures to identify an error, it is submitted that an error in transmission may consist of defects in reception that can be picked out by normal use of security procedures or by the intervention of a human operator and not by a computer, for example where a free-formatted text is garbled. There may also be situations where there is no way by which the recipient knew or could have known of the defect. In addition, a garbled message may or may not allow the recipient to identify the sender.

123. It is suggested that the uniform rules might state the obligations of the recipient with regard to the detection of errors, the obligations flowing from the detection of an error and the consequences of the recipient's compliance, or failure to comply, with its obligations. If the recipient knew or should have known that the message was garbled or somehow impossible to process, it should be under an obligation to notify the sender. In cases where the sender did not receive such notification due to the negligence of the recipient who failed to comply with applicable security procedures or to give the required notice, the uniform rules might state that the sender should be able to rely on the message as sent. In cases where the recipient notifies the sender of an error, the message might be given no effect. In cases where the recipient did not know and could not have known that there was an error in the message, the sender should be bound by the message as received by the recipient. It is submitted that such rules would be consistent with the provisions of the UNCITRAL Model Law on International Credit Transfers, particularly with articles 5(5), which reads as follows:

"(5) A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, the sender is not bound by an erroneous duplicate of, or an error or discrepancy in, a payment order if

(a) the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates, errors or discrepancies in a payment order, and

(b) use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate, error or discrepancy.

[...] Paragraph (5) applies to an error or discrepancy in an amendment or a revocation order as it applies to an error or discrepancy in a payment order."

VII. FURTHER ISSUES POSSIBLY TO BE DEALT WITH

A. Liability of a third party providing communications services

124. At its previous session, the Working Group discussed the liability of EDI network operators, who might cause loss by improper or untimely transmission of, for example, a contract offer, payment order, notice to release goods, or a notice that goods were damaged. In addition, a network operator might cause damage by failing to perform or by incorrect performance of value-added services that the network had undertaken to perform.

125. It may be recalled that various types of services may be performed by EDI networks. One category of networks consists of third parties who only transmit messages without providing additional value-added services (passive networks). Another type are third parties who provide value-added services such as verification, authentication, archiving, recording or copying. A further type, referred to also as central data managers, are third parties whose management of the flow of information is essential for the functioning of a closed EDI network so that each party who wishes to join the network has to agree to conduct the transactions through the central data manager.

126. In practice, the liability of network operators is to a large measure restricted. In the case of network operators that have a public status, the restriction or exclusion of liability is often established in the law or regulation governing the functioning of the network. The responsibility of passive carriers of data (such as telephone, telex or facsimile networks) in particular is low or excluded. In the case of networks that have no such public status, liability restrictions are found in contracts with users of the communications services. In addition to excluding or placing financial limits on liability, liability restrictions generally concern the basis of liability and the burden of proof. Liability may be restricted also through rules determining that the operator was liable only for direct loss or loss that the operator could reasonably foresee; for example, when a payment order or an acceptance of a contract offer is not transmitted properly, the liability may be limited to the fee paid for the transmission and to the interest lost because payment was made late.

127. In devising liability rules it has to be borne in mind that EDI messages may have to travel through networks of various operators, including operators that are not in a contractual relationship with the sender or the addressee of the message, and that sometimes the user of the communication service does not know through which networks the message would travel.

128. An operator might offer different fees for a given service, depending on the level of liability accepted by the operator. It might be acceptable to allow a broad freedom of contract in excluding liability as long as the user has a reasonable choice to pay a higher fee for a higher level of liability and that competition exists among network operators.

129. Since it can be predicted that computer failure, transmission system failure and power failure will sometimes occur, EDI users, third-party service providers and the EDI community as a whole might be expected to plan so as to minimize the likelihood of such failure and to avoid or overcome the consequences. Some of the planning involved is common to all types of computer and data transmission activities and includes such matters as redundancy of equipment, back-up files and disaster recovery plans. It may be thought that in order to determine whether the computer failure, transmission system failure or power failure should constitute an exonerating event, it should be determined whether it could have been avoided or its consequences could have been avoided or overcome by proper planning in advance.

130. With the increased use of EDI, the likelihood of an error or fraud remaining undetected would diminish. For example, when a given transaction is implemented by a series of messages (e.g., purchase order, functional acknowledgement of the order, acceptance of offer, functional acknowledgement of the acceptance, shipment order, instruction to the carrier), electronic security measures are likely to alert the users in the event of alteration of data at a particular segment of the message chain.

131. At its previous session, the Working Group was generally agreed that in principle the users and the networks should be free to agree on the level of liability of the network. This freedom, however, should be limited by a mandatory provision ensuring that the liability of the network was not excluded or set at an unreasonably low level.

132. With regard to any statutory liability provision that might be prepared by the Commission, various approaches are possible. One possible approach would be to base the liability provision on the principle that the obligation of the network was to provide, to the best of its ability, the means to carry out the service ("obligation of means"). Another possible approach would base the provision on the principle that the network guaranteed the performance of the service ("obligation of result"). It may also be expected that the network should not be able to exclude its liability for serious instances of negligence or gross misconduct.

Liability based on negligence could be expressed by setting out positive duties owed by the network to the user and by providing that the network is liable if it is in breach of such a duty. Alternatively, liability could be expressed by stating that the network is liable if it fails to take all the measures that could reasonably be required to avoid the damage. As to the damages, provisions might allow the network to exclude liability for indirect and unforeseeable damages.

133. Other factors that might be taken into account in devising rules on the liability of network operators might include whether it was the operator of the network or another party who constructed the communications system, whether it was the user or the network operator who decided that a particular communications system would be used, whether the network operator was the only party in control of the communications system, whether the communications system was offered to the user with or without a possibility to adapt the system to particular needs of the user, and whether the user fulfilled its duty to observe agreed security measures.

134. In view of the complexity and variety of the issues that might be considered, the Working Group may wish to decide whether the question of the liability of network operators could appropriately be dealt with by way of basic rules to be included in the uniform rules, for example mandatory provisions setting a minimum level of liability. An alternate solution would be to embark on the preparation of a detailed liability regime dealing with the above-mentioned and possibly also with additional issues.

B. Documents of title and securities

135. The issue has been examined in previous reports (see A/CN.9/350, paras. 104-108 and A/CN.9/WG.IV/WP.53, paras. 84-90). The issue was also addressed as part of the preliminary discussion of the legal issues of EDI at the previous session of the Working Group (see A/CN.9/360, paras 119-124).

136. At the previous session of the Working Group, the discussion on the topic of negotiability of documents of title in an EDI environment focused on maritime bills of lading. It may be noted, however, that legal issue of negotiability might also arise in the context of the increased use of EDI with regard to other documents of title or negotiable instruments. The Working Group may wish to request the Secretariat to prepare a study on those issues for discussion at a later session.

IV. POSSIBLE FUTURE WORK

A. Proposals for possible future work made at the UNCITRAL Congress: note by the Secretariat (A/CN.9/378) [Original: English]

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INTRODUCTION

1. The UNCITRAL Congress on International Trade Law on the theme "Uniform commercial law in the 21st century" was held from 18 to 22 May 1992 in New York, in the context of the twenty-fifth session of the Commission. Amongst the main topics for discussion were the process and value of unification of commercial law, sale of goods, services, payments, electronic data interchange, dispute settlement, transport and the future role of UNCITRAL. It is expected that the proceedings of the Congress will be published by the end of 1993.

2. One of the principal aims of the Congress was to provide participants, who included practising lawyers, government officials, judges, arbitrators and teachers of law, with a forum in which to voice their practical needs as a basis for future work by the Commission and other formulating agencies. Many speakers at the Congress did indeed make proposals on topics that the Commission and other formulating agencies could take up as part of their future work. The proposals were made in different contexts, with some being more definite recommendations for future work while others were suggestions that a certain topic may be

worthy of study. Some proposals were very specific and concrete while others were of a more general nature. A list of the proposals made is presented in part I of this note, without stating the number of times that a particular topic was proposed or the strength of the recommendation. The note also presents, in part II, what action the Secretariat has taken on some of the proposed topics.

3. In addition to the proposals for undertaking work on harmonization of rules, a number of other suggestions were made. Most of them were generally aimed at either enhancing coordination with other agencies involved in international trade law, promoting uniformity in interpretation of uniform texts or increasing the dissemination of texts emanating from the Commission. Those suggestions are listed in part III of this note. The Secretariat will examine these suggestions and, if regarded appropriate, implement them within available resources. Some of the proposals are already being implemented. An example of this (though not being implemented by the Secretariat) is the setting up of the International Moot Arbitration Competition which is designed to increase public awareness of the United Nations Sales Convention, the Model Arbitration Law and the UNCITRAL Arbitration Rules.

I. TOPICS FOR HARMONIZATION AND UNIFICATION OF RULES

Proposals on general contracting

1. Preparation of an explicit set of guidelines covering the problems created by discrepant standard contract forms ("battle of forms").
2. Preparation of model texts setting forth a variety of warranty and corresponding liability limitation clauses.
3. Achieving some measure of unification with respect to the validity of exemption clauses.
4. Development of international standards for evaluating unfair, unreasonable or unconscionable terms in contracts.
5. Uniform rules on enforceability of penalty and liquidated damages clauses in international contracts.
6. Development of a multilateral framework of rules and principles to provide for a fair trade in services.
7. Elaboration of rules on the protection of trade/business information in cross-border transactions.

Proposals on specific types of contracts

1. A general review of the most common standard sales conditions in international sales particularly the choice of law clauses.
2. Preparation of a legal guide on privatization contracts.
3. Fair contracts for the sale of commodities.
4. Legal guide on marine insurance contracts.
5. Preparation of model clauses or provisions to facilitate implementation of "build, operate, transfer" (BOT) projects.
6. Integration of some model forms of contract into the text of future editions of the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.
7. Buy-back agreements in joint venture transactions.
8. Management contracts by non-equity owners.
9. Uniform terms in insurance contracts.
10. Contracts for the transfer of technology.
11. Association agreements and mergers.
12. A legal guide for franchisees and a standard form or model disclosure law for franchise agreements.
13. Rules setting standards of service for brokerage services, including those of stocks, real estate and commodities.

14. Simplification and standardization of the formalities and documentation as well as harmonization of the basic principles of trademark protection.
15. Model laws on protection of intellectual property and patents.
16. Rules setting standards for the tourist industry, including those of hotels and travel agencies.

Payments and security interests

1. Harmonization of banking regulations (e.g. in reporting requirements).
2. Assignment of claims and security interests in different types of property.
3. Uniform laws on retention of title.
4. Uniform rules on the liability of banks.
5. Coordination and harmonization between the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988) and the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices (1975).
6. Security interests in trade marks and service marks.
7. Harmonization of laws on elimination of money laundering.
8. Uniform rules on appropriate and secure assignments of letters of credit.
9. International aspects of bankruptcy.

Electronic data interchange (EDI)

1. Development of an international legal framework to address the issues presented by the growth of electronic commerce.
2. Elaboration of uniform rules concerning the liability of intermediary network providers.
3. Development of standards for data protection.
4. Supplementing the UNCITRAL Legal Guide on Electronic Funds Transfers to deal with flight capital and tax evasion situations.
5. Uniform law on admissibility of evidence in electronic form.
6. Negotiability of electronic documents.
7. A model agreement for electronic payment orders.

Dispute settlement

1. Harmonization of rules on award of interest, including determination of rate of interest, in international commercial arbitration.

2. Survey of effectiveness of national application of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
3. Solutions to problems that arise in multiparty arbitration.
4. Preparation of a legal guide on pre-hearing conferences in international commercial arbitration, e.g. on the presentation of evidence.
5. Update of the 1958 New York Convention in particular with regard to enforceability of interim measures.
6. Clarification of certain issues arising out of the 1958 New York Convention, e.g. determination of internationality of an agreement under article II or the issue of refusal of enforcement on the grounds of public policy.
7. The effect of arbitration on the running of limitation periods.
8. Provisions on costs in arbitration and on the liability of arbitrators.
9. "Preventive dispute settlement" clauses.
10. Establishment of specialized courts entrusted with assistance in and supervision of arbitration.

Other topics

1. A uniform antimonopoly law.
2. Transnational tax laws.
3. Environmental labelling for products or services.
4. Consumer protection law.

II. ACTION BY THE SECRETARIAT

1. To facilitate decisions by the Commission on possible future work, the Secretariat has prepared notes on some of the suggested topics. The introductory notes are presented as addenda to this note and concern the following topics: procurement of services (addendum 1), pre-hearing conferences in international commercial arbitration (addendum 2), assignment of claims (addendum 3), cross-border insolvency (addendum 4), and privatization (addendum 5). The notes present a preliminary look at the issues and the legal problems that exist in these areas that may act as an impediment to international trade. They also set out the work that has been done in the past, either by UNCITRAL or other organizations, and discuss the desirability and feasibility of future work on each of these topics. Notes of that nature on other topics will be presented at future sessions.

2. In addition to the notes referred to in the preceding paragraph the Secretariat has been monitoring developments on work that is being carried out in other organizations on some of the proposed topics. An example of this

is the proposal made during the Congress that the Commission should consider future work in the field of the Build, Operate and Transfer (BOT) project financing concept.

3. BOT is conceived as a way to reduce pressure on the use of public funds for project financing and to promote the transfer of technology through the involvement of the private sector in financing, building and operating infrastructure projects. In its most basic form, a BOT project is where the Government grants a concession for a period of time to a consortium for the development of a project. The consortium finances or arranges for financing for the project, constructs the project, and operates and maintains the facility during the life of the concession. Meanwhile, through sale or charge for use of the facility or its products, the consortium recovers returns on its equity and pays off its debts. At the end of the concession period the project is transferred to the Government.

4. In order to promote and facilitate the utilization of the BOT concept, the United Nations Industrial Development Organization (UNIDO) is currently preparing "Guidelines for the development, negotiation and contracting of BOT projects". They are to be finalized by early 1994. The Guidelines will deal with the strategy and development of BOT arrangements and the major issues of implementing BOT projects. These include: economic viability of the project, financial and risk allocation aspects, governmental support, legal and political environment, procurement, structure and negotiating of the contractual package, transfer of technology, maintenance and transfer of ownership. The Guidelines will also deal with the standard project agreement and standard provisions for BOT contracts.

5. The Secretariat participated in UNIDO's first preparatory meeting of experts on the Guidelines and will continue to cooperate with UNIDO in this respect. The Secretariat intends to prepare a note for the next session of the Commission on the desirability and feasibility of possible future work in the area such as the preparation of a legal guide on contracting for BOT or on model legislation enabling contractual relations for BOT including, in particular, the concession agreement.

III. PROPOSALS ON COORDINATION, UNIFORM INTERPRETATION AND DISSEMINATION

Coordination

1. Enhancement of the Commission's original mandate to coordinate legal activities in the field of international trade law.
2. Enhancement of coordination with other international organizations in the promotion of uniform texts and in legal training and assistance.
3. Promotion of the work undertaken by the United Nations Conference on Trade and Development (UNCTAD), e.g., on restrictive trade practices.

4. Coordination with other international organizations and United Nations agencies in utilizing UNCITRAL's work in regional commercial law unification efforts.
5. Submission of texts by other formulating agencies to UNCITRAL for endorsement.
6. Consideration of holding joint working groups with the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law.
7. Preparation of a convention on principles for the interpretation and application of uniform law.
8. Issuance of an official commentary and recommendations on the application of the United Nations Sales Convention (e.g. on fundamental breach of contract and on exemption clauses).
9. Preparation of official commentaries on UNCITRAL texts.

Promotion of uniform interpretation

1. Establishment of a court of international trade and of uniform law to which States could refer any disputes on the application and interpretation of uniform law.
2. Establishment of an international tribunal for resolution of questions arising from the application of the United Nations Sales Convention.
3. Establishment of an accessible computerized database containing decisions on the United Nations Sales Convention.
4. Issuance of a periodical to publish differing applications and interpretations concerning international trade law.
5. A General Assembly resolution encouraging the reporting of national cases regarding the interpretation and application of uniform laws.
6. Establishment of an expert panel to review and investigate complaints by States about problems in the application and interpretation of uniform laws.

Dissemination of information

1. Promotion of the inclusion of UNCITRAL texts in the teaching of international trade law, together with manuals and university curricula for such teaching.
2. Establishment of an UNCITRAL Moot Arbitration Programme.
3. Establishment of an UNCITRAL Newsletter.
4. Establishment of an international documentation centre for commercial law.

Others

1. Establishment of a scholarship or endowment in honour of Professor Clive M. Schmitthoff.
2. Establishment of national UNCITRAL support groups.

B. Procurement of services: note by the Secretariat (A/CN.9/378/Add.1) [Original: English]

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). The Working Group devoted its eleventh to fifteenth sessions to the preparation of the draft Model Law on Procurement which is before the Commission at the present session for final review and adoption (the reports of those sessions are contained in documents A/CN.9/331, 343, 356, 359 and 371).

2. At its tenth session the Working Group decided to limit the Model Law, at least initially, to the procurement of goods or construction and not to deal with the procurement of services (A/CN.9/315, para. 25). The Working Group decided that it would be preferable to first finalize model statutory provisions for the procurement of goods or construction before elaborating such provisions for the procurement of services. A principal reason for this decision was that certain aspects of the procurement of services are governed by different considerations from those that govern the procurement of goods and of construction.

3. As the preparation of model provisions on the procurement of goods and of construction is being completed at the present session, the Commission may wish at this stage to consider the possibility of formulating model statutory provisions for the procurement of services. At the fifteenth session the Working Group lent its support to the preparation by the Secretariat of a note on the desirability and feasibility of preparing uniform model provisions on the procurement of services. The Working Group indicated that the note could envisage different possible options as to the scope of services to be covered by such provisions (A/CN.9/371, para. 255). Accordingly, the present note addresses the desirability of preparing model provisions on the procurement of services, the main differences between procurement of services and procurement of goods or construction, and the possible contents of the model statutory provisions. The note also presents, in its annex, the proposed text of possible amendments and supplements to the UNCITRAL Model Law that would be designed to expand its scope to cover the procurement of services.

I. DESIRABILITY OF PREPARING MODEL STATUTORY PROVISIONS ON PROCUREMENT OF SERVICES

4. While the procurement of goods and of construction takes up the larger portion of the procurement budgets of most public entities, services constitute a significant component of total government procurement in most countries. Furthermore, it would appear that the trend towards privatization will lead to the transfer to the private sector of services previously performed exclusively by Government. However, many countries lack a well regulated system for the procurement of services.

5. National laws on the procurement of services display differences from State to State. While the laws of some States do contain provisions on the procurement of services, the laws in some other States do not clearly differentiate between the procurement of goods or construction and the procurement of services, and therefore fail to take account of the specific circumstances relevant to procurement of services. The laws in yet other States do not deal with the procurement of services at all. It would therefore seem that the procurement of services is, in many instances, not subject to procedures that are sufficiently open, fair and competitive to ensure adequate quality and a fair price for the public purchaser. In this context, model statutory provisions could be used to assess the adequacy of existing legislation and as a model for new legislation where none presently exists.

6. Subsequent to the earlier decision to delay formulation of provisions on services, a reason that has arisen for the preparation of model provisions in the near future is the need of various States that are already enacting domestic legislation on the basis of the Model Law to have a model for a comprehensive legislative framework for procurement, one that covers the procurement of services.

7. There have also been further developments in the treatment of procurement of services by multilateral organizations concerned with procurement. In particular, there are now concrete proposals within the General Agreement on Tariffs and Trade (GATT) aimed at extending the GATT Agreement on Government Procurement to also cover the procurement of services. Furthermore, the European Community, as a follow-up to its existing directives on procurement, has now enacted Council Directive (EEC) 92/50 relating to the Coordination of Procedures for the Award of Public Service Contracts. An expansion by UNCITRAL of the scope of its work to cover services would be in line with the steps taken by those organizations to broaden the scope of legal instruments governing procurement to encompass services.

II. DIFFERENCES BETWEEN PROCUREMENT OF SERVICES AND PROCUREMENT OF GOODS OR CONSTRUCTION

8. Unlike the procurement of goods or construction, the procurement of services typically involves the supply of an intangible commodity whose quality and exact content may be difficult to quantify. The precise quality of the services provided will be largely dependent on the skill and expertise of the service providers. This is in contrast to the supply of goods or of construction, where technical and quality specifications are more suited to be specified in the solicitation documents and are relatively easy to monitor and enforce during performance. Furthermore, contracts for the procurement of goods and of construction usually contain guarantees of quality and performance.

9. Since it is often not practicable to monitor and to enforce quality and performance standards in contracts for procurement of services, the best assurance that the procuring entity has of receiving high-quality services is to

ensure that the supplier possesses a high level of technical competence and skill. The price of services has therefore often not been considered as important a factor in the evaluation and selection process as the quality and competence of the supplier. From this perspective, price-based procedures for evaluation and comparison of tenders as currently set out in article 29 of the Model Law would not necessarily be considered appropriate for the procurement of services.

10. Since technical criteria have usually been regarded as more important evaluation factors than price, the practice has tended to be to evaluate the technical and the price aspects of the offer separately. The service providers who have the best-evaluated technical ability then either compete on the basis of price or on the basis of an evaluated combination of both price and technical ability, or they engage in negotiations with the procuring entity regarding price or any other aspects of their tender.

III. POSSIBLE EVALUATION PROCEDURES FOR MODEL STATUTORY PROVISIONS ON SERVICES

11. Apart from the tendency to evaluate the price separately from other factors, the principles and procedures for the procurement of goods and of construction may generally be made applicable to the procurement of services. Variations would involve mainly the evaluation procedures and criteria so as to give effect to the relative importance of the technical competence and quality of the supplier.

12. Identification of the types of evaluation factors to be recognized is generally settled in practice. Those factors will usually concern: the general technical competence of the service providers; the qualifications and competence of the personnel specifically assigned to provide the services; and the suitability of alternative proposals, if any have been sought. Along with the evaluation criteria themselves, the relative weight to be given to each factor and the manner in which the weighting is to be applied in the evaluation should also be predetermined and disclosed to service providers in the solicitation documents.

13. There are basically three methods by which price can be taken into account separately from the evaluation according to technical criteria. In the first method, the service providers that attain the highest technical-competence rating (e.g. beyond a specified threshold level) are placed in a straightforward price competition in which the offer with the lowest price is to be selected. In the second method, the results of the technical evaluation and the price proposals are given relative weightings and the service provider with the highest combined evaluation is the successful one. In the third method, the procuring entity holds negotiations on the price or any other aspects of the tender with the provider with the highest technical rating, with the aim of getting the best value. If negotiations with that provider are unsuccessful, the procuring entity then negotiates with the provider rated second, and so on down the list, until a procurement contract is concluded, or until all remaining tenders are rejected.

IV. SCOPE OF SERVICES TO BE COVERED

14. Some States may wish to exempt certain services from the competitive procurement process. This would be mainly when the nature of certain services or that of their providers makes the services more amenable to being acquired directly, rather than being procured through competitive means. By "direct acquisition" is meant the obtaining by the procuring entity of the required services through direct purchase from a service provider, without having placed a number of service providers through a competitive procurement procedure. The European Community dealt with the issue of the scope of services to be covered by exempting some services (e.g. arbitration and conciliation services) from the operation of the Directive.

15. It would not necessarily be feasible or useful to attempt to list in a comprehensive way in a model law the scope of services to be covered by each enacting State, since States may differ as to which services to include. It would therefore appear to be preferable to leave the question of scope of services to be covered up to enacting States. Further guidance on the issue could be provided in a commentary. This would be in keeping with the general approach of the Model Law to recognize that, while it is preferable to subject as much of public procurement as possible to the Model Law, States may wish to exclude certain types of procurement.

16. Some States may also wish to subject the procurement of different services to different procurement methods. The EC Directive provides three different procurement methods and divides services into two separate lists. The first list consists of "priority services", which are subject to the full operation of the Directive whereas the second, "non-priority" list, refers to services whose procurement is subject to less rigorous procedures. It may be noted that the EC hopes to review the Directive in three years with the intention of combining the two lists so as to make the Directive fully applicable to a wider range of service contracts.

V. POSSIBLE METHODS OF FORMULATING MODEL STATUTORY PROVISIONS

17. It would appear that the preferable method of formulating model provisions on the procurement of services would be to prepare an additional chapter ("IV bis") for the UNCITRAL Model Law on Procurement, dealing exclusively with the procurement of services. Such an additional chapter would necessitate a number of amendments in the Model Law, in particular with respect to definitions and the application of certain sections of the Model Law to the chapter on services.

18. The main advantage of the above approach is that it would result in a consolidated model law covering all procurement and would guide enacting States in the formulation of a consolidated law. Furthermore, it would avoid the preparation of an entirely separate model law on the procurement of services, an approach that would not only involve duplication of work but would also have the disadvantage of presenting to States two model laws dealing with essentially the same subject matter. The suggested

approach would also permit the Commission to adopt finally at the present session the Model Law, dealing with goods and construction. The Commission could then mandate the Working Group to prepare the additional chapter on services and to identify the amendments to the text of the Model Law, that would be needed to incorporate a chapter on services. It may also be considered desirable for the text of the provisions on services to be submitted to the Commission at its next session, in view of the urgent need for such model provisions in a number of countries.

19. The other method would be to provisionally approve the Model Law on Procurement (covering goods and construction) and to mandate the Working Group to prepare the extra chapter on services, but without re-opening matters of substance in the Model Law as approved. Using either method, once the additional chapter and the amendments are agreed, a consolidated, amended version of the Model Law, covering goods, construction and services, would then be issued.

ANNEX

DRAFT ADDITIONAL ARTICLES AND AMENDMENTS TO THE UNCITRAL MODEL LAW ON PROCUREMENT TO ENCOMPASS PROCUREMENT OF SERVICES

(The draft articles below are meant to be illustrative and are intended to assist in assessing the feasibility of preparing an additional chapter for the Model Law to encompass the procurement of services.)

DRAFT AMENDMENTS TO THE MODEL LAW

1. Add services to the definition of "procurement" and move the reference to "incidental services" to the definition of "goods" so that the definition of "procurement" would read as follows: "Procurement" means the acquisition by any means, including by purchase, rental, lease or hire purchase, of goods, construction or services.

Comment: The purpose of this amendment would be to add services to the scope of the Model Law.

2. Add a definition of services to read: (d bis) "*Services*" means the provision by suppliers or contractors of products that are neither goods nor construction.

Comment: A definition of services might be considered to be unnecessary. However, since there is a definition of "goods" and of "construction", for the sake of consistency a definition of services may also be included. The above definition would imply that all procurement by public entities could be governed by the Model Law since anything that did not constitute goods or construction would be defined as services.

3. Add a reference to incidental services in the definition of "goods" as follows: "goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity, and includes services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves.

Comment: In view of the deletion of the reference to incidental services from the definition of "procurement", the effect of this

addition is to enable the procuring entity to procure incidental services that are an integral part of a goods-supply contract, in accordance with the provisions in the Model Law that regulate the procurement of goods. Otherwise, the procuring entity would have to procure those incidental services in accordance with the proposed chapter IV *bis* on the procurement of services. Such a reference to incidental services is already found in the definition of "construction".

4. In article 6(5), add a cross-reference to article 37w(4)(b) as follows: "Subject to articles 8(1), 29(4)(d) and 37w(4)(b)".

Comment: This amendment would add preferential margins based on nationality for the procurement of services as an additional exemption to the general rule of non-discrimination on the basis of nationality.

5. In article 7(1), add a cross-reference to chapter IV *bis* on services as follows: "... prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapters III, IV or IV(bis),

... "

Comment: This amendment would have the effect of expressly making the provisions of Article 7 on prequalification proceedings applicable to the procurement of services.

6. In article 9(2), add a cross-reference to article 37x(3)(b),(c),(d) and (e).

Comment: Article 9(2) deals with those communications in the procurement of goods or construction that would not have to be transmitted in a manner that provides a record of the communication. Those types of communications in the procurement of services are to be found in article 37x(3)(b),(c),(d) and (e).

7. In article 32(1) and (5), add a cross-reference to articles 37w(4)(a) and 37x concerning the acceptance of tenders in the procurement of services.

Comment: Article 32(1) and (5) makes a direct reference to provisions in the Model Law on the acceptance of tenders in the procurement of goods and of construction. The additional cross-references would have the effect of expressly making the provisions of article 32(1) and (5) on acceptance of tenders applicable to the procurement of services.

8. In article 38, add a cross-reference to articles 37w(2),(3) and (4), and 37x(3)(d) and (e).

Comment: This amendment would have the effect of adding to the list of exclusions in article 38 the decisions of the procuring entity that, in the procurement of services, would not be subject to recourse proceedings.

DRAFT ADDITIONAL ARTICLES

Chapter IV *bis*. Methods and procedures for procurement of services

Article 37s. Application of chapters I, III and V

(1) The provisions of chapters I, III and V of this Law shall apply to the procurement of services, except to the extent that those provisions are derogated from in this chapter.

(2) The provisions of chapters II and IV of this Law shall not apply to the procurement of services, except to the extent that those provisions are made applicable by this chapter.

Comment: Chapters I (General Provisions) and V (Review) apply to chapter IV *bis* because they are generally applicable to the entire Model Law. Chapter III (Tendering Proceedings) applies because, as stated in paragraph 11 of the present note, to a significant measure the principles and procedures for the procurement of goods and of construction can be applied to the procurement of services. The principal derogations from chapter III would therefore relate to the types of evaluation criteria and documentation required to evaluate qualifications and to examine, evaluate and compare tenders. Chapters II and IV do not apply because they concern conditions for use and procedures for procurement methods that are not applicable to the procurement of services except to the extent that articles 37y and 37z make them applicable.

Article 37t. *Contents of invitation to tender and invitations to prequalify*

(1) The invitation to tender shall contain:

(a) the information required in accordance with article 19(1), except the information referred to in subparagraphs (b) and (c) thereof;

(b) a description of the services to be procured;

(c) the desired or required time for the provision of the services.

(2) An invitation to prequalify shall contain at least the following information:

(a) the information required in accordance with article 19(1), (a), (d), (e), (g) and (h), and article 19(2)(a), (b), (c), (d) and (e);

(b) a brief description of the services to be procured.

Article 37u. *Prequalification proceedings*

(1) Prequalification proceedings shall be carried out in accordance with article 7, except to the extent derogated from in paragraph (2) of this article.

(2) The prequalification documents shall contain at least the following information:

(a) a request for information from the supplier or contractor on the experience and capacity of the personnel that will be involved in the provision of the services;

(b) a description of the services to be procured;

(c) the information referred to in article 7(3).

Article 37v. *Contents of solicitation documents*

(1) The solicitation documents shall contain at least the following information:

(a) the information referred to in article 21, except the information referred to in subparagraphs (d), (e), (g), (h), (i) and (u);

(b) a description of the services required;

(c) the required time in which the services are to be provided;

(d) the manner in which in the tender price is to be formulated;

(e) a request for information on the experience of the personnel that will be involved in the provision of the services, unless the information has been provided in prequalification proceedings in accordance with article 37u(2)(a);

(f) if alternative proposals to the contractual terms and conditions or to other requirements set forth in the solicitation documents are permitted or required, a statement to that effect;

(g) the criteria that will be used in evaluating the proposals and the relative weight to be accorded to the criteria in accordance with article 37w(1);

(h) the method by which the price will be taken into account in the evaluation of tenders in accordance with article 37w(4).

(2) If prequalification proceedings have not been engaged in, the solicitation documents shall also contain:

(a) a request for information on the past experience of the supplier or contractor and its personnel in providing services of a kind similar to those to be procured;

(b) the qualification criteria that will be used in the evaluation of tenders.

Comment on articles 37t, 37u and 37v: The additional documentation required by the procuring entity in the procurement of services is mainly intended to enable the procuring entity to ascertain the technical competence and ability of the supplier and contractor and of the personnel that will be assigned to implement the procurement contract.

Article 37w. *Examination and evaluation*

(1) The procuring entity shall establish the criteria for evaluating the tenders and determine the relative weight to be accorded to each criterion and the manner in which they are to be applied in the evaluation. The criteria shall concern:

(a) the experience of the suppliers and contractors and their technical competence in providing services comparable to those required by the procuring entity;

(b) the conformity of tenders with the requirements of the procuring entity;

(c) the qualifications and competence of the personnel proposed to provide the services;

(d) if alternative proposals were sought or required in accordance with article 21(g), the suitability and adequacy of the proposals made;

(e) the price.

(2) The procuring entity shall establish a threshold level with respect to quality and technical aspects that the tenders shall have to attain in order to merit further consideration under paragraph (4) of this article.

(3) Without considering the price of the tenders, the procuring entity shall rate each tender in accordance with the factors for evaluating the tenders and the relative weight and manner of application of those factors as set forth in the solicitation documents. The procuring entity shall then rank the tenders in accordance with the ratings.

(4)(a) The procuring entity shall then compare the prices of the tenders that have attained a rating at or above the threshold level established in accordance with paragraph (2) of this article. The successful tender shall be either:

(i) the tender with the lowest price; or

(ii) the tender with the highest combined evaluation of the price, and of technical capacity as rated in accordance with paragraph (3) of this article; or

(iii) the tender which the procuring entity selects after negotiations in accordance with article 37x.

(b) If authorized by the procurement regulations (and subject to approval by . . . (each State designates an organ to issue the approval), in evaluating and comparing the tenders, a procuring entity may grant a margin of preference for the benefit of tenders for provision of services by domestic suppliers or contractors. The

margin of preference shall be calculated in accordance with the procurement regulations.

Comment: Article 37w is meant to give effect to the principle referred to in paragraphs 8 to 10 of the present note that the major factor in the examination and evaluation of tenders in the procurement of services is the technical competence and ability of the supplier or contractor. The establishment of a threshold level enables the procuring entity to disregard those tenders whose technical competence rating is too low to merit further consideration.

The procuring entity is presented with three options as to how to combine an evaluation of technical and price factors. The first option, in paragraph (4)(i), is presented because, if the qualification threshold is set at a high level, then those suppliers and contractors that attain a rating at or above that level would in all probability be able to provide the services at a more or less equal level of competence. This would permit the procuring entity to put those tenders through a straightforward price competition where the tender with the lowest price would be the successful one.

In the second option, as set out in paragraph (4)(ii), the procuring entity may wish to weight and rate the price of the tenders as a separate criterion, and then combine the two weighted criteria in evaluating each tender. It would then compare the ratings of the tenders on the basis of the combined evaluations and the tender with the highest combined rating would be the successful one.

Under paragraph (4)(iii), the procuring entity may negotiate with suppliers so as to ascertain the successful tender. Such negotiations are subject to article 37x.

Article 37x. Negotiations

(1) The procuring entity may engage in negotiations with suppliers and contractors as a means of ascertaining the most successful tender if it has so specified in the solicitation documents.

(2)(a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential.

(b) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or any other information relating to the negotiations without the consent of the other party.

(3) The procuring entity shall employ the following procedures in the negotiations with suppliers or contractors:

(a) invite for negotiations on the price or other aspects of its tender, the supplier or contractor that has attained the highest rating in accordance with article 37w(3);

(b) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for nego-

tiations if the negotiations with the suppliers or contractors with higher ratings do not result in a procurement contract;

(c) inform the other suppliers or contractors that they did not attain the required threshold level;

(d) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (3)(a) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations;

(e) the procuring entity shall then invite the supplier or contractor that attained the second highest rating for negotiations; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers and contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining tenders.

Comment: It would appear that negotiations to ascertain the most successful tender are most commonly used in the procurement of consultancy services. Article 37x aims at ensuring that the negotiations are fair to both the procuring entity and the suppliers and contractors by providing for confidentiality and respect for the ranking in the technical rating, while leaving the procuring entity some flexibility in determining which supplier or contractor best meets its needs.

Article 37y. Request for quotations

(Subject to approval . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement for services by means of a request for quotations in accordance with article 36 when the circumstances in article 15 arise in regard to the procurement of services.

Article 37z. Conditions for use of single source procurement

(Subject to approval . . . (each State designates an organ to issue the approval),) the procuring entity may engage in single-source procurement for services in accordance with article 37 when the circumstances in articles 14(1)(d) and 16 arise in regard to the procurement of services.

Comment to articles 37y and 37z: These articles make applicable to the procurement of services articles 15, 16, 36 and 37, in case it may be appropriate to procure services by means of request for quotations or single source procurement. The conditions for use and the procedures for those two methods as applicable in the procurement of goods and of construction are therefore made applicable to the procurement of services.

C. Guidelines for pre-hearing conferences in arbitral proceedings: note by the Secretariat

(A/CN.9/378/Add.2) [Original: English]

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INTRODUCTION

1. It was observed at the Congress on International Trade Law held by the Commission during its twenty-fifth session in 1992, as well as at other forums discussing international arbitration, that the principle of discretion and flexibility in the conduct of arbitral proceedings might in some circumstances make it difficult for participants to predict the manner of proceeding and to prepare for the various procedural actions. In connection with those observations, it has been stated that such difficulties could be avoided or reduced by holding at an early stage of arbitral proceedings a conference between the arbitrators and the parties in order to discuss and plan the proceedings. Furthermore, it was suggested that it would be useful to prepare guidelines for such "pre-hearing conferences". Possible work by the Commission on such guidelines is discussed in section I.

2. The Commission at its nineteenth session in 1986 considered a report entitled "Coordination of work: activities of international organizations on certain aspects of arbitration" (A/CN.9/280).¹ The report covered activities of various international organizations with respect to the following topics of arbitration: multi-party arbitration, taking of evidence in arbitral proceedings, international court assistance in taking evidence in arbitral proceedings, the law applicable to arbitration agreements, adaptation or supplementation of contracts by third persons, and a code of ethics for arbitrators in international commercial arbitration. The purpose of the report was to provide information on the activities of other organizations and to invite consideration by the Commission of whether any of those issues warranted closer examination from the point of view of coordination of work and possible future work by the Commission itself. The Commission was of the view that multi-party arbitration and the taking of evidence in arbitration gave rise to issues that merited further consideration.² These two topics are among those considered in section I, in the context of possible guidelines for pre-hearing confer-

ences, since it is believed that a number of issues arising from these two topics can appropriately be addressed by such guidelines. Further considerations of the two topics are contained in sections II and III. Conclusions are set forth at the end of the paper.

I. PRE-HEARING CONFERENCE

A. Introductory remarks

3. Arbitration rules governing arbitral proceedings, in particular the stage of proceedings when hearings are held and various documents exchanged, typically allow a fair degree of discretion and flexibility in the conduct of arbitral proceedings.

4. An example for the flexibility and discretion in the conduct of proceedings is article 15(1) of the UNCITRAL Arbitration Rules, which provides:

"1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

5. The principle of flexibility and discretion has two kinds of limits. First, the discretion of the arbitral tribunal does not extend to questions that are settled in the applicable rules; in the case of the UNCITRAL Rules, this is indicated in article 15(1) in the introductory phrase "Subject to these Rules".³ Second, the arbitral tribunal must observe mandatory procedural provisions of the law applicable to the arbitration.⁴ Such mandatory provisions, however, often do not increase the level of certainty and predictability of

¹Reproduced in *United Nations Commission on International Trade Law: Yearbook, Volume XVII: 1986* (United Nations publications, Sales No. E.88.V.4), part two, chapter IV.

²Report of the United Nations Commission on International Trade Law on the work of its nineteenth session; *Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)*, paras. 254-258; also reproduced in *United Nations Commission on International Trade Law: Yearbook, Volume XVII: 1986* (United Nations publications, Sales No. E.88.V.4), part one, A, paras. 254-258.

³The UNCITRAL Arbitration Rules provide several exceptions to the general principle of flexibility in the conduct of proceedings; they concern, for example, delivery of notifications, communications or proposals (art. 2(1)); obligation to hold oral hearings if either party so requests (art. 15(2)); notice of oral hearings (art. 25(1)); requirement to identify in advance any witnesses to be heard (art. 25(2)); and various aspects of taking evidence by experts (art. 27). In addition, the Rules contain specific provisions on the steps to be taken in order to establish the arbitral tribunal and commence the proceedings, as well specific provisions relating to the arbitral award.

⁴This requirement is expressed in article 1(2) of the UNCITRAL Rules; it is also expressed in statutory provisions on setting aside of arbitral awards and on recognition and enforcement of arbitral awards.

arbitral proceedings. One mandatory principle, which is in various formulations present in all procedural systems, is expressed in article 18 of the UNCITRAL Model Law on International Commercial Arbitration: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

6. The principle of discretion and flexibility is useful and generally considered as the best approach inasmuch as it can accommodate different procedural styles and thus allow arbitral proceedings to be adapted to the case at hand and to be conducted in the procedural style to which the parties and the arbitrators are accustomed.

7. The need for flexibility and discretion diminishes in so far as the participants in the arbitration are in a position to plan the proceedings and prepare their procedural actions. If such planning does not take place, it is possible, in particular in an international arbitration, that a party or a member of the arbitral tribunal will find the proceedings surprising, unpredictable and difficult to prepare for. This may lead to misunderstandings, delays and increased costs of proceedings. Factors such as differences in procedural traditions are mentioned as reasons for such difficulties. It may be added that, since arbitrations do not have to follow, and usually do not follow, procedural patterns usual in a court, and since many arbitrators have developed individual variations of a procedural style, those difficulties may arise also in arbitrations in which the participants' legal backgrounds are not dissimilar.

8. As a measure to avoid such difficulties, there exists a practice of holding, shortly after the constitution of the arbitral tribunal, a meeting between the arbitral tribunal and the parties with a view to clarifying and planning the conduct of subsequent proceedings. Appropriate procedural agreements are concluded or decisions taken at such meetings in order to make subsequent hearings more effective and predictable. Meetings of this kind are referred to in practice by terms such as "pre-hearing conference", "preliminary hearing", "pre-trial review", or "administrative conference". The present paper uses the term "pre-hearing conference".

9. Few sets of international arbitration rules make specific reference to pre-hearing conferences. Among the rules that do so are the Rules of Procedure for Arbitration of the International Centre for the Settlement of Investment Disputes (ICSID) (1984) (art. 21(1)). Among the rules that do not refer to a pre-hearing conference are, for example: the UNCITRAL Arbitration Rules, Rules of the London Court of International Arbitration, and the International Arbitration Rules of the American Arbitration Association. The procedure for drawing up the "Terms of Reference" at the beginning of an arbitration, as specified in article 13 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, is in some of its elements similar to a pre-hearing conference; nevertheless, while the terms of reference are rather specific about the claims and points at issue, they typically do not address the procedural details usually dealt with in a pre-hearing conference.

10. Pre-hearing conferences are in practice convened irrespective of whether the agreed set of arbitration rules deals with such a conference. This indicates that arbitral tribunals

consider the decision to convene such a conference to be within the general procedural authority of the arbitral tribunal to conduct arbitral proceedings in the manner it considers appropriate (see above, paragraph 4).

11. The confidential nature of arbitration makes it difficult to measure the extent of the practice of holding pre-hearing conferences. Judging by reports of practitioners, it seems that in a good number of international arbitrations such conferences are held. It appears that pre-hearing conferences are particularly likely to be convened in cases where the arbitrators see the role of the arbitral tribunal more as one of a moderator of the proceedings as opposed to an active investigator, and where, in accordance with this procedural tendency, the parties are expected to assume a fair degree of procedural initiative.

12. It might be concluded that, since there appear to be no reports objecting in principle to the practice of holding pre-hearing conferences, and since many commentators praise the usefulness of the practice, it may be expected that pre-hearing conferences are likely to become more frequent also where they have not been customary.⁵

B. Proposal for preparation of guidelines for pre-hearing conferences

13. It is suggested that holding a pre-hearing conference constitutes a useful practice in that it facilitates the preparation of the parties for the proceedings, helps avoid misunderstandings and expedites arbitrations. Pre-hearing conferences are particularly useful in international arbitrations, in which the expectations of parties or arbitrators as to the manner of proceeding may differ. Furthermore, the focused and early discussion of procedures at a pre-hearing conference fosters adopting procedural decisions by consensus, as opposed to the presiding arbitrator making procedural orders or the parties imposing procedures on the arbitral tribunal by their agreement.

14. For a pre-hearing conference to be effective, it is highly advisable for the arbitrators to prepare an agenda with topics for discussion and to give the parties advance notice of those topics. Arbitrators who have had limited experience with pre-hearing conferences may find it time consuming to prepare one. Similarly, an insufficiently experienced party may find it difficult to participate effectively in such a conference.

⁵The VIIIth International Arbitration Congress, in the context of the consideration of a hypothetical international commercial case, heard replies to the question whether in that kind of case it was customary to hold a pre-hearing conference. According to the replies, in some parts of the world, such as the United States, England and Nigeria, it is customary to hold such conferences; for arbitrations under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC), it was said that meetings for the preparation of "terms of reference", which are regularly held, often serve as a pre-hearing conference (see, however, para. 9). For some other parts of the world, such as Arab countries, Eastern Europe or Japan it was indicated that such conferences were unusual or not customary; some replies portraying the situation in those other parts of the world indicated that there are no formal obstacles to holding such conferences and that some pre-hearing conferences have been held. See International Council for Commercial Arbitration, *Comparative Arbitration Practice and Public Policy in Arbitration*, Congress series no. 3, Pieter Sanders, ed. (Deventer, Kluwer, 1987), pp. 63-66.

15. There exist some guidelines for the preparation and conduct of pre-hearing conferences.⁶ However, those guidelines, usually rather short and in the form of a checklist of topics to be discussed, were prepared for the work of a particular arbitral institution under a particular set of arbitration rules or were designed for domestic cases.

16. In order to facilitate the preparation and carrying out of pre-hearing conferences, it is suggested that it would be useful for the Commission to prepare guidelines for pre-hearing conferences, taking into account various legal traditions and the needs of international commercial arbitration. This work would contribute to the dissemination of practical knowledge about arbitration, and would facilitate participation in arbitrations of persons who have little contact with arbitral practice in traditional arbitration centres.

17. The purpose of the guidelines would be to increase certainty and predictability in arbitral proceedings, while maintaining flexibility in the conduct of proceedings. The guidelines would do so by drawing the attention of the parties and the arbitrators to questions that could usefully be considered at a pre-hearing conference. Those questions could concern technical details in the implementation of the rules governing the proceedings as well as questions not dealt with by those rules.

18. The assumption would be that the parties involved in the pre-hearing conference have agreed on a set of arbitration rules or, if they have not, that they may wish to do so at the pre-hearing conference. The decision to use the guidelines would not in itself mean any modification of the agreed arbitration rules. It might be appropriate, however, for the parties to agree at the pre-hearing conference on procedural solutions that would complement the agreed set of arbitration rules. It may also be that the parties would wish to modify the agreed rules in light of the discussions at the pre-hearing conference. In order to facilitate such agreements, it may be appropriate for the guidelines to contain, with respect to selected procedural issues, illustrative clauses, possibly in alternatives.

19. While the participants would normally make their decisions at the pre-hearing conference, it might be useful in some cases for the tribunal to meet after the conference and draft a document setting out decisions resulting from the conference.

20. The guidelines should draw attention to the obligation to observe mandatory procedural law.

21. Generally speaking, the purpose of pre-hearing conferences is to consider questions of arbitral procedure. Nevertheless, in this context it would not be useful to make a clear distinction between procedure and substance, since it is frequently beneficial at pre-hearing conferences to touch upon issues that may not be strictly procedural (e.g., precise definition of the relief sought, stipulations of undisputed facts, and exchange of information concerning points at issue).

22. The timing of pre-hearing conferences should be flexible. While a pre-hearing conference is typically held shortly after the arbitral tribunal has been appointed, the development of the case may make it useful for the participants to meet at more than one pre-hearing conference.

23. While work by the Commission on the proposed subject might be regarded as a useful complement to the UNCITRAL Arbitration Rules and, more generally, as an appropriate continuation of the Commission's work in the area of arbitration and conciliation, it appears that any guidelines elaborated by the Commission would not necessarily have to be tied to arbitrations governed by the UNCITRAL Arbitration Rules.

C. Possible topics for consideration at pre-hearing conference

24. The purpose of the following tentative outline of topics that may be discussed at a pre-hearing conference is to facilitate consideration by the Commission of whether to prepare the guidelines and to elicit observations to be used in the preparation of draft materials by the Secretariat, were the Commission to decide to proceed with the project.⁷

25. It is suggested that, while the guidelines should contain a fairly complete list of questions to be considered, it should be made clear in the guidelines that not all the questions should necessarily be put on the agenda of a pre-hearing conference. Furthermore, the list of questions in the guidelines should not be regarded as exhaustive.

(a) Rules governing arbitration

26. If in case of an ad hoc arbitration the parties have not agreed on a set of arbitration rules, it is advisable that they do so at the pre-hearing conference.

(b) Administrative support

27. The participants may wish to consider whether they wish an institution to provide administrative support to the arbitration. If so, it is useful to consider the types of administrative services needed, the types of services available and the costs involved.

(c) Appointment of secretary of the tribunal

28. The participants may wish to consider whether, in view of the size and complexity of the case, it is warranted for the arbitral tribunal to appoint a person who is to carry out administrative tasks under the direction of the tribunal (secretary, registrar or administrator). If such a person is to be appointed, it is recommendable to discuss the types of administrative tasks that person will carry out. (The guidelines might include examples of such administrative tasks.)

(d) Possibility of settlement

29. The guidelines, in discussing whether settlement of the dispute should be a topic at a pre-hearing conference,

⁶For example, the Iran—United States Claims Tribunal has adopted the Internal Guidelines of the Tribunal (undated), reproduced in *Iran—United States Claims Tribunal Reports*, vol. I, 1983, p. 98. Another example are the *Guidelines for Expediting Large, Complex Commercial Arbitrations (1990)* of the American Arbitration Association.

⁷In drafting a number of items in this outline use was made of the article by Howard M. Holtzmann "Balancing the need for certainty and flexibility in international arbitration procedures", written for the Twelfth Sokol Colloquium on International Law "International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?", University of Virginia School of Law, 27-28 March, 1992.

should recognize that in principle the parties should not be hindered in attempting to settle the dispute. Nevertheless, it may be said that, in particular when settlement does not appear easily attainable, it is advisable, in order to preserve the effectiveness of the pre-hearing conference, to limit the discussions at the conference to the following: (i) the status of any settlement discussions (limited to whether any discussions took place or are likely to take place); (ii) consideration as to whether the possibility of settlement discussions should affect the scheduling of the arbitral proceedings; and (iii) whether the parties would be willing to consider conciliation or other forms of alternative dispute resolution procedures and, if so, whether they wish to proceed on the basis of a set of rules such as the UNCITRAL Conciliation Rules.

(e) *Points at issue, relief or remedy sought, order of deciding issues*

30. If points at issue or the relief or remedy sought have not been clearly defined in the submitted statements, it is advisable to clarify them, without, however, hearing arguments in support of claims. Consideration might be given to identifying issues that could be decided as preliminary questions. It might also be considered whether any issue (e.g., whether the defendant is liable) should be decided in a partial award earlier than other issues (e.g., the amount of damages).

(f) *Uncontested statements of fact*

31. In order to simplify the taking of evidence, it is advisable for the parties to stipulate that certain statements of fact are to be regarded as uncontested. If the parties are willing to do so, a time period may be set within which they should submit the stipulations in writing to the arbitral tribunal.

(g) *Place of arbitration*

32. If the place of arbitration has not been determined, the participants may wish to determine the town or country and the locale where the arbitration is to be held.

33. The participants may wish to discuss whether any reason exists for conducting part of the proceedings outside the locale or place of the arbitration. For example, circumstances may make it appropriate to hear witnesses, to hold meetings of the arbitral tribunal for consultation among its members, or to inspect goods, other property or documents at a place other than the locale, town or country of the arbitration.

(h) *Hearings*

34. It is advisable to consider the following:

- (i) the expected length of hearings;
- (ii) whether the hearings will be held on consecutive days or will be separated;
- (iii) time schedule for hearings;
- (iv) the order in which the parties will make their oral presentations;
- (v) whether opening statements or closing statements will be heard;

- (vi) whether rebuttal and rejoinder statements will be permitted; if so, whether certain limitations should be observed (e.g., whether a rebuttal or rejoinder by a party should be limited to matters covered in the other party's previous statement);
- (vii) any right of the arbitral tribunal to impose time limits on oral arguments or testimonies;
- (viii) whether the parties should submit a written summary of the arguments made orally; if so, whether summaries should be submitted at the hearing or could be submitted shortly thereafter;
- (ix) the manner of taking oral evidence by witnesses (on this matter it might be decided to include in the guidelines illustrative clauses on which the parties could agree or on which the arbitral tribunal can model its procedural decision);⁸
- (x) whether witnesses will be required to make an oath or affirmation and, if so, its form, taking into account any laws of the place of arbitration governing the administration of oaths;
- (xi) whether interpretation will be needed and, if so, the arrangements therefor and how costs will be borne;
- (xii) whether a stenographic transcript or a tape recording of the hearings will be made and, if so, the arrangements for those services and how costs will be borne.

(i) *Language of proceedings*

35. Unless the language or languages to be used in the proceedings has already been determined, the participants should make that determination in accordance with the applicable rules.

36. It may be discussed whether documents or exhibits annexed to the statement of claim, and documents and exhibits to be submitted later, that are not in the language of the proceedings may be submitted in their original language or should be accompanied by a translation. (The guidelines might contain further considerations regarding costs or a possible decision that identified documents or exhibits or types of documents or exhibits may be submitted in the original language.)

(j) *Written statements*

37. The following questions may be considered:

- (i) which written statements, in addition to the statements of claim and defence, should a party submit;
- (ii) which written statements is a party entitled to submit (e.g., a claimant's replication to the statement of defence and the defendant's rejoinder);

⁸Different solutions may be offered: one may be to provide that witnesses will be questioned first by the arbitral tribunal, and then may be questioned by the party who called the witness, cross-examined by the other party and re-examined by the party who called the witness; it may also be provided that the procedure is subject to control by the arbitral tribunal, including the right to deny a party to question a witness. Another solution may be for a witness to be examined and cross-examined by the parties under control of the presiding arbitrator, while the arbitral tribunal retains the right to pose questions during or after the parties' questioning.

- (iii) whether post-hearing written statements will be permitted;
- (iv) whether all statements should be made consecutively or whether the arbitral tribunal expects them to be submitted simultaneously;
- (v) the structure of written statements;⁹
- (vi) a time schedule for submitting written statements;
- (vii) the manner of transmitting the written statements (e.g., they may be exchanged directly between the parties, with copies to the arbitral tribunal, or they may be filed with an administrator and transmitted by the administrator to the arbitrators and the other party).

(k) *Documentary evidence*

38. It is advisable to determine a time schedule for submitting documentary evidence.

39. The parties may be encouraged to agree to submit jointly one set of documents whose authenticity is not disputed ("the agreed bundle"). It should be made clear to the parties that the purpose of this procedure is to avoid duplicate submissions and discussions concerning the authenticity of documents, and that the procedure does not prejudice the position of the parties concerning the significance of the content of the documents.

40. It may be useful to agree that, unless a document is contested within a specified time period, (i) the document is accepted as having originated from the indicated source, (ii) a copy of a communication (e.g., letter, telex, telefax) is accepted without further proof as having been received by the addressee and (iii) a photocopy is accepted as correct. It may be clarified that, at least as regards the presumption under (iii), a document may be contested later if the arbitral tribunal considers the delay justified.

41. It may be considered whether voluminous or complicated documentary evidence should be presented by reports of independent persons (e.g., public accountants or consulting engineers) or through summaries, tabulations, charts, extracts or samples. This approach should be combined with arrangements that give the other party the opportunity to review the underlying data and the methodology of preparing documents based on that data. A time schedule may be advisable.

42. The arbitral tribunal may enquire whether a party intends to seek, or to request the arbitral tribunal to seek, production of documentary evidence from the other party. If so, conditions such as the following may be laid down: the document must be described with reasonable precision; the arbitral tribunal must have recognized the documentary evidence as relevant, admissible and material; the document must be within the control of the party from whom production is sought; and the seeking party must have made reasonable but unsuccessful efforts to obtain the document. The parties should be reminded that the arbitral tribunal would be free to draw its conclusions from the

failure of a party to produce a properly requested document. In addition, it may be useful to establish a time-frame for submission of a request for documents, for production of documents or other response to the request.

(l) *Physical evidence*

43. It may be useful to enquire whether a party intends to submit physical evidence other than documents and to determine arrangements for such submission (e.g., time schedules, the opportunity for the other party to inspect the evidence in advance of the hearing, and measures to safeguard the evidence).

44. If a party or the arbitral tribunal intends to request an on-site inspection of goods, other property or documents, it may be useful to consider arrangements and time schedules.

(m) *Practical requirements concerning written statements and exhibits*

45. When extensive submissions are likely, it might be useful to determine a number of practical details such as:

- (i) number of copies in which each writing is to be submitted;
- (ii) size of paper;
- (iii) uniform system for numbering of exhibits;
- (iv) method for identifying exhibits, including tabs;
- (v) requirement that when a party refers to a submitted document, the document must be identified by its heading and document number assigned to it;
- (vi) requirement that paragraphs in documents prepared for the proceedings be numbered;
- (vii) whether translations will be included in the same volume as the original text or will be submitted in a separate volume.

(n) *Evidence of witnesses*

46. If witnesses are to be heard, and it has been agreed that the party presenting the evidence must submit in advance of the hearing a written communication relating to the testimony of the witness, it is advisable to consider the elements of such a communication. It might also be appropriate to prepare an illustrative clause. (In preparing the guidelines on this point, account should be taken of existing texts, such as for example, article 25(2) of the UNCITRAL Arbitration Rules and article 5 of the IBA Rules of Evidence.)¹⁰ (As to the manner of taking oral evidence of witnesses, see above, paragraph 34, item (ix)).

47. It may be useful to consider arrangements for submitting evidence of witnesses in the form of written and signed statements, including the question whether such statements should be sworn to and, if so, what formalities would be required.

⁹An example of such a structure is provided in article 31(3) of the Rules of Procedure for Arbitration of the International Centre for the Settlement of Investment Disputes (ICSID).

¹⁰The Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration ("IBA Rules of Evidence") were adopted in 1983 by the Council of the International Bar Association; the Rules are published in a brochure of the International Bar Association; also published in *Yearbook Commercial Arbitration* (Deventer, Kluwer), vol. X-1985, pp. 152-156, and in *Arbitration International*, vol. 1, No. 2 (July 1985), pp. 119-124.

48. It may be considered whether certain persons affiliated with a party should be presumed interested in the outcome of the case and therefore excluded from testifying (e.g., executives, employees of certain status or regardless of status, shareholders or pensioners of a company). If certain persons are excluded from testifying, it may be considered how will the arbitral tribunal receive information from them.

49. It is advisable to clarify whether it is proper for a party or a legal adviser to interview witnesses or potential witnesses prior to their appearance at a hearing.

(o) *Expert evidence*

50. The decisions to be made at the pre-hearing conference would depend on whether the agreed upon arbitration rules foresee that experts are to be appointed by the arbitral tribunal or whether it is up to the parties to present expert testimony.

51. In the first case, the participants may discuss, for example, (i) whether one or more experts will be appointed; (ii) whether the arbitral tribunal should invite comments of the parties on the choice of the expert or the expert's terms of reference; (iii) arrangements regarding the costs for the expert; (iv) procedures to permit the parties to express in writing the opinion on the expert's report, to interrogate the expert at a hearing and to present an expert witness to testify on the points reported on by the expert appointed by the arbitral tribunal.

52. If the arbitral tribunal itself does not appoint experts, and it is entirely up to the parties to present evidence of expert witnesses, the guidelines on the point may be an adaptation of foregoing paragraphs 46-49 which relate to evidence of witnesses.

(p) *Procedural arrangements for multi-party arbitration*

53. When the arbitration involves more than two parties and possibly also more than two disputes ("multi-party arbitration"), it is advisable to discuss the anticipated course of proceedings in order to avoid unnecessary delays and costs and to ensure the respect of each party's procedural rights.

54. It is possible that the disputes joined into one multi-party arbitration are covered by arbitration agreements that have not been harmonized (e.g., they refer to different sets of arbitration rules). The pre-hearing conference offers an opportunity to eliminate any such conflict by agreement of the parties.

55. It is advisable to identify the main points at issue in the various disputes involved, with a view to ascertaining whether it would be useful to divide the multi-party proceedings into stages. The first stage may be devoted to any objections concerning the jurisdiction of the arbitral tribunal. The following stages may concentrate in appropriate order on reaching decisions that in some way constitute preliminary decisions in another dispute (e.g., facts to be established in one dispute may be relevant in another dispute, or liability found to exist in one dispute may affect the decision in another dispute).

56. Since the decision in one dispute may affect the position of a party in another dispute, it is important to give each interested party an opportunity to present its arguments on the issues that affect that party. If some issues do not affect all the parties involved, it may be possible, in order to save costs, to plan the hearings in such a way that a party would have to be present only at hearings of concern to that party.

57. It is advisable to consider at the pre-hearing conference procedural questions such as the scheduling of meetings, flow of communications among the parties and the arbitral tribunal, the manner in which the parties will participate in hearing witnesses, the appointment of experts and the participation of the parties in the taking of evidence by experts, the order in which the parties will make statements, and the apportionment of the deposits for costs.

II. MULTI-PARTY ARBITRATION

A. Introductory remarks

58. As noted above in paragraph 2, the Commission, at its nineteenth session in 1986, considered that multi-party arbitration required further study.

59. There are many situations that may give rise to a dispute involving more than two parties and possibly also more than two disputes. The following situations are some of the many examples of the notion of multi-party arbitration:

- a case in which a single arbitration is to decide more than one dispute between different pairs of parties. For example, in a construction contract, one arbitration may be established to decide two disputes arising from the same construction defect, one between the purchaser and the contractor and another one between the purchaser and the architect; in another example, the sale of goods by A to B and the resale of those goods to C may give rise to a single arbitration to decide the dispute between A and B and the dispute between B and C, both disputes arising from the same defect in the goods;
- arbitration in which the dispute is between parties A and B, but where a third party C, who has an interest in the outcome of the dispute, is allowed to join the proceedings in order to submit evidence and make statements. Such a situation may arise, for example, in an arbitration between purchaser A and seller B because of defects in the goods, in which case the responsibility of party C (who sold the goods to party B) may depend on whether the arbitral tribunal finds the goods to be defective. Such cases are sometimes referred to as "joinder", "impleader" or "intervention";
- a multilateral contract (e.g. a joint venture or consortium) may give rise to a dispute in which on each side one or more parties to the contract are involved.

60. A possible benefit of establishing a multi-party arbitration, as opposed to considering disputes in separate arbitrations, is that multi-party arbitration avoids inconsistent decisions, a possibility which, while not frequent, exists when related disputes are treated in separate arbitrations. For example, if the purchaser of a construction works sues for the same defect the contractor and the designer in sepa-

rate proceedings, the independent and uncoordinated evaluations of the facts may result in the purchaser being unsuccessful in both cases. Another potential benefit is that considering the related issues in one proceedings may save time and costs. Such savings can be achieved, for example, when pieces of evidence or arguments relevant in more than one dispute are considered once for all the disputes.

61. In spite of such possible benefits, it is often difficult to agree on and establish a multi-party arbitration, and complications may arise in carrying out such an arbitration.

62. At the time of setting up a network of contracts affecting more than two parties or a multilateral contract, when dispute settlement clauses are typically formulated, it is usually impossible to know which parties, and with what interests, will be implicated in a dispute. This makes parties reluctant to agree on a multi-party arbitration clause.

63. After the dispute in a multi-party situation has arisen it may be difficult to obtain agreement of all the parties to establish a multi-party arbitration. One reason may be a party's reluctance to allow a person who is not a party to the contract in dispute to obtain access to facts concerning the contract (e.g., a seller of goods may not wish the producer of the goods to be involved in a dispute with the ultimate buyer of those goods, or the main contractor may prefer not to involve a subcontractor in the dispute with the purchaser of industrial works).

64. Another difficulty, assuming that the parties have agreed in principle to hold a multi-party arbitration, may be that arbitration agreements covering the different disputes involved foresee different methods of appointing the arbitrators. Furthermore, even if those methods do not differ or have been harmonized, the interests of the parties may differ to the extent that each party wishes to appoint an arbitrator. Those circumstances may hinder the usual appointment of a single-member or three-member arbitral tribunal.

65. A small number of jurisdictions have attempted to overcome the difficulties in setting up a multi-party arbitration by allowing a party who considers that two or more cases should be dealt with in one proceedings to obtain a court order consolidating the cases into a single multi-party arbitration. Legislation to this effect has been adopted in the Netherlands, Hong Kong, and in the state of California, while in some other jurisdictions of the United States of America such a power of courts has been recognized in case law. In some jurisdictions (e.g., in Australia and Canada) laws have been adopted empowering courts to order consolidation on terms established by the court, but only if all the parties have agreed to consolidation. It may be noted, however, that considerations in some countries as to whether to adopt such legislation have led to the decision not to do so because potential complications involved in court-ordered consolidations were thought to outweigh its potential benefits. A recommendation against allowing court-ordered consolidations was taken, for example, in 1990 in England by a law reform advisory committee.

66. Furthermore, assuming that the arbitral tribunal has been established, multi-party proceedings covering several disputes can be more complicated to manage than bilateral

proceedings. Complications may arise, for example, in planning the sequence of issues to be considered, in taking evidence and hearing arguments in such a way that each interested party has an opportunity of presenting its case, in scheduling meetings, and in managing the flow of documentation. Delays and costs resulting from such complications may reduce, or even exceed, the savings the parties might have hoped to achieve by organizing a multi-party arbitration.

B. Possible future work by the Commission

67. It appears that, in view of the great variety of possible multi-party situations and in view of the reluctance of parties to agree to multi-party arbitration, it may not be promising to undertake a project concentrating on the elaboration of a model multi-party arbitration clause. For situations when the parties have in principle agreed that a multi-party arbitration be held but have difficulties in establishing the arbitral tribunal, a partial solution may be an agreement entrusting the appointment of all the arbitrators to an appointing authority. A more flexible and comprehensive approach might be to prepare a guide explaining features, advantages and disadvantages of multi-party arbitration.

68. As to difficulties mentioned above in paragraph 66, which arise after the establishment of the arbitral tribunal, it appears that a pre-hearing conference presents a suitable opportunity to address them (see above, paragraphs 53-57).

69. The other issues (mentioned above in paragraphs 62-64), which arise before the establishment of the arbitral tribunal, cannot be discussed at a pre-hearing conference, because such a conference presupposes the existence of the arbitral tribunal. The Commission may wish to consider that the decision as to any future work on those issues (e.g., on a guide or on statutory provisions on court-ordered consolidation) should be made at a later stage. That decision would be easier to make in light of views to be formed during possible future work on guidelines for pre-hearing conferences and in light of the progress of work on multi-party arbitration in the International Chamber of Commerce (ICC).

70. An ICC Working Party (established by the ICC Commission on International Arbitration) has been working for a number of years on multi-party arbitration. As reported by the Working Party, one of its objectives has been to expand on the Guide on Multi-party Arbitration under the Rules of the ICC Court of Arbitration, which was adopted by the ICC in 1981 (ICC doc. No. 420/297, 28 April 1987; the ICC Guide was published in the ICC Brochure No. 404, 1982). In 1986 the Working Party submitted to the ICC Commission on International Arbitration draft guidelines on ICC multi-party arbitration and a draft multi-party arbitration clause (ICC doc. No. 420/276, 30 January 1986, annex I and II). The guidelines and the clause have not been adopted in view of controversial reactions from ICC National Committees (ICC doc. No. 420/282, 1 July 1986). The ICC Working Party is continuing work on the project.

III. TAKING OF EVIDENCE

A. Introductory remarks

71. As mentioned above in paragraph 2, the Commission considered at its nineteenth session that the taking of evidence was another area that should be further studied.

72. The practice of taking evidence in arbitration follows different patterns. Some arbitrators and parties are inspired by the "adversarial" system, under which it is essentially up to the parties to gather evidence and present it to the arbitrators, who do not take an active role in the evidentiary process. One of the cornerstones of the adversarial system is that the basic evidence is presented in the form of verbal testimony and that the party disputing the fact is able to test such testimony by cross-examining the witness. Other arbitrators and parties are influenced by the "inquisitorial" system, which, while maintaining the principle that the parties are to prove facts supporting their case, leaves room for the arbitral tribunal to take initiative in the taking of evidence. It appears, however, that in international arbitral practice sharp lines between the two procedural systems are disappearing and that participants in international arbitrations prefer to follow hybrid patterns.

73. Contractual arbitration rules largely do not regulate the details of the method of taking evidence. This is true also of the UNCITRAL Arbitration Rules, although these Rules address more questions of the evidentiary procedure than many other international rules. As a result, many questions of evidentiary procedure are in practice left to the discretion of the arbitral tribunal.

74. As noted above in paragraph 7, the principle of discretion and flexibility in the conduct of arbitral proceedings, while acceptable as a general approach, may give rise to difficulties when parties and arbitrators in a given arbitration have different expectations as to the method of taking evidence.

B. Possible future work by the Commission

(a) *Set of rules*

75. One way for addressing those difficulties may be a set of contractual rules of evidence that the parties may agree upon. A disadvantage of a single set of rules, however, is that, to the extent it increases certainty and predictability in the proceedings, it reduces flexibility with which the evidentiary process can be adapted to legal traditions and expectations of the participants in an arbitration.

76. The IBA Rules of Evidence (see above, footnote 10) constitute such a set of rules prepared at the international level. The content of the IBA Rules is summarized in document A/CN.9/280 (above, footnote 1, paragraphs 30-38). As noted in the introduction to the Rules,

"They are solely concerned with the presentation and reception of evidence in arbitrations and are recommended by the International Bar Association for incorporation in, or adoption together with, institutional or other general rules or procedures governing international commercial arbitrations."

77. The procedures provided by the IBA Rules are, on the one hand, fairly detailed, but, on the other hand, allow the arbitral tribunal a good degree of discretion to act otherwise than prescribed in the Rules.¹¹ As a result, the IBA Rules, read as a whole, while providing welcome guidance, do not provide more certainty than, for example, the UNCITRAL Arbitration Rules.

78. In view of the confidentiality of arbitration, it is difficult to estimate the extent to which the IBA Rules are used. On the basis of published awards and information obtained from practitioners, it appears that the cases in which the IBA Rules are formally agreed upon are not many. It may be, however, that more numerous are the cases in which the Rules, while not formally agreed upon, have served as a guide on taking evidence.

(b) *Guide on taking evidence*

79. Another way to address difficulties in taking evidence may be a guide that would discuss possible methods of taking evidence and perhaps also include various models of rules that parties could agree upon.¹² Such a guide could contribute to the development of efficient arbitral practices by educating parties and arbitrators.

80. While recognizing the important benefits of such a guide, it may be noted that the guide would probably not decisively increase certainty and predictability of proceedings in a given arbitration. To achieve certainty and predictability, it is necessary to settle details of evidentiary procedure before the beginning, or at an early stage, of the arbitration.

81. It appears that parties are reluctant to settle details of arbitral procedure before the dispute has arisen. This reluctance may be due to a tendency of parties not to spend too much time on the arbitration agreement and rules of arbitration before a dispute has arisen. Another reason may be that in determining the details of evidentiary procedure it may be advisable to bear in mind the background of the arbitrators, which may make it inadvisable to settle those details only after the arbitrators have been appointed.

(c) *Guidelines for pre-hearing conferences*

82. In view of the considerations mentioned in the preceding paragraph, it appears that an appropriate moment for fixing details of evidentiary procedure is a pre-hearing conference, which is typically held at an early stage of the arbitral proceedings. Guidelines for pre-hearing conferences, as outlined above in paragraphs 13-57, might suggest procedural solutions and, where appropriate, illustrative clauses that could be used in deciding on a particular procedure.

¹¹For example, notwithstanding detailed rules on taking of evidence by witnesses, it is provided that the arbitral tribunal "shall have at all times complete control over the procedure in relation to a witness giving oral evidence" (art. 5(10)) and that "Nothing herein shall preclude the Arbitrator in his discretion from permitting any witness to give oral or written evidence" (art. 5(14)). Another such provision entitles the arbitrator "to exercise all the powers he deems necessary to make the arbitration effective and its conduct efficient as regards the taking of evidence" (art. 7(h)).

¹²The idea of guidelines for presenting evidence in arbitration was considered at the Vth International Arbitration Congress (New Delhi, 1975) (reports and discussions are published in *Proceedings of the Fifth International Arbitration Congress* (New Delhi, New Indian Council of Arbitration, 1975)). See document A/CN.9/280, paras. 27 and 28.

CONCLUSIONS

83. As discussed above in paragraphs 13-16, it is suggested that the Commission decide to prepare guidelines for pre-hearing conferences. In the context of that work, it is suggested to address also procedural arrangements for multi-party arbitration (see above, paragraphs 53-57) and for the taking of evidence (see above, paragraphs 38-52). If the Commission agrees with the suggestion, it may wish to request the Secretariat to prepare a draft text of guidelines. The draft might be submitted to the Working Group on International Contract Practices once it has completed its work on guarantees and stand-by letters of credit. Otherwise, the Commission itself might wish to consider the draft at its twenty-seventh session in 1994 or twenty-eighth session in 1995.

84. As to the question whether the Commission should undertake additional efforts in the area of multi-party arbitration, perhaps by preparing a guide, the Commission may wish to defer the decision. The taking of that decision may be easier in light of views to be formed during the work on guidelines for pre-hearing conferences and in light of the progress of work on multi-party arbitration in the International Chamber of Commerce (see above, paragraphs 69-70).

85. As to possible work on the taking of evidence in arbitration, perhaps in the form of a guide, the Commission may wish to consider that the need for such work, as well as its scope, would be clearer after agreement has been reached on the scope and substance of guidelines for pre-hearing conferences (see above, paragraphs 79-82).

D. Assignment of claims: note by the Secretariat (A/CN.9/378/Add.3) [Original: English]

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INTRODUCTION

1. During the Congress on International Trade Law held by the Commission during its twenty-fifth session in May 1992 in New York, it was suggested that work should be undertaken by the Commission on assignment of claims, an issue that the United Nations Sales Convention left unaddressed.

2. The present note addresses some of the legal issues in assignment of claims raising problems in international trade that are not addressed satisfactorily by existing rules, and considers the possible benefit of uniform rules that the Commission may wish to consider preparing.

I. ASSIGNMENT OF CLAIMS AS COMMERCIAL TRANSACTION

3. Assignment of claims is a transaction by which a party ("assignor" or "initial creditor") transfers to another party ("assignee") a claim for payment that the assignor has against a third party ("debtor"). Typical commercial purposes of assignments of claims are to sell a claim, pay a debt, or provide security for a debt.

4. In national as well as international trade, the assignment of claims finds extensive practical application as a means to give security for loans provided by financing institutions. Claims are assigned for security purposes either because the assignor does not have other suitable assets to offer as security or because the financing institution does not wish to take goods or other property as security. What distinguishes this type of security, as compared to a sale of a claim, is, for example, that, if the assignee collects payment from the debtor without the assignor having defaulted in the performance of the obligation for which the claim was given as security, the assignee may be liable to the assignor for breach of contract.

5. The assignment of claims often constitutes an element in "factoring" transactions, transactions in the context of which it is common that a supplier of goods or services assigns payment claims arising from its commercial activity to a financial institution ("factor"). The services of the factor may be to correspond with the debtors, collect the claims, keep certain records, possibly assume a part of non-payment risks, and to provide financing to the assignor of the claims. In a "forfeiting" transaction, which is in some respects similar to factoring, the assignor, in assigning the claim and receiving the amount of the claim reduced by the

interest and the assignee's fee, obtains agreement from the assignee (financing institution) to waive the right to have recourse to the assignor if the claim is not paid.

II. LEGAL PROBLEMS IN ASSIGNMENT OF CLAIMS

6. One source of problems in the context of assignment of claims in international trade are divergences among national laws on the subject-matter. Another source of problems is the lack of modern rules on assignment adapted to deal with the needs of international trade. Furthermore, in some countries assignment of claims, or assignment as a security transaction, is not addressed at all in legislation.

7. National laws differ considerably on questions such as the requirements for the assignment to be valid. For example, some laws require a writing, others require notification of the debtor or even registration of the assignment, while in yet other national laws no particular formality is required. Divergent answers are also given to questions of assignability of claims, for example, which claims are permitted to be assigned and which ones are not assignable, whether it is permitted to assign a future claim arising from a contract yet to be concluded, the validity of "bulk" assignments of all or part of present and future claims, the effect of an agreement between the creditor and the debtor that an existing or future claim should not be assigned (no-assignment clause), and whether it is possible to assign a part of a claim.

8. Differing requirements are provided in national laws for a valid assignment of claims to be effective towards the debtor. Those requirements are, for example, that the debtor obtained knowledge of the assignment, that the debtor was notified in a particular form about the assignment, that the debtor has consented to the assignment, or that the assignment has been registered in a particular public registry. Those differences are aggravated by the fact that many States recognize only assignments that have been made known to the debtor or registered in accordance with their national laws. As a result, an assignee seeking to enforce the assigned claim may be faced with a defence by the debtor that the assignment is not valid under the law of the State where the debtor has its place of business.

9. Particularly troublesome are different solutions in national laws as to the conflicts of priority between the assignee and another person asserting a right in the assigned claim. A priority conflict may arise between the assignee and an unpaid creditor of the assignor who has initiated an execution process regarding the assigned claim; in case of the assignor's bankruptcy, such a conflict may also arise between the assignee and the administrator of the assignor's assets who wishes the assigned claim to be included in those assets. Generally, the assignee is given priority if a certain act took place before the execution proceedings (or the opening of the bankruptcy proceedings), but national laws differ as to what that act should be. According to some national laws, the relevant act is the conclusion of the assignment agreement, in others it is the notification of the debtor and in yet others it is the registration of the assignment. It should be noted, however, that many national laws contain rules entitling the administrator

of the bankrupt's assets to invalidate an assignment. The conclusion of the assignment within a specified period before the opening of the bankruptcy proceedings is a typical case in which, according to those rules, an assignment can be invalidated as a transaction contrary to the principle of equal treatment of creditors.

10. A priority conflict may also arise when the same claim has been assigned to more than one assignee. Such successive assignments may occur, for example, when a purchaser, pursuant to an agreement with its supplier who retain title to the goods until their price is paid, assigns to that supplier the claims to the proceeds from the sale of the goods, but later the purchaser assigns to a bank all its present and future claims against its clients in order to obtain working capital. Successive assignments may also be a result of a mistake or fraud. Some national laws give priority to the first assignee, others to the first assignee to notify the debtor, and yet others to the first assignee to register the assignment. It may be added that many national laws give priority to the supplier retaining title with regard to the proceeds from the resale of goods in case the supplier has lost the title to a good-faith buyer of the goods.

11. The above-mentioned problems and legal uncertainties may negatively affect the interests of all parties concerned. Sellers (assignors) face difficulties in mobilizing their claims in order to obtain working capital. The debtors' position is prejudiced in that uncertainties may arise as to their rights towards the assignees and the assignors. Assignees are often not in a position to know whether the assignments will be valid and enforceable in the country of the debtors. As a result, foreign creditors (assignees) may decide to withhold credit, which would otherwise be available, from sellers whose only or main asset is their claims against their clients.

III. PAST AND CURRENT WORK ON ASSIGNMENT AND RELATED TOPICS

A. National legislatures: special laws

12. The need for legal certainty and rules suited to trade has led some countries to modernize their legislation on assignment with the enactment of special laws dealing with assignment as a security transaction (for example, France has adopted such a law, known as *Loi Dailly*, in 1981, modified in 1984). In other countries, the revision of legislation on secured transactions, which includes assignment of claims, is being considered.¹ In yet other countries, where the particular problems arising in the context of assignment as a security transaction are not addressed in sufficient detail by the existing general provisions on

¹A study group of the Permanent Editorial Board for the Uniform Commercial Code (UCC) of the United States of America has published in December 1992 a report calling for major changes in article 9 of the UCC, which deals with secured transactions. The report recommends to enlarge the scope of article 9 to cover property presently not covered, to improve the system for filing of security interests with appropriate offices, to facilitate the perfection of security interests in, *inter alia*, letters of credit, and to clarify the rights and duties of the secured creditor towards the debtor and other secured creditors. Work on the preparation of drafts of legislative modifications is expected to begin later in 1993. Similar legislative reviews are being undertaken in other countries.

assignment, legal writers increasingly support a legislative intervention for the modernization of the law of assignment, or secured transactions in general.

B. The Commission: security interests

13. At its twelfth session (1979), the Commission had before it a report entitled "Security interests: feasibility of uniform rules to be used in the financing of trade" (A/CN.9/165).² The report noted that "although in principle there are no assets of a debtor which could not be used as collateral, certain kinds of moveables and moveables which are used in certain ways raise special problems" and that "it may be thought desirable to facilitate the use of claims not in the form of negotiable instruments as collateral, in which case special rules would be necessary" (paragraphs 47 and 51). As to the possible issues that may be addressed in uniform rules, the report suggested the form of security agreements, required and permissible provisions in the security agreement, rights of the secured party on default, types of movables which may be used as collateral, conflicts between the secured creditor and third parties, and the effect of foreign created security interests (paragraphs 41-59).

14. At the Commission's thirteenth session (1980), in the context of the discussion of the report "Security interests: issues to be considered in the preparation of uniform rules" (A/CN.9/186),³ which considered security interests in different kinds of movables, including claims, the conclusion reached was "that worldwide unification of the law of security interests in goods . . . was in all likelihood unattainable". The Commission was led to that conclusion because it was concerned that the subject was too complex and the divergences among the different legal systems too many, as well as that it would require unification or harmonization of other areas of law, such as that of bankruptcy. During the discussion at that session, it was noted that it was advisable for the Commission to await the outcome of the work on the retention of title by the Council of Europe and on factoring by the International Institute for the Unification of Private Law (UNIDROIT), prior to the Commission undertaking any further work of its own.⁴

²Reproduced in *United Nations Commission on International Trade Law: Yearbook* (hereafter referred to as "*UNCITRAL Yearbook*"), vol. X: 1979, part two, II, C. Previous relevant reports on security interests are: report of the Commission on the work of its first session (1968), paras. 40-48 (*UNCITRAL Yearbook*, vol. I: 1968-1970, part two, I, A); report of the Commission on the work of its third session (1970), paras. 139-145 (*UNCITRAL Yearbook*, vol. I: 1968-1970, part two, III A); "Security interests in goods" (A/CN.9/102) (*UNCITRAL Yearbook*, vol. VI: 1975, part two, II, 5); report of the Commission on the work of its eighth session (1975), paras. 47-63, (*UNCITRAL Yearbook*, vol. VI: 1975, II, A); "Study on security interests" and "Legal principles governing security interests" (A/CN.9/131 and annex) (annex prepared by Prof. Ulrich Drobnig of Germany) (*UNCITRAL Yearbook*, vol. VIII: 1977, part two, II, A); "Article 9 of the Uniform Commercial Code of the United States of America" (A/CN.9/132) (*UNCITRAL Yearbook*, vol. VIII: 1977, part two, II, B); report of the Commission on the work of its tenth session (1977), para. 37 (*UNCITRAL Yearbook*: vol. VIII: 1977, part one, II, A), and report of the Committee of the Whole II, paras. 9-16, (*UNCITRAL Yearbook*, vol. VIII: 1977, part one, II, A, annex II).

³Reproduced in *UNCITRAL Yearbook*, vol. XI: 1980, part two, III, D.

⁴Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (1980), *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/35/17)*, paras. 26-28, (*UNCITRAL Yearbook*, vol. XI: 1980, part one, II, A).

C. UNIDROIT: Convention on International Factoring

15. Article 1.1 of the UNIDROIT Convention on International Factoring (Ottawa, 1988) specifies that the "Convention governs factoring contracts and assignments of receivables as described in this Chapter". According to article 1.2, "factoring contract", for the purposes of the Convention, means a contract by which a party ("the supplier") "may or will assign" to another party ("the factor") receivables arising from contracts of sale of goods made between the supplier and its customers ("debtors"), provided that a notice of the assignment is given to the debtor in writing and that at least two of the following four functions are to be performed by the factor: finance for the supplier, including loans and advance payments; maintenance of accounts (ledgering) relating to the receivables; collection of receivables; and protection against default in payment by debtors.

16. The Convention, which covers assignments of claims to the extent they take place in the context of factoring, deals to that extent with a number of assignment issues, such as notification of the debtor, validity of assignment of all present and future claims, invalidity of no-assignment clauses, and defences (including set-off) available to the debtor against the factor (assignee). Rules of the Convention on those issues would have to be taken into account, should the Commission decide to undertake work on assignments of claims. It may be noted that the Convention does not deal with the issue of priorities between the factor (assignee) and third parties, an issue that raises problems in practice, both in the context of factoring and in the context of assignment of claims in general. The Committee of Governmental Experts, which adopted the draft Convention, decided to exclude the issue of priorities between the factor (assignee) and third parties "on account of their extreme complexity . . . notwithstanding the widely expressed regret that the Convention failed to regulate an aspect of the question which created very great difficulties at international level".⁵

D. Council of Europe/ICC: retention of title

17. The European Committee on Legal Cooperation (CDCJ) of the Council of Europe prepared in 1982 a draft Convention on retention of title.⁶ However, in view of the numerous reforms of the law on this subject, the Committee did not take a final position on that draft Convention, and in 1986 it decided to adjourn its work indefinitely pending the outcome of those reforms.⁷ The International Chamber of Commerce (ICC) has prepared a guide providing basic information on retention of title in 19 national laws.⁸

⁵UNIDROIT 1987, Study LVIII—Doc. 33, para. 10.

⁶European Committee on Legal Cooperation (CDCJ) (82) 15.

⁷European Committee on Legal Cooperation (CDCJ) (83) 36, paras. 20-25.

⁸ICC publication No. 467.

E. UNIDROIT: security interests in mobile equipment

18. In March 1992, UNIDROIT convened a restricted exploratory working group of experts to examine the feasibility of drawing up uniform rules on certain aspects of security interests in mobile equipment. This working group found that such a project would be feasible if it were confined to certain international aspects of security interests in mobile equipment of a kind normally moving from one State to another in the ordinary course of business (e.g., aircraft and containers). A Study Group, convened by the President of UNIDROIT for the preparation of uniform rules, held its first meeting in March 1993 and will meet again in 1994.

F. EBRD: draft Model Law on Secured Transactions

19. The European Bank on Reconstruction and Development (EBRD) is currently preparing a model law on secured transactions which could be used for establishing national laws in countries in Central and Eastern Europe and the former Soviet Union. It is intended that the model law would establish a contractual security interest that a debtor may grant to a creditor in various types of assets, including payment claims. The model law, which is intended to be finished by autumn 1993, will likely contain rules on registration of the security interest and on conflicts of priority between several creditors asserting a right in the collateral. The work by the EBRD would have to be taken into account, should the Commission decide to undertake work on assignment of claims.

IV. FUTURE WORK

20. It is submitted that the disparity of laws on assignment of claims and the lack of modern rules on the topic (above, paragraphs 6-11) give rise to difficulties that constitute an obstacle to international and national trade. While the assignment of claims is an important means to obtain financing for commercial transactions, the disparity and uncertainty of laws and the lack of modern rules make it difficult for sellers, buyers and financing institutions to take full advantage of its use. In particular, it is difficult for financing institutions to know whether they may accept claims against foreign debtors as security for trade credit, what rights the financing institution would have under such an assignment, and how the assignment should be concluded for it to be effective against third parties and enforceable against the foreign debtor.

21. In order to overcome such difficulties, it is suggested that the Commission consider preparing uniform legislative rules on assignment of claims. In such work, the Commission could draw useful guidance from the extensive preparatory work in its earlier project on security interests (above, paragraphs 13-14), the UNIDROIT Convention on International Factoring (above, paragraphs 15-16), the work of the European Bank for Reconstruction and Development (above, paragraph 19), as well as from national projects to modernize the law of security interests.

22. Uniform rules on assignment of claims would enhance the creditworthiness of those suppliers of goods (assignors) whose only, or main, assets are payment claims arising from their supplies. Financing institutions (assignees) would benefit from such uniform rules in that, in providing financing to clients, they would have certainty that their security interests in claims are enforceable. Buyers of goods and services (debtors) would benefit in that their rights and obligations would be clearly defined and harmonized, and that their suppliers, to the extent they would be able to use payment claims to obtain financing, would be more willing to supply goods on credit.

23. If the Commission agrees with the suggestion, it may wish to request the Secretariat to prepare, in consultation with interested international organizations, for the twenty-seventh session of the Commission in 1994, a study on the possible scope of uniform rules and on possible issues to be dealt with in the rules. Such a study could consider whether the uniform rules should be restricted to assignments for security purposes or whether the uniform rules should deal also with assignments other than for security purposes.

24. A further issue for the study would be whether the uniform rules should cover only international assignments and how should an international assignment be defined. Another question would be whether it would be desirable to establish a regime that would, in its area of application, displace the national regimes, or whether a special regime should be created which the parties could opt for by agreement. The study would also consider possible issues to be covered by the uniform rules, such as the form in which an assignment should be concluded; assignability of claims; no-assignment clauses; warranties of the assignor; defences of the debtor against the assignee; effects of an assignment towards third parties; any option or requirement for registering an assignment; feasibility and features of an international registration system for assignments or other security transactions; effects of registration; and priorities among several persons asserting a right to the assigned claim.

25. An important question to be considered in the study would be whether the uniform rules should be restricted to assignments of claims, or whether it would be desirable to prepare more broadly conceived uniform rules on security interests in movable assets, including claims. This aspect of the study would depend on the consideration of questions such as: (a) is there equal practical need and desirability for the harmonization of law in both areas; (b) what might be the time needed to complete a more comprehensive project as opposed to a project limited to assignment of claims; (c) would it be desirable to leave a dichotomy between unified rules on security interests in claims and non-unified national rules on security interests in other kinds of movable assets; (d) would certain rules (e.g., on the registration of security interests in a public register) have the same purpose and be subject to the same legislative policy in the case of movable goods and in the case of claims. As to the possibility of work on security interests in movable goods, including claims, it may be noted that at the Congress on International Trade Law, held by the Commission during its twenty-fifth session in May 1992 in New York, it was proposed that the Commission should revive its earlier

project on security interests (above, paragraphs 13-14). In support of that proposal, it was suggested that the Commission's main reason for discontinuing work on this topic might not have been so much the complexity of the issues involved but rather the realization that, at that time, unification was not necessary on a worldwide scale.

26. In presenting alternatives as to the scope of possible uniform rules, the study would also present to the Commission proposals for coordination of work and cooperation with other international organizations, in particular UNIDROIT and the European Bank for Reconstruction and Development.

E. Cross-border insolvency: note by the Secretariat (A/CN.9/378/Add.4) [Original: English]

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INTRODUCTION

1. At the Congress on International Trade Law, held in May 1992 in New York in the context of the twenty-fifth session of the Commission, proposals were made that the Commission consider undertaking work on international aspects of bankruptcy. In describing one of the proposals it was stated that it may not be practical to think of unifying the bankruptcy laws since in the evolution of international law we were too far from the time when we could expect countries to have similar bankruptcy laws. However, it was said that problems could be reduced to a more manageable level by focusing at issues in the State where the assets were located, as contrasted to the State where the bankruptcy proceedings were initiated, and answering how those assets should be handled.

2. The purpose of this note is to assist the Commission to decide whether an in-depth study on the desirability and feasibility of harmonized rules in this field should be undertaken.

3. After the introductory section I, section II considers some legal issues that may give rise to problems due to a lack of harmony among national laws. Section III provides a brief description of work at the international level towards harmonization of laws in the area. Conclusions are set out at the end of the paper.

I. GENERAL REMARKS

4. Most legal systems contain rules on various types of proceedings that may be initiated when a debtor is unable

to pay its debts. "Insolvency proceedings" is the generic expression used in this note for those types of proceedings. Two types of insolvency proceedings may be distinguished, for which a uniform terminology has not emerged.

5. In one type of proceedings (hereafter referred to as "liquidation"), a public authority, usually a court, and typically acting through an officer appointed for the purpose (referred to here as "bankruptcy administrator"), takes charge of the insolvent debtor's assets with a view to transforming non-monetary assets into a monetary form, distributing the proceeds proportionately to the creditors, and, at the end of the proceedings, liquidating the debtor as a commercial entity. In some States this is the only type of proceedings used. Other terms that are often used for this type of proceedings are for example, bankruptcy, winding-up, *faillite*, *quiebra*, *Konkursverfahren*. It may be noted, however, that terms such as bankruptcy might be understood as having a broader meaning which includes also composition proceedings as described in the next paragraph.

6. The other type of proceedings (hereafter referred to as "composition"), which is known in many but not all States, exists as an alternative to liquidation proceedings. The purpose of the alternative proceedings is not to liquidate the insolvent debtor, but to allow it to overcome the financial crisis and resume normal participation in commerce. Such proceedings, also usually carried out under the supervision of a court, are typically aimed at reaching an agreement, or composition, between the debtor and its creditors about relief that should allow the debtor to reorganize and restore its commercial viability. The relief may be in the form, for example, of partial abatement of the claims against the debtor, prolongation of payments periods, or

renegotiation of existing debtor's obligations. While such relief is being negotiated, the debtor enjoys protection from enforcement actions of creditors over the debtor's assets. It may be possible for composition proceedings to be initiated during liquidation proceedings. Other terms used for this type of insolvency proceedings are, for example, reorganization, arrangement, *concordat préventif de faillite*, *suspensión de pagos*, *administración judicial de empresas*, *Vergleichsverfahren*.

7. For insolvency proceedings to be initiated, a court order is typically needed. The initiative to open such proceedings may be taken by the insolvent debtor itself (voluntary insolvency) or by a creditor or creditors (involuntary insolvency). In some States the same type of insolvency proceedings apply to all insolvent merchants, whereas others use two types of proceedings, one for legal persons and another for merchants who are natural persons.

8. In many States, for a court to have jurisdiction to open insolvency proceedings, a certain link between the debtor and the State is required. That requirement may be satisfied, for example, if the debtor has in that State its principal place of business, residence, corporate seat or centre of administration, or if the debtor is registered as a company in the State. This type of insolvency proceedings is often referred to as "domiciliary" insolvency proceedings.

9. In addition to domiciliary insolvency proceedings, a good number of States allow the opening of insolvency proceedings even if the above-mentioned domiciliary link between the State and the debtor does not exist. This type of insolvency proceedings, often referred to as "non-domiciliary" insolvency proceedings, can be initiated in a State if, for example, some of the debtor's assets are in the State or if the debtor who is a natural person is passingly present in the State. Some States allow the opening of this type of proceedings in a broad spectrum of situations, while in others the possibility of holding such proceedings is more restricted. These insolvency proceedings can be carried out in parallel and independently from any domiciliary or other non-domiciliary insolvency proceedings initiated in another State.

II. SOME ISSUES IN CROSS-BORDER INSOLVENCIES

10. Cross-border insolvency is the term frequently used for insolvency cases in which the assets of the debtor are located in two or more States, or where foreign creditors are involved. The following sections A to G describe some areas of cross-border insolvency where problems may arise due to a lack of harmony among national rules.

A. Effect of liquidation proceedings in one State on assets located in another State

11. In the legislation of many States it is expressly stated, or it is understood, that liquidation proceedings opened in the State are to take effect over all the assets of the debtor, including the assets located abroad. The intention is that all the debtor's assets should be available to the administrator for establishing the pool of proceeds from which the credi-

tors are to be paid. Some of these laws expressly indicate that such universal effect of liquidation proceedings results only from a domiciliary liquidation and not from a non-domiciliary one (see above, paragraphs 8 and 9).

12. There are, however, also national laws according to which the effects of domiciliary liquidation proceedings taking place in the State is restricted to the bankrupt's assets located in that State. Such a self-imposed restriction has been criticized because it hinders the access of the creditors to all the assets of the debtor.

13. Many States claiming universal effect for their liquidation proceedings recognize, in varying degrees and with some limitations, the universal effect also for liquidation proceedings opened abroad. There are, however, also States which, while claiming universal effect for their liquidation proceedings, deny such effect to foreign liquidation proceedings.

14. In the States that are ready in principle to recognize foreign liquidation proceedings, a usual condition for recognition is that there be a substantial link between the bankrupt and the State of the liquidation proceedings. That link may be, for example, that the foreign liquidation proceedings are domiciliary proceedings (see above, paragraph 8) or that the bulk of the bankrupt's assets is located in that foreign State.

15. According to some national laws, for foreign liquidation proceedings to be given effect, it is necessary to obtain a formal recognition of the foreign court decision opening the proceedings. According to those laws, such recognition is usually subject to the same procedures as any recognition of a foreign court decision. In other national laws, the recognition of foreign liquidation proceedings, while being subject to certain controls (e.g., as to jurisdiction of the foreign court and the observance of fundamental principles of procedure), does not require a formal recognition procedure.

16. Even if liquidation proceedings taking place in a State is not given a full and formal effect by the States in which the bankrupt debtor has assets, there may be several ways to enhance the cross-border effectiveness of the liquidation proceedings. For example, if the person who is currently holding the bankrupt's assets is amenable to the jurisdiction of the State where the liquidation proceedings are taking place, the bankruptcy administrator may institute proceedings against that person for the surrender of those assets. In addition, the bankrupt debtor may be under a duty, or may be ordered by the court conducting the insolvency proceedings, to take the steps necessary to make all its assets abroad available to the bankruptcy administrator. Furthermore, a creditor who obtained in a foreign State full payment from the bankrupt debtor, and who is amenable to the jurisdiction of the State where the liquidation proceedings are taking place, might, under certain circumstances, be obligated by the court to surrender that payment to the administrator and accept to be paid under the same terms as the other creditors.

B. Cross-border judicial assistance

17. When insolvency proceedings are initiated in a State, the administrator of the debtor's assets or an interested

creditor may wish to obtain assistance from a foreign court. The assistance, to the extent it is available, may consist, for example, of turning over to a foreign bankruptcy administrator assets belonging to the insolvent debtor; publicizing foreign insolvency proceedings; suspending a creditor's legal action against the debtor that would, contrary to the principle of equality among creditors, diminish the bankrupt's assets; granting measures of protection against debtor's assets; staying an effort by a creditor to create or enforce a security interest regarding a debtor's property; challenging preferential transfers of property or transfers alleged to be fraudulent; opening local ancillary insolvency proceedings; or allowing the administrator to act in behalf of foreign creditors.

18. The current rules and practices on cross-border court assistance in insolvency matters are rather diverse. Some States, in particular those that deny effect to insolvency proceedings declared in a foreign country, are not prepared to entertain formal requests for assistance (e.g., by a foreign bankruptcy administrator). In those States, the only way for a foreign bankruptcy administrator to make local assets available to foreign creditors, or to obtain another form of assistance, may be to initiate local insolvency proceedings, in which the foreign creditors would then be able to participate, either themselves or through the foreign bankruptcy administrator.

19. Some States have rules that specifically address court assistance in cross-border insolvencies. Differences, however, exist as to the types of assistance available. In other States no specific rules exist on court assistance in foreign insolvencies. Furthermore, in some States cross-border court assistance is subject to fairly specific conditions, while in others this is a matter left largely to the discretion of the court.

C. Right of all creditors to participate in insolvency proceedings

20. Many national laws allow in principle all creditors, domestic and foreign, to participate in insolvency proceedings; however, foreign authorities are usually precluded from lodging public-revenue claims arising, for example, from tax, penal and similar obligations. Yet, in some States this preclusion does not apply if part of the debtor's assets originate from the State lodging its revenue claims.

21. According to the law of some jurisdictions, the principle of non-discrimination among creditors applies only for claims that are payable in the State in which the insolvency proceedings are taking place; in those jurisdictions, any claims payable exclusively abroad are subordinated to the claims payable in the State of the insolvency proceedings.

D. Priority rules in distribution of assets

22. Many national laws classify claims against the bankrupt with the purpose of establishing an order of priority among them. The claims granted the highest priority are to be satisfied from the bankrupt's assets in full before subsequent categories of claims can be paid.

23. Considerable differences exist among national laws as to the number and types of preferred categories of claims. The expenses of the liquidation proceedings and the fees of the bankruptcy administrator in many laws enjoy the highest priority. Specified fiscal claims by the authorities of the State where the liquidation proceedings take place are in many States also high on the priority list. The next priority is often given to claims for salaries by the bankrupt's employees, although in some States the preferential treatment is limited by an amount or by a maximum retrospective time-period for claims for arrears. Beyond these typical preferred categories of claims, the rules on subsequent preferred categories, defined by the type of creditors or transaction, are more diverse.

24. The question of priority of claims is generally determined by the rules of the State in which the liquidation proceedings take place, regardless of whether the case involves foreign creditors or assets surrendered from a foreign country. Such a conflicts rule means that a court, if it wants to respect priority expectations of creditors in liquidation proceedings that take place or may take place in its State, would be inclined not to surrender bankrupt's assets located in the State to a foreign bankruptcy administrator. The motives for refusing to surrender the assets are likely to be particularly strong when the assets requested to be surrendered would probably be consumed by the preferred fiscal claims by the State requesting the surrender. In this context, the preferred treatment of fiscal claims has been criticized, and it was argued that it would be easier to establish a workable system of cooperation between States in insolvency matters if the preferential treatment of fiscal claims were abolished or radically curtailed. It appears that such arguments may have led some States to restrict considerably the preferences accorded to such claims.

E. Cross-border compositions

25. In contrast to cross-border liquidation proceedings, in which an important issue is whether the proceedings opened in one State affects assets abroad, an important question in cross-border compositions is whether the terms of relief agreed upon in a composition in one State (e.g., abatement of claims) can be invoked by the debtor against a creditor in court proceedings in another State.

26. In many States, a clear answer to the question does not appear to have emerged in the legislation and case law. Opinions have been expressed that compositions are procedural agreements and that, as a result, they should have effect only in the country of origin. Another view is that, in the absence of an international agreement, a foreign composition should be recognized to the extent it concerns debts that are governed by the law of the State where the composition was concluded. Yet another view is that a composition should be binding on all those creditors who have participated or were given a possibility of participating in the composition. There is also a view that a foreign composition should be recognized under the same conditions as foreign liquidation proceedings. According to yet another view, one condition for recognition should be that the composition was carried out in a State with which the

insolvent debtor has a close link (e.g., by having there the place of business, residence, centre of administration or the bulk of its assets); another condition should be that the composition was intended to encompass all creditors and that it did not discriminate among creditors or was not otherwise contrary to the public policy of the State where the composition is being invoked.

F. Recognition of security interests

27. Most national laws recognize that a creditor holding a security interest in an item of property included in the bankrupt's assets has a right to satisfy its claim by relying on the security interest, without having to surrender the proceeds for sharing with the other creditors. Such security interests, which can considerably diminish the availability of assets for meeting the claims of the unsecured creditors, are, for example, the retention of title, pledge, assignment of a claim as a security,¹ mortgage, lien, or floating charge. Movable as well as immovable property may be subject to such security interests.

28. There are differences among legal systems as to the rules governing security interests. Differences concern, for instance, the types of security interests recognized in national laws, the formalities for establishing a security interest, the procedures for invoking a security interest, and the priority rules for cases when more than one creditor has a security interest in the same item.

29. Differences exist also as to the treatment of security interests in insolvency proceedings. The differences relate to issues such as: whether a particular type of security interest retains its effectiveness upon opening of insolvency proceedings; the right of the bankruptcy administrator with respect to the sale of the property subject to the security interest; the existence of any privileged claims enjoying priority over secured claims; and the conditions under which another creditor or the bankruptcy administrator may invalidate a security interest created during a specified time period before the opening of the insolvency proceedings.

30. In many national laws, security interests in tangible property are in principle considered to be governed by the national law of the State where the property concerned was located at the time of creation of the security interest. If that national law is different from the law governing the insolvency proceedings, a possible problem impeding the creditor to rely on the security interest may be that the security interest in question is not known in the national law governing the insolvency proceedings.

G. Impeachment of debtor's transactions prejudicial to creditors

31. Many States have rules that make it possible for the bankruptcy administrator or an interested creditor to set aside or modify a debtor's transaction that diminished the

debtor's assets. Such transactions may be, for example, a sale of debtor's property on terms unusually favourable to the buyer, preferential payments of debts to selected creditors, or security interests created retrospectively for previously unsecured debts. National laws differ, for example, as to the types of transactions that may be affected, the types of remedies available to the bankruptcy administrator or an interested creditor, and the conditions for impeaching a transaction (e.g., the point in time before the commencement of the insolvency proceedings after which a transaction by the debtor becomes suspect and liable to impeachment, the terms of the transaction that make it impeachable, and knowledge by the debtor's contracting party about the possible insolvency of the debtor).

32. Difficult questions to which national laws give differing answers, or to which the answers are not settled, concern also conflicts of laws and conflicts of jurisdictions. The questions are, for example: whether, in a given State, a foreign bankruptcy administrator is entitled to request impeachment of a transaction or whether such a remedy is available only to a local bankruptcy administrator; whether a State would recognize a foreign court decision impeaching a transaction; and which national law is applicable to a claim for such a remedy (e.g., the law of the State where the insolvency proceedings take place, the law where the property in question is currently located or was located before the transaction, the law of the person who benefitted from the transaction or the law applicable to the transaction).

III. INITIATIVES TOWARDS REGULATION OF CROSS-BORDER INSOLVENCIES

A. Regional initiatives

1. Latin American States

33. In Latin America, three texts deal with international aspects of insolvency law: the Convention on Private International Law, Havana 1928 ("Bustamante Code") and two Treaties on Commercial International Law, 1889 and 1940 ("Montevideo Treaties").

(a) *Bustamante Code*

34. The Bustamante Code has been adopted by 15 Latin American States. It provides that the debtor's civil or commercial domicile is the link required for jurisdiction to open insolvency proceedings. If the debtor has one domicile, only insolvency proceedings in the State of the domicile are allowed; if the debtor has a commercial domicile in more than one State, proceedings can be opened in each of those States.

35. Provisions are included on: recognition in other contracting States of bankruptcy and composition orders; recognition of the powers of a bankruptcy administrator appointed in a foreign contracting State; recognition of foreign decisions setting aside or modifying transactions that were concluded within a specific period prior to the

¹Assignment of claims as a method of providing security to creditors is discussed in note A/CN.9/378/Add.3; paragraph 13 of that note refers to the previous work of the Commission in the area of security interests.

insolvency declaration and that prejudice the debtor's creditors.

(b) *Montevideo Treaties*

36. The relations between four Latin American States are governed by the Montevideo Treaty of 1889, while the relations between three Latin American States, of which one is also a Party to the 1889 Treaty, are governed by the Montevideo Treaty of 1940. The former provides rules for liquidation, while the latter provides guidance also for compositions, suspensions of payments and other analogous proceedings provided for in the contracting States.

37. Both Treaties refer to the debtor's commercial domicile as the required link for jurisdiction to open insolvency proceedings. If the debtor has a commercial domicile in other States, proceedings can be opened in each of those States.

38. Under the scheme of the Treaties, the authority of bankruptcy administrators, as determined by the laws of the State where the insolvency proceedings were opened, is recognized in all contracting States. Provisional measures can be enforced over property located in other States, and courts in those other States are to publicize the opening of the proceedings and the taking of the provisional measures. Provision is also made for local creditors in those States to petition for separate involuntary proceedings to be carried out in accordance with the law of the State where they are opened. Creditors can rely on security interests, in both immovable or movable property, before the court where the property is located, as long as those security interests were established before the opening of the insolvency proceedings.

2. *Nordic Council*

39. Under the auspices of the Nordic Council, the Nordic States concluded in 1933 the Convention between Denmark, Finland, Iceland, Norway and Sweden regarding Bankruptcy. The Convention was amended in 1977 and 1982.

40. Recognition is granted in all contracting States for bankruptcy proceedings opened in any contracting State where the bankrupt has its residence or registered office.

41. The Convention amalgamates all assets of the debtor in all contracting States into a single mass to be administered and distributed according to the rules of the State where the bankruptcy proceedings were opened. However, special preferences or security rights attached to the debtor's assets are to be governed by the law of the country where the assets concerned are located. Provision is made for publicizing the bankruptcy proceedings in other contracting States where assets of the debtor are located, preparation of an inventory of the debtor's assets, provisional measures, judicial assistance from authorities in other States, and recognition of judicial decisions, in particular for the purpose of confirming a composition with creditors.

3. *Council of Europe*

42. The member States of the Council of Europe concluded the European Convention on Certain International Aspects of Bankruptcy (Istanbul, 5 June 1990). Up to 1 June 1993, no State had adhered to it.

43. According to the Convention, the competence to open a bankruptcy is determined by the place where the debtor has the centre of its main interests; for companies and legal persons, unless the contrary is proved, the place of the registered office is presumed to be the centre of their main interests.

44. The main purpose of the Convention is to allow the bankruptcy administrator to act in other jurisdictions on behalf of the creditors, to take provisional measures, and to institute legal proceedings in any of the member States. In addition, when a debtor has been declared bankrupt in a State (main bankruptcy), the Convention provides that the debtor may, by virtue of this fact alone, be declared bankrupt in another contracting State (secondary bankruptcy). Furthermore, the Convention allows the bankrupt's creditors located in different States to introduce claims in the State where the bankruptcy proceedings were opened, and to receive adequate information about the proceedings.

4. *European Communities (EC)*

45. Efforts have been under way in the European Economic Community since the 1960s to prepare a text on legal aspects of cross-border insolvency. The latest text being considered, the draft Convention on Insolvency Proceedings (1992), which the drafters have not yet released to the public, is, according to a written comment, not intended to harmonize the laws of the member States, but rather to construct legal conditions for handling cross-border bankruptcies in the EC by settling conflicts of laws and jurisdictions. To this end, the text is based on the notion that there should be one bankruptcy proceedings comprising all assets regardless of where they are located. The extent of universality may be limited by the possibility of the opening of one or more secondary proceedings, whose effects are confined to the territory of the States in which they were opened.

B. *Other initiatives*

1. *The Hague Conference on Private International Law*

46. The Hague Conference started work on regulation of bankruptcy in 1894. At its 28th session in 1928, the Conference decided to transform earlier drafts for a multilateral bankruptcy Convention into a model bilateral treaty. This model treaty was not widely adopted.

2. *International Bar Association (IBA)*

47. The International Bar Association formulated in 1989 a Model International Insolvency Cooperation Act (MIICA). The Model Act is based on the notion of

universality and on the premise of a single administration of the insolvent debtor's assets wherever they are located.

48. The Model Act obligates the courts of enacting States to provide assistance to a foreign bankruptcy administrator. Such assistance may be: to make the debtor's assets available to the foreign bankruptcy administrator; to stay or dismiss an action against the debtor; to provide evidence relating to the insolvency; to recognize and enforce a foreign judgement; and to provide any other appropriate relief. The conditions for providing such assistance are: that the State of the bankruptcy administrator provides substantially similar treatment for foreign insolvencies as that provided in the Model Act; that the foreign court having jurisdiction over the bankruptcy administrator is a proper and convenient forum to supervise the insolvency proceedings; and that the administration of the property of the debtor in the respective foreign jurisdiction is in the overall interests of all creditors of the debtor. In case the requested court assistance is denied, the foreign bankruptcy administrator may commence insolvency proceedings in the State that denied the assistance.

CONCLUSIONS

49. The current lack of harmony among national rules governing cross-border insolvencies has often been noted as an obstacle to international trade. Attention has been drawn to the fact that, because of the disharmony of rules on issues such as cross-border effect of liquidation proceedings (above, paragraphs 11-16), international court assistance in insolvency matters (above, paragraphs 17-19), the right of creditors to participate in insolvency proceedings (above, paragraphs 20-21), priority rules in the distribution of assets to creditors (above, paragraphs 22-24), cross-border effect of compositions between the insolvent debtor and creditors (above, paragraphs 25-26), recognition of security interests created under a foreign law (above, paragraphs 27-30), or impeachment of debtor's transactions prejudicial to creditors (above, paragraphs 31-32), the access of unsecured and secured creditors from different States to the debtor's assets is subject to obstacles, uncertainties and inequalities. A further negative effect of the disharmony of rules is that courts and legislators, in their tendency to protect creditors from their own territories, may be inclined to restrict recognition of foreign insolvency proceedings, may take measures favouring local creditors, and may be reserved in providing court assistance to foreign creditors. This situation may lead to several full-scale insolvency proceedings conducted simultaneously in different jurisdictions without meaningful coordination between them, which is wasteful, further increases the possibility of unequal treatment of creditors and may give rise to conflicts between actions of the various bankruptcy administrators.

50. It has been stated by commentators and associations of practitioners that it would be desirable to harmonize ground rules in some of the areas of insolvency law, which would allow international insolvencies, including compositions, to be resolved in a more predictable fashion and

without undesirable conflicts between the jurisdictions interested in the insolvency. Views were expressed that it would be desirable to formulate a harmonized network of legislative rules that would enable a bankruptcy administrator, under certain conditions, to include in the assets from which the creditors will be paid also the debtor's assets located in a foreign State. One of the conditions for such extraterritorial effect of bankruptcy proceedings should be that the bankruptcy proceedings were initiated in accordance with harmonized rules on jurisdiction. Furthermore, the State requested to surrender assets to a foreign bankruptcy administrator should be allowed to ensure that specified local creditors are protected.

51. However, while recognizing the desirability of a workable system of cooperation between States in insolvency matters, it has also been pointed out in international discussions that it may be unrealistic to suppose that any principle of universality of insolvency proceedings could be attained at the global, or even at regional, level in the foreseeable future. It has been said that it will continue to be unacceptable that interests and expectations arising under local law could be overridden by the effects of insolvency proceedings taking place elsewhere.

52. The Commission may wish to bear in mind the foregoing views in determining whether it would be worthwhile for it to consider the matter in depth. Among the primary objectives of the in-depth consideration would be to identify the aspects of international insolvency law that lend themselves to being harmonized and the most suitable vehicle for the harmonization, such as a multilateral treaty, model law or a model bilateral treaty.

53. In the context of considering the foregoing issues, the Commission might also wish to study the question of possible effects of the opening of insolvency proceedings on relationships or proceedings beyond those comprised in the insolvency proceedings. For example, if, in the context of a bank guarantee, the principal becomes subject to insolvency proceedings, it may be useful to clarify whether there is any justification for the bank to suspend payment or terminate the guarantee on the ground that the proceedings reduce the bank's ability to obtain reimbursement from the principal. A similar issue may arise in the context of a letter of credit when the applicant for the issuance of the letter of credit becomes subject to insolvency proceedings. In another example, when in an international arbitration the defendant becomes subject to insolvency proceedings, the question may arise whether the opening of the proceedings should have any effect on the arbitration. Such effects of insolvency proceedings on other relationships or proceedings are often determined not in the law on insolvency proceedings but in the law governing the respective relationship or proceedings.

54. Should the Commission consider the project useful, it may wish to express preliminary views on the direction of the future work and request the Secretariat to prepare, in consultation with other relevant international organizations, including the Hague Conference on Private International Law, for a future session of the Commission a study on the feasibility of harmonized rules on international insolvencies.

**F. Legal issues in privatization: note by the Secretariat
(A/CN.9/378/Add.5) [Original: English]**

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INTRODUCTION

1. At the Congress on International Trade Law, held by the Commission during its twenty-fifth session in May 1992 in New York, a suggestion was made to consider preparation of a legal guide on contracts for privatizing State-owned enterprises with a view to helping States in the process of privatization as well as protecting the legitimate interests of private investors.

2. The purpose of the present note is to facilitate considerations in the Commission as to whether work should be undertaken in the area of privatization.

I. GENERAL REMARKS

3. "Privatization" is a widely used term to refer to a process by which State-owned enterprises are transferred, through different types of contracts, to private parties. The term "privatization contract" is used in this note to refer to a contract by which a State-owned enterprise is transferred to a private party.

4. Motives for privatization are, for example, to make the national economy more market oriented, to reduce the influence of the State over enterprises, to foster the creation of a class of managers who will run enterprises as commercial businesses, to introduce or expand the private ownership of company shares among the population, to increase efficiency in the utilization of the resources of enterprises, to obtain revenues for the Government, and to reduce public debt.

5. The process of privatization has been undertaken in many States from different geographic regions and at different levels of industrial development. In recent years, privatization is being carried out on a large scale in States that are abandoning the system of socialist ownership and State-planned economy in favour of a market economy based on a broader private ownership of enterprises.

II. LEGISLATIVE FRAMEWORK FOR PRIVATIZATION

A. Need for adequate legal infrastructure

6. For a privatization programme to be successful, it is necessary for the State in question to have in place suitable laws and institutions that allow and protect individual and corporate ownership of commercial property, that inspire confidence in potential domestic and foreign investors and that provide a harmonized legal system for the carrying out of the commercial activities of privately owned enterprises. Many States with a privatization programme that have had a longer tradition of private ownership of enterprises have been developing such laws and institutions over a long period of time and, as a result, in those States no major legislative work is required. However, in States in transition from socialist forms of ownership to private ownership extensive legislative and administrative work is required to establish those laws and institutions.

7. The needed laws and institutions may concern diverse areas such as: ownership and transfer of immovable commercial property; prerogatives of the State in determining the use of land; environmental protection; types, formation, organization and limited liability of companies; restitution of nationalized property to former owners; various types of commercial contracts; intellectual property; securities and stock markets; banking and financial services; tax system; competition and restrictive business practices; insolvency; employment matters; accounting; dispute settlement procedures.

8. In some of the areas of law just mentioned harmonized international legal texts exist. In other areas, national laws are used as models.

B. Specific laws on privatization

9. In many States, the implementation of a privatization programme is based on a law adopted specifically for that

purpose. The types of issues covered by such laws differ widely from State to State and depend on factors such as the existence of legislative rules necessary to support private ownership of enterprises, and the need to establish a governmental institution or institutions to administer the implementation of the privatization programme.

10. The following list, prepared on the basis of a limited number of national laws on privatization, indicates issues that have been addressed in such national laws:

- objectives of the privatization programme;
- enumeration of the enterprises to be privatized or the authorization of a body to determine the enterprises to be privatized;
- procedures for deciding to privatize a company;
- methods of privatization (e.g., sale, lease, entrusting the management of an enterprise to a private entrepreneur, "build, operate, transfer" (BOT) contract);
- the responsibilities of the State bodies in charge of administering or supervising the implementation of the privatization programme;
- persons and entities to which State-owned enterprises may be transferred, with special provisions, for example, for the employees of the enterprise, its managers, and foreign investors;
- preferential rights of employees of the enterprise to be privatized (e.g., to buy an amount of shares at discount prices or by installment payments);
- quotas of shares to be offered at preferential terms to certain categories of the population;
- a requirement that the buyer have experience in the trade of the enterprise to be privatized;
- procedures for administering the sale of shares to preferred purchasers, which may include, for example, rules on the distribution and sale of coupons incorporating the right to purchase shares;
- special provisions for privatization in certain industrial sectors;
- the process of selling an enterprise, e.g., bidding, auction, offering of shares in a securities market, direct sale of shares;
- dividing or transforming State agencies engaging in a commercial activity into commercial corporations to be privatized, with provisions on the allocation of assets and liabilities to those corporations;
- procedures for determining the price of the enterprises to be sold;
- payment terms, including the possibility of paying the price in instalments;
- possibility of paying the price with claims against the State ("debt-for-equity swap"), and the manner in which those claims are offered for sale to prospective purchasers of enterprises;
- obligations by the State to use the proceeds from the sale of enterprises for specified purposes (e.g., to reduce public debt);
- the possibility that the State will retain responsibility for certain obligations of privatized enterprises that arose before the privatization (e.g., obligations arising from environmental damage or labour relations);
- registration of enterprises;
- provisions on the content of by-laws of enterprises to be privatized;
- accounting rules;
- liquidation of non-viable State-owned enterprises and the sale or other use of their assets;
- protection against nationalization granted to domestic and foreign investors, cases in which nationalization is nevertheless allowed (e.g., when public interest is established by a legislative body), and a timely and fair compensation for nationalized property;
- tax treatment of parties that take over State-owned enterprises;
- the possibility of transferring income, or proceeds from the subsequent resale of an enterprise, to a foreign country;
- employment and social rights of the employees;
- form and structure of a privatization contract (e.g., written form, signatures, parties to the contract, the names of any intermediaries, manner of describing the assets to be privatized);
- commitments that an investor may be required to make in the privatization contract (e.g., that the buyer will maintain a certain level and structure of employment; conclude a collective employment contract with employees; not sell the enterprise during a certain period; maintain a production programme; make investments of a certain kind or in an agreed amount; adhere to a determined pricing policy; take specified measures to protect the environment; avoid certain restrictive business practices);
- the right of the State to invalidate a privatization contract in case of certain violations of the law or in case of certain kinds of breach of the privatization contract;
- fines for infringements of the law.

III. PRIVATIZATION CONTRACTS

A. General remarks

11. Enterprises are frequently privatized by being sold to private investors. The following section B describes some clauses specific to contracts for the sale of an enterprise. Sections C and D describe briefly the leasing of State-owned enterprises and the entrusting to a private party of the management of a State-owned enterprise.

12. A frequent characteristic of negotiations for the conclusion of a privatization contract is that the State may be guided not only by commercial criteria, but also by social, employment or industrial objectives of the Government. The influence of those objectives may lead to a decision to transfer an enterprise to a party that, while not offering the

best financial terms, for example, guarantees to keep the existing employees or that has fewer oligopolistic ties than the other bidders. The weight to be given to those governmental objectives varies from case to case, and often no predetermined weighting formulas are given to the bidders. In order to prevent improper applications of such non-commercial considerations, some States have adopted rules such as that sales at or below the net-book value of an enterprise must be audited and specially approved.

13. As part of the negotiation process, bidders are usually requested to submit a business plan describing the intentions of the prospective owner. The plan is usually required to be structured in such a way that it indicates how the bidder intends to address the governmental objectives referred to in the preceding paragraph. For example, the bidders may be requested to indicate the expected level of investment (specified, e.g., as to fixed assets, working capital, technology and human resources); projected employment over the next several years; and plans for developing the enterprise, its production and markets.

14. In order to facilitate and expedite negotiations, prospective buyers are often granted access to certain business records or similar sources of information. Such access is typically conditioned by a commitment to keep the information confidential.

15. For the finalization of the terms of the privatization contract it is necessary that during the negotiations the prospective buyer is given information about the various encumbrances of the enterprise. Those may be, for example, land mortgages, patents, licences, significant contract duties, outstanding debts and assignments of claims and rights. In some cases, in particular when the governmental entity selling the enterprise had not exercised effective control over the enterprise, extensive work may be necessary to establish all the encumbrances by checking various records, reviewing contracts, and interviewing managers of the enterprise.

B. Sale of enterprise

(a) *Employment clause*

16. Privatization contracts may stipulate the number and structure of full-time jobs that the purchaser agrees to maintain for a specified period of time. Such a clause may be included in the contract in exchange for a price that is lower than the initial price based on the assessed value of the enterprise.

17. For the case that the new owner does not live up to the commitment, an increase in price, liquidated damages or a penalty may be stipulated. The formula for the amount to be paid may be set in such a way that the payment to the former owner for each employee laid off contrary to the agreement would come close to the cost of keeping the employee. Sellers usually refuse to accept generally formulated clauses releasing the buyer of its commitment in case of "conditions beyond the purchaser's control". In few cases sellers have accepted more specific clauses setting out the values of market indicators that would modify the new owner's commitment.

(b) *Investment clause*

18. The purchaser may commit itself to invest in the enterprise. Such commitments usually refer to monetary investments and specify the amount of investment and the time during which the amount must remain invested. Such an investment clause often sanctions the breach of the commitment with a payment of up to 50 per cent or more of the investment not made.

(c) *Speculation clause*

19. The contract may call for a revaluation of the purchase price, usually by a neutral expert, and for payment of a higher price if the privatized enterprise is sold before the expiry of the specified period (e.g., between 5 to 15 years) without having met the social targets mentioned in the contract. An alternative to such a revaluation clause may be a "surplus levy" clause according to which the purchaser is obliged to pay an amount based on the difference between the price paid for the enterprise and the resale price.

(d) *Business continuation clause*

20. Some contracts provide that if the purchaser discontinues production before the agreed point of time, liquidates the enterprise, lets it go bankrupt or modifies the production programme in a significant way, the purchaser will have to pay an agreed amount. Usually it is agreed that the amount to be paid decreases over a number of years until the clause ceases to be operative.

(e) *Revaluation clause for real estate*

21. In some cases, in particular when it is difficult to measure the value of real estate or when extraordinary instability in the real estate market is expected, the contract may include a clause according to which the State is to benefit from an increase in the value of the real estate if it occurs within the agreed period. Such a clause may apply only to the land or also to some of the buildings. In order to safeguard the purchaser's interests, such clauses may maximize the increase that must be returned, provide that only a certain percentage of the increase is to be returned, specify that only an increase over the agreed threshold is to be taken into account, stipulate the method for establishing the value of the real estate (e.g., by neutral experts), or provide for a respite for any payment to be made on the basis of the clause.

(f) *Payment clause*

22. The payment clause would address issues such as the time when the purchase price is to be paid, payment guarantees for deferred payments, and the interest rate. Usually the seller insists that the purchaser itself be committed to pay the agreed amounts, instead of limiting the purchaser's responsibility by placing some of the payment obligation on the newly founded company.

23. In some States laws have been adopted according to which the parties to a privatization contract may agree, with specified limits, that the purchaser will pay a part of the price by assigning to the State payment claims against the State ("debt-for-equity swap"). Prospective buyers would typically buy those payment claims from foreign

creditors for the purpose of making payments in the context of privatization.

(g) *Clause on reserves for potential liabilities*

24. At the time of the sale of an enterprise, it may be uncertain whether the past activities of the enterprise will give rise to liability. For the case that such liability materializes, the privatization contract may establish a financial reserve to cover any liability.

25. Under one approach, used in particular if the likelihood of liability appears somewhat remote, the originally calculated price for the enterprise is not reduced, and the State undertakes to cover the liability up to a specified amount. Under another approach, which may be used if liability is likely to materialize, the price calculated originally is reduced by an agreed amount; if the liability does not materialize within a specified period, the owner of the enterprise is to pay to the State the amount by which the originally calculated price was reduced. In order to avoid improper use of the reserved amount, the State may be given a right to participate in any negotiations or dispute settlement proceedings concerning the liability; in addition, in order to provide to the owner an incentive for limiting payments from the reserve, the owner may be given a right to keep a percentage of the reserve if it is not used.

(h) *Repair of environmental damage*

26. One of the risks the new owner of an enterprise is to bear in mind are expenditures needed to bring the site of the enterprise up to the legally required environmental standards. Since the cause for those expenditures existed before the privatization, the seller of the enterprise may be ready to bear a specified proportion of any such costs. For example, it may be agreed that the buyer will assume responsibility for specified clean-up work up to a specified amount, while further costs up to an agreed amount are to be shared in a specified way, and any excess costs are to be borne by one or the other party. Different formulae may be used for different kinds of environmental problems (e.g., spent oil, smoke emission, asbestos). The contract may provide for the right of the State to approve the plans and contracts for the expenditures in which the State is to participate. Any environmental consequences that arise after the enterprise has been privatized would normally be the sole responsibility of the enterprise.

(i) *Seller's warranties*

27. The assumption is that the seller is the owner of the enterprise and that the enterprise owns its real estate, and the privatization contract may express that assumption. If it is possible that third parties might dispute the ownership, it is advisable to address that possibility in the contract. Issues concerning ownership might arise, for example, because of unclear or inaccurate records of the enterprise being privatized. Those issues may arise also in the context of legislation on denationalization, which are mentioned in the following paragraphs on "restitution claims".

(j) *Restitution claims*

28. A number of States in transition from a socialist system of ownership to a private system of ownership have

adopted laws according to which former owners of nationalized property have a right under specified conditions to reclaim ownership in the nationalized property.

29. Sometimes it is possible, in parallel with the contract for the privatization of an enterprise, that the State reaches a settlement with the former owners of the enterprise or their successors by paying compensation to them from the proceeds of the privatization. If such a settlement cannot be reached during the period the privatization contract is being negotiated, the State may, by a clause in the privatization contract, accept the obligation to settle the former owner's claim within an agreed period and agree to an interim arrangement until the restitution claim is settled. The interim arrangement may be, for example, that the prospective buyer assumes the management of the enterprise, the State retains a partial responsibility for certain costs and losses of the enterprise, and the duty of the prospective buyer to make the agreed investments is postponed until the privatization contract takes full effect. The privatization contract would take full effect when the claim of the former owner has been settled, unless the settlement has not been reached by the agreed time limit and the prospective buyer terminated the contract.

30. If the former owner is claiming not the enterprise itself but an item of property of the enterprise, the privatization contract can be finalized under the condition that the State assumes the obligation to settle the claim or to pay to the new owner of the enterprise the value of the property that had to be surrendered to the former owner. If the return of the particular property compromises the viability of the enterprise, it may be necessary to terminate the privatization contract and settle the outstanding claims.

C. Leasing of enterprise

31. The State may decide to lease an enterprise to a private party, for example, when it wishes to retain the ownership while considering that the efficiency of the enterprise is likely to improve under the management of a lessee; when the purpose is to obtain an annual income from the enterprise; when the Government decides to experiment with the private management of an enterprise as a prelude to the sale of the enterprise; or when no suitable buyer has emerged, while there is a prospect to find a lessee.

32. The following are examples of advice given in respect of contracts for the leasing of enterprises:

(a) the leasing period should be sufficiently long in order to give the lessee an incentive to run the enterprise in a way that will be in the long-term interest of the enterprise;

(b) the contract should contain clauses obligating the lessee to maintain the value of the assets; such clauses are necessary in order to avoid that the lessee's short-term interest in profits would adversely affect the long-term value and viability of the enterprise;

(c) the amount of the leasing fee may be fixed for the entire leasing period, or it may be flexible so that the Government would benefit from increases in the profits of the enterprise; the increases in the lease payments should

be so designed as not to affect negatively the lessee's interest in operating the enterprise;

(d) it is necessary for the contract to indicate clearly, on the one hand, the scope of the lessee's autonomy in managing the enterprise and deploying the personnel, and, on the other hand, the prerogatives of the State in those areas;

(e) it is advisable for the contract to contain provisions against the lessee managing the assets, and manipulating the profit-earning picture, of the enterprise in such a way as to discourage potential bidders for the purchase of the enterprise.

D. Management contract

33. The State may wish to transfer to a private party only the management of the enterprise, pay the private party a fee therefor, and retain the other ownership functions. This method of privatization may be used, for example, when the enterprise has been making losses attributable to managerial inefficiency or where the new management should improve the economic and commercial position of the enterprise with a view to achieving later a better sales price for the enterprise.

34. The following are examples of advice given in respect of management contracts:

(a) a management contract should clearly demarcate the services that are covered by the management fee from the services that are necessary from time to time and are to be paid separately;

(b) the fee payable to the management may be composed of an agreed amount and an amount to be calculated on the basis of the profits of the enterprise or on the basis of the physical extent of production or sales;

(c) the contract should contain clear provisions as to the powers of the management in determining the production programme, prices and employment policy;

(d) if the management of the enterprise is entrusted to a company that is also involved in supplying goods or services to that enterprise or is selling its products, it is advisable to agree on clauses that would prevent improper pricing of goods or services and the enterprise becoming dependent on the business with that party for its viability and profit.

35. Some advice mentioned above concerning the leasing contract apply, *mutatis mutandis*, also to management contracts.

IV. WORK OF OTHER ORGANIZATIONS ON PRIVATIZATION

A. United Nations Development Programme

36. In 1991, "Guidelines on Privatisation" were prepared by the Interregional Network on Privatisation, which is a group of experts from developing countries personally involved in privatization and which works under the auspices of the Division for Global and Interregional Programmes of the United Nations Development Programme (UNDP).

37. The issues considered in the Guidelines include: whether a State authority should be set up to manage the process of privatization and its powers and responsibilities; possible need for legislation authorizing privatization of public enterprises; transformation of non-corporate public enterprises into stock companies; measures to promote competition; leasing and entrusting the management of an enterprise to a private party as methods of privatization; full privatization of a company or the sale of only a part of the shares in a company; sale of an enterprise to its managers and employees; sale of an enterprise to a cooperative society of investors; sale of assets of an enterprise instead of the sale of the enterprise itself; valuation of assets and liabilities of an enterprise and related valuation of the enterprise as a whole; setting a price for assets; techniques of sale of shares; joint ventures; need to develop a capital market; impact of privatization on employees; regulatory interest of the Government in privatized enterprises and means of continued influence of the State in privatized enterprises; considerations regarding the sale of enterprises to foreign investors.

38. The Guidelines describe, in chapter 23 entitled "Technical assistance and cooperation", various possibilities for a Government to obtain technical assistance in formulating its national policies and laws relating to privatization or in privatizing an individual enterprise.

B. Asian-African Legal Consultative Committee

39. The Secretariat of the Asian-African Legal Consultative Committee (AALCC) prepared for the thirty-second session of the AALCC in 1993 a preliminary study entitled "Legal issues involved in the matter of privatization of State-owned enterprises" (AALCC/XXXII/KAMPALA/93/13). According to the document, the final objective is the preparation of a guide on legal aspects of privatization in Asia and Africa, and the principal aim of such a guide would be to assist the AALCC member Governments in carrying out their privatization programmes in a manner consistent with their national economic interests.

40. The preliminary study considers experience with State-owned enterprises, discusses reasons for privatization, and briefly compares various methods of privatization (such as an outright sale of an enterprise, sale of a minority part of a company, entrusting the management of an enterprise to a private party, lease of an enterprise, and a concession to operate an enterprise). The study also mentions amendments to national laws that might be necessary to carry out a privatization programme.

C. Economic Commission for Europe

41. The Working Party on International Contract Practices of the Economic Commission for Europe approved in 1990 a guide entitled "Legal aspects of privatization in industry" (ECE/TRADE/180, United Nations, New York 1992). As stated in the introduction, the aim of the guide is to assist countries in transition in their task of establish-

ing a suitable legal framework for privatization, and it does so by outlining: the principal problems most likely to arise in the course of privatizing enterprises; the new laws and institutions which will be required; and the main methods than can be employed in the task of privatization.

42. As to the main problems in privatization in Eastern Europe, the publication considers: the need to establish administrative institutions responsible for executing the privatization programme; clarification of the question of ownership rights of the State; demonopolization of enterprises created in a centrally planned economy and possibly their break-up into smaller and competitive units; determination of the appropriate price for selling an enterprise; the need to create capital markets; the question whether, before selling an enterprise, certain restructuring measures should be taken (e.g., replacing or upgrading of machinery, laying off of redundant workers or liquidating debts that impair the solvency of the enterprise); protection of new owners, particularly against nationalization without prompt and effective compensation.

43. Furthermore, the publication discusses various segments of the legal system that must be adapted to a market economy and that are necessary to inspire confidence in potential investors. The types of laws discussed are in particular those on establishing and protecting property rights; the transfer of ownership of land and commercial enterprises; foreign ownership of land; State control over the purpose for which land is used; liability for environmental damage caused by the enterprises to be privatized; restitution of nationalized property to former owners; status, establishment and functioning of business organizations (company law); contract law; insolvency proceedings; securities; taxation; promotion of competition; employment; and accounting practices.

44. As to the main methods of privatization, the publication refers to the sale of State-owned enterprises; sale or leasing of State-owned assets; and granting to the private sector of contracts for services that had previously been provided by the State itself.

45. The same Working Party has also prepared a document entitled "Guide on selected legal issues related to privatization and foreign direct investment in the economies in transition: a comparative analysis" (TRADE/WP.5/R.9/Rev.1, 25 November 1992), which is intended to be revised and, with some additions, issued under the new title "Privatization and foreign investment in the countries of Central and Eastern Europe: legal aspects".

46. Furthermore, the Working Party has prepared a preliminary outline of a future publication to be entitled "Guide on the financing of East-West trade/privatization in Central and Eastern Europe" (annex to document TRADE/WP.5/45, 1 December 1992). The outline indicates that the guide will deal, among other issues, with measures to improve the legal framework for financing in the economies in transition. Those measures will concern, for example, improving the legislative process, fixing priorities in the development of legislation (civil code, commercial code, procedural laws); problems of implementation and enforcement of new legislation; property laws; role of commercial banks in econo-

mies in transition; problems of restitution of nationalized property from the point of view of financing; types of corporate entities; registration formalities; issues of labour law; security interests; debt-for-equity swap; taxation issues; terms and conditions of leases; franchising; intellectual property problems; methods of foreign investment; present position as to capital markets; mergers and acquisitions; methods of privatization; methods of financing; the role of international and national lenders; build-operate-transfer (BOT) transactions; problems of exchange risks and mechanisms for reducing them; use of offshore escrow accounts; use of exchange controls; dispute resolution; government guarantees; sovereign and other immunity; training and transfer of financial know-how.

D. European Communities

47. The Commission of the European Communities has, in conjunction with the Commonwealth of Independent States, set up a Task Force on Law Reform with the aim to assist the Independent States in drafting the most important market-economy laws, in developing training programmes for legal personnel, and in building or improving institutions for implementing market-economy legislation.

E. International Chamber of Commerce

48. The International Chamber of Commerce (ICC) has set up a Special Task Force on Privatization. According to the ICC Handbook 1992, the Task Force "aims to accumulate knowledge about countries' experiences with privatisation for general use by members, especially members in developing countries and central and eastern Europe".

CONCLUSION

49. As noted above in paragraphs 6 to 8, in some States, in particular those in transition from a system of socialist ownership of means of production to a system of private ownership, the implementation of privatization programmes requires extensive legislative work in a number of areas of national law. While in some of those areas legislative work can be based on international treaties and model laws, in other areas the only models available are foreign national laws. Yet, even where international legal texts exist, they are often not used, and instead foreign national laws are taken as models. It is suggested that, despite circumstances conducive to using national laws as models (e.g., historical ties or extensive trade with a country, or a tendency of experts providing technical assistance to offer their national laws as models), in many instances it would be in the best interest of the State concerned to adopt internationally harmonized texts. International texts tend to be more modern and better adapted to the needs of international trade than national laws; in addition, the adoption of harmonized laws facilitates trade with a greater number of countries than the adoption of a national law; furthermore, by adopting an international text, the State makes its law more readily understandable to foreign trading partners, and thus reduces the need for choice-of-law clauses in commercial contracts and decreases the number

of instances in which domestic traders would have to operate under a foreign and unknown national law. Consequently, the Commission may wish to call upon the States concerned to bear in mind the advantages of internationally harmonized legislation, as well as to call upon the international organizations providing technical assistance to assist the relevant legislative officials in making informed decisions about the use of harmonized legal texts.

50. As to laws dealing specifically with privatization (above, paragraphs 9-10), it appears that the needs of States, and the issues to be addressed in those laws, differ considerably, depending on factors such as the extent of privatization to be carried out, the social and other policies underlying the privatization, and the existence of laws sup-

porting private ownership of enterprises. The Commission may wish to consider that the work of organizations mentioned above in paragraphs 36 to 48 in disseminating expertise for the preparation of such laws is useful and should be encouraged.

51. As to the legal issues in privatization contracts (above, paragraphs 11-35), the Commission may wish to consider that the Secretariat should continue to monitor the development of the contract practices and the manner in which the organizations active in the area are addressing problems that arise in practice. The Secretariat would report to the Commission at a future session, and present suggestions, in the event that there would appear to be a need for the Commission itself to undertake work on those issues.

V. COORDINATION OF WORK

Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General (A/CN.9/380) [Original: English]

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INTRODUCTION

1. The General Assembly, in resolution 34/142 of 17 December 1979, requested the Secretary-General to place before the United Nations Commission on International Trade Law, at each of its sessions, a report on the legal activities of international organizations in the field of international Trade Law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In response to that resolution, detailed reports on the current activities of other organizations related to the harmonization and unification of international Trade Law have been issued at regular intervals, the last one having been submitted at the twenty-third session in 1990 (A/CN.9/336). At the twenty-fourth session of the Commission, the

Secretariat, due to the disappointing response of development agencies and other organizations to its request for information related to the harmonization and unification of international law, proposed to continue its investigation and to report its findings to the Commission at its twenty-fifth session (A/CN.9/352). At its twenty-fifth session, the Commission considered a special report prepared by the Secretariat on assistance by multilateral organizations and bilateral aid agencies in the modernization of commercial laws in developing countries (A/CN.9/364).

3. This report is another in the series mentioned and has been prepared in order to update and supplement the report submitted at the twenty-third session of the Commission. It is based on information available to the Secretariat about the activities of international organizations from 15 February 1990 generally up to March 1993. Documents referred to in this report and further information may be sought

directly from the organizations concerned. The Secretariat appreciates the assistance given to it by all those international organizations and others that sent information on their current activities related to the harmonization and unification of international Trade Law.

4. The activities of UNCITRAL related to the harmonization and unification of international Trade Law are referred to briefly in this report for the sake of completeness. The current work of UNCITRAL is summarized each year in the report of the Commission's annual session. The report and the background documents are subsequently reprinted in the *Yearbook of the United Nations Commission on International Trade Law*.

5. The work of the following organizations is described in the present report:

(a) *United Nations bodies and specialized agencies*

CTC: Centre for Transnational Corporations, paragraph 111

ECE: Economic Commission for Europe, paragraphs 10, 37, 110

GATT: General Agreement on Tariffs and Trade, paragraphs 7, 56, 105

IBRD: International Bank for Reconstruction and Development, (World Bank), paragraphs 118, 119

ICAO: International Civil Aviation Organization, paragraph 85

IMO: International Maritime Organization, paragraphs 67, 72, 73, 74, 75

UNCITRAL: United Nations Commission on International Trade Law, paragraphs 6, 9, 57, 59, 63, 107, 129, 130, 131

UNCTAD: United Nations Conference on Trade and Development, paragraphs 20, 21, 22, 23, 24, 25, 26, 28, 39, 40, 61, 63, 65, 67, 68, 69, 70, 71, 106, 112, 132, 133

UNDP: United Nations Development Programme, paragraph 38

UNESCO: United Nations Educational, Scientific and Cultural Organization, paragraphs 41, 52, 54, 134, 135

UNIDO: United Nations Industrial Development Organization, paragraphs 27, 29, 30, 31, 32, 136

WIPO: World Intellectual Property Organization, paragraphs 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 139, 140

(b) *Other intergovernmental organizations*

AALCC: Asian-African Legal Consultative Committee, paragraphs 33, 36, 92, 114, 120

Cartagena Agreement, paragraph 115

CCC: Customs Co-operation Council, paragraphs 109, 121

EBRD: European Bank for Reconstruction and Development, paragraph 18

HAGUE CONFERENCE: Hague Conference on Private International Law, paragraphs 97, 98, 99, 100, 101, 102, 103, 104

OECD: Organization for Economic Cooperation and Development, paragraph 8

OTIF: Office des Transports Internationaux Ferroviaires, paragraphs 86, 87

SIECA: Secretaría Permanente del Tratado General de Integración Económica Centroamericana, paragraph 128

UNIDROIT: International Institute for the Unification of Private Law, paragraphs 14, 16, 17, 53, 91, 113, 117, 137, 138

(c) *International non-governmental organizations*

CIT: Comité international des transports ferroviaires, paragraph 88

CMI: Comité maritime international, paragraphs 67, 76, 77, 78, 79, 80, 81, 82, 83, 84

Common Fund for Commodities, paragraphs 19

FIATA: International Federation of Freight Forwarders, paragraphs 64, 66

ICC: International Chamber of Commerce, paragraphs 12, 13, 15, 34, 55, 58, 65, 93, 108, 125

ICCA: International Council for Commercial Arbitration, paragraphs 95, 126

ILA: International Law Association, paragraphs 96, 116

IRU: International Road Transport Union, paragraphs 89, 90

I. INTERNATIONAL COMMERCIAL CONTRACTS IN GENERAL

A. Procurement

1. UNCITRAL

6. At its twelfth session (8-19 October 1990), the Working Group on the New International Economic Order considered the second draft of the Model Law on Procurement (draft articles 1 to 27, A/CN.9/WG.V/WP.28). At its thirteenth session (15-26 July 1991), the Working Group considered the second draft of articles 27 to 35 (A/CN.9/WG.V/WP.30) and the first draft of articles 36 to 42 (A/CN.9/WG.V/WP.27) on the review of acts and decisions of the procuring entity. At its fourteenth session (2-13 December 1991), the Working Group considered draft articles 1 to 27 of the Model Law as revised following the twelfth session (A/CN.9/WG.V/WP.30), as well as articles 28 to 41 (A/CN.9/WG.V/WP.33 and 34; article 42 had been deleted at the thirteenth session). At its fifteenth session (22 June-2 July 1992), the Working Group reviewed and adopted draft articles 1 to 41 of the Model Law. It also affirmed its earlier decision that a commentary giving guidance to legislatures enacting the Model Law should be prepared by the Secretariat. In October 1992, an informal ad hoc working party of the Working Group was convened to review the commentary. The Working Group also noted that a note on the desirability and feasibility of preparing uniform law provisions on the procurement of services would be prepared by the Secretariat and submitted to the Commission at its twenty-sixth session (5-24 July 1993). The Model Law will be considered for adoption by

the Commission at its twenty-sixth session. At that session, the Commission will also have before it the Draft Guide to Enactment of the UNCITRAL Model Law on Procurement (A/CN.9/375) and a note by the Secretariat on possible future work in the procurement of services (A/CN.9/378/Add.1).

2. GATT

7. At GATT negotiations are under way, in pursuance of article IX:6(b) of the GATT Agreement on Government Procurement, aiming at broadening the Agreement to include, in addition to central government entities, those at a lower level, such as regional and local authorities, as well as other entities whose procurement policies are substantially influenced by government, such as telecommunications, energy, water management and transport utilities. The negotiations also aim at expanding the Agreement's coverage to include services contracts, including construction services contracts. Finally, the negotiations aim at improving the existing text of the Agreement, for example by the inclusion of a challenge system, which would allow interested suppliers to challenge alleged breaches of the Code under the national legislation of the country of the procuring entity. The draft Final Act of the Uruguay Round of Multilateral Trade Negotiations includes an agreement on procedures designed to facilitate accession to the Agreement on Government Procurement.

3. OECD

8. Within the framework of the joint OECD/CCEET (Center for Cooperation with European Economies in Transition) and EEC/PHARE programme of Support for Improvement in Governance and Management (SIGMA) in Central and Eastern European Countries, technical assistance is being provided for the reform of public procurement systems. The assistance helps States whose economies are in transition to incorporate key features of market-economy procurement systems, including the administrative and management apparatus as well as the legal infrastructure. Seminars and technical consultations are held, including with the participation of the UNCITRAL secretariat, and in which use is made of the UNCITRAL Model Law on Procurement being prepared by the Commission.

B. International countertrade practices

1. UNCITRAL

9. At its twenty-third session in 1990, the Commission considered several draft chapters of the Legal Guide on Drawing Up International Countertrade Contracts (A/CN.9/332 and Add.1-7) and decided that the Secretariat should complete the preparation of the remaining draft chapters and submit them to the Working Group on International Payments. The Working Group on International Payments, at its twenty-third session in September 1991, considered the remaining draft chapters of the Legal Guide and draft illustrative provisions (A/CN.9/WG.IV/WP.51 and Add.1-7).

The Working Group requested the Secretariat to revise the draft chapters of the Legal Guide and present them to the Commission at its twenty-fifth session. At its twenty-fifth session, the Commission considered the draft materials for the Legal Guide (A/CN.9/362 and Add.1-17) and adopted the Legal Guide.

2. ECE

10. The Working Party on International Contract Practices in Industry of the ECE Committee on the Development of Trade completed and adopted at its thirty-fifth session (November 1989) a Guide on International Counterpurchase Contracts (ECE/TRADE/169) and at its thirty-sixth session (June 1990) a Guide on International Buy-back Contracts (ECE/TRADE/176).

C. UNIDROIT: principles for international commercial contracts

11. The UNIDROIT Study Group on Progressive Codification of International Trade Law continued its work on general principles applicable to international commercial contracts. The Group met twice in 1990 to examine the revised drafts of, and explanatory reports on, chapter 4, Interpretation; chapter 5, Performance, section 2: Hardship and chapter 6, Non-performance, section 1: General Provisions, section 2: Specific Performance, and section 3: Termination. The Group met once in 1991 to review a revised draft of, and explanatory report on, chapter 6, Non-performance, section 4: Damages and Exemption Clauses. It also met twice in 1992 to examine draft provisions and comments on chapter 1: General Provisions, and comments made by the Governing Council at its seventieth and seventy-first sessions on chapter 5, Performance, section 1: Performance in General.

D. ICC: Incoterms 1990

12. The *Incoterms 1990* is the new edition of the ICC definitions of trade terms such as FOB, CIF and C & F, which came into force on 1 July 1990 (ICC publication No. 460). This new edition of Incoterms, the first in ten years, clarifies existing terms and adjusts the Incoterms in order to meet the modern needs. A Guide to *Incoterms 1990* was also published (ICC publication No. 461). The Guide includes comments on the changes to the 1980 edition and explains the Incoterms in detail.

E. ICC: retention of title

13. An updated and completed edition of the Guide on Retention of Title is scheduled to be published soon. The Guide explains different national practices, laws and regulations on retention of title. It also provides sample clauses, specifically on export sales, to serve as a practical tool for exporters, buyers, bankers, lawyers and other parties involved in drafting and interpreting international sales contracts.

F. Commercial agents and distributors

1. UNIDROIT: agency in the international sale of goods

14. The UNIDROIT secretariat prepared and circulated to Governments and other interested organizations a study on the internal relations between principals and agents in the international sale of goods, as well as an annexed draft Convention on Contracts of Commercial Agency in the International Sale of Goods. It also prepared a document analysing the relations between principals and agents, so as to allow the Governing Council to decide whether work should be continued on the subject. At its seventieth session in 1991, the Governing Council determined that no further work on this subject was justified, as it had emerged that EEC and EFTA countries were unlikely to be interested in participating in further work until the EEC Directive on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents had been fully implemented. In addition, it was decided that any work should be postponed to await the implementation of the 1983 Geneva Convention on Agency in the International Sale of Goods.

2. ICC: commercial agency; distributorship

15. ICC published in 1991 a Model Commercial Agency Contract, which incorporates prevailing practices in international trade as well as principles generally recognized by the domestic laws on agency agreements (ICC publication No. 496). The Working Party on Commercial Agency Agreements is progressing on a draft of a Model Distribution Agreement which is expected to be published soon.

G. UNIDROIT: franchising contracts

16. At its sixty-ninth session in 1990, the Governing Council decided that the secretariat should continue following new developments and authorized it to cooperate with the International Bar Association (IBA) and other interested organizations and to prepare a list of subjects for study. At its seventieth session in 1991, the Governing Council expressed its support for a questionnaire prepared by Committee X of IBA for circulation in an effort to elicit information regarding the law and practice of franchising in various countries and instructed the secretariat to submit the comments of the Governing Council to IBA and to prepare for the seventy-first session in 1992 a paper identifying issues related to franchising that could be considered in the preparation of uniform rules. At its seventy-first session, the Governing Council considered that paper and postponed taking a final decision on the future work until its seventy-second session in 1993, by which time the answers to IBA questionnaire would have been received and analysed by the secretariat in a new paper, that would be considered by a restricted subcommittee of the Governing Council, to be held before the seventy-second session.

H. Security interests

1. UNIDROIT: international aspects of security interests in mobile equipment

17. At its seventieth session in 1991, the Governing Council considered a preliminary paper analysing replies to a questionnaire circulated among Governments and interested organizations related to the subject of security interests in mobile equipment and authorized the secretariat to convene a restricted exploratory working group for the purpose of ascertaining the need for, and feasibility of, drawing up international rules governing certain aspects of security interests in mobile equipment. The working group met in March 1992 and came to the conclusion that such a project was not only useful but also feasible on condition that it would be restricted in scope. At its seventy-first session, the Governing Council considered the report of the working group and decided to set up a Study Group on International Aspects of Security Interests in Mobile Equipment. The first meeting of the Study Group is scheduled to be held in April 1993. The second meeting will take place in 1994.

2. EBRD: model law on secured transactions

18. EBRD is drafting a model law on secured transactions which may be used for adoption, as is or modified, in Central and Eastern European countries. The draft is expected to be available by autumn 1993. The drafting team of EBRD is supported by an international advisory board comprising 20 experts in the field of secured transactions (for more details on the activities of UNIDROIT and EBRD on this topic see A/CN.9/378/Add.3, paras. 15, 16 and 19).

II. COMMODITIES

A. Common Fund for Commodities

19. The Common Fund for Commodities, formerly an UNCTAD project, is now directly administered by the Headquarters of the Common Fund at Amsterdam. The International Lead and Zinc Study Group submitted project proposals to the Common Fund on transfer of technology and promotion of demand: hot dip galvanizing of zinc and zinc die casting.

B. UNCTAD: commodity agreements

20. The aims of international commodity agreements and arrangements vary from one agreement/arrangement to another. The principal objectives of agreements with economic provisions are price and export earnings stabilization, although they often also aim at long-term development. Agreements whose main functions are developmental comprise activities related to improved market access and supply reliability, increased diversification and industrialization, augmented competitiveness of national products *vis-à-vis* synthetics and substitutes, improved marketing and distribution and transport systems. International commodity agreements may have additional objectives, e.g., the promotion of consumption, the prevention of unemployment or underemployment, and the alleviation of serious economic

difficulties. All of them give priority importance to transparency and statistical functions. Since the last report, several commodity agreements or arrangements have been adopted pursuant to the objectives adopted by UNCTAD in resolutions 93(IV) and 124(V) on the Integrated Programme for Commodities as well as the Final Act of UNCTAD VII and the Cartagena Commitment of UNCTAD VIII.

C. UNCTAD: terms of reference of the Standing Committee on Commodities

21. Consensus was reached at the eighth session of the Conference, held in Cartagena, Colombia, in February 1992, on the role UNCTAD should play in the commodities field. The terms of reference of the Standing Committee on Commodities, established at the second part of the thirty-eighth session of the Trade and Development Board, specify this role in detail.

D. UNCTAD: complementary facility for commodity-related shortfalls in export earnings

22. The Intergovernmental Group of Experts on the Compensatory Financing of Export Earnings Shortfalls, which concluded its work at its resumed second session (10-18 April 1989), submitted its report for consideration by the UNCTAD Trade and Development Board at its sixteenth special session (8-9 and 16 March 1990). A decision was adopted at that session (379 (S-XVI)) in which the Trade and Development Board invited countries other than EEC and Switzerland to consider, if deemed appropriate, the possibility of introducing commodity-related schemes and encouraged further cooperation among such schemes. It also decided that the problem of shortfalls in commodity export earnings of developing countries arising from market instability, as well as the question of compensatory financing of export earnings shortfalls, should be kept under review in UNCTAD as part of the ongoing work of the Committee on Commodities, taking into account the various views expressed at the Board's sixteenth special session and in the conclusions and recommendations of the Intergovernmental Group of Experts. It further requested the Secretary-General of UNCTAD to follow developments in various compensatory financing schemes and their implications for the development of developing countries. This mandate is now reflected in "A New Partnership for Development: the Cartagena Commitment", adopted at the eighth session of the United Nations Conference on Trade and Development (report of UNCTAD VIII, TD/364, part I, sect. A, para. 212), as well as in both the terms of reference adopted at the thirty-eighth session of the Trade and Development Board and the work programme of the Standing Committee on Committees adopted at its first session (19-23 October 1992). This mandate concentrates on the analysis and review of problems stemming from export earnings shortfalls of developing countries including commodity-related shortfalls.

E. UNCTAD: Global System of Trade Preferences (GSTP)

23. The Global System of Trade Preferences among developing countries (GSTP) is established as a framework

for the exchange of trade concessions among member countries of the Group of 77. It constitutes an instrument for the promotion of trade among these countries. The Agreement entered into force on 19 April 1989 among the 40 countries which ratified it and have become participants. The exchange of tariff concessions covered about 1,700 tariff lines, and participants agreed to multilateralize these concessions among themselves. Exclusive tariff preferences in favour of the least developed participants were provided pursuant to the provisions of the GSTP Agreement regarding special and differential treatment for the least developed countries. Since the entry into force of the Agreement, the GSTP Committee of Participants has been performing its functions as the governing body of the Agreement. Significant trade transactions have taken place under the Agreement, but the GSTP partners felt that further efforts were still needed to expand their GSTP preferential trade, and they thus agreed to the launching of the Second Round of GSTP Negotiations.

24. During the GSTP Ministerial Meeting, held at Tehran on 21 November 1991, the Tehran Declaration on Launching the Second Round of GSTP Negotiations was adopted with the aim of facilitating the process of accession to the Agreement and carrying forward the exchange of trade concessions. The Tehran Declaration provided for the establishment of the GSTP Negotiating Committee for the Second Round. The Negotiating Committee held its first session on 22 July 1992 and adopted its Plan for the Second Round of GSTP Negotiations.

F. UNCTAD: Generalized System of Preferences (GSP)

25. At its nineteenth session, held from 18 to 22 May 1992, the UNCTAD Special Committee on Preferences addressed openly, for the first time in 20 years of application of the GSP, the question of graduation or differentiation. It was concluded that the application of the GSP in the treatment of beneficiary countries could lead to arbitrary and restrictive results; objective and rational criteria for their treatment would be the best way to avoid such unwanted and often discriminatory results; one of its positive effects could and should be a better spread of benefits among developing countries. It should also open the way for increased product coverage in areas of export interest to developing countries. Moreover, domestic credibility of the GSP in the preference-giving countries would be enhanced; country and product differentiation was preferable to complete country exclusion because such a macroeconomic policy decision could create problems at the microeconomic level for the graduated country.

III. INDUSTRIALIZATION

A. UNCTAD: economic cooperation and integration among developing countries

26. The UNCTAD secretariat has prepared a publication entitled *Bilateral Agreements on Trade and Economic Cooperation concluded by Developing Countries* which reproduces the texts of the agreements arranged by subject-

matter (UNCTAD/ST/ECDC/36, vols. I and II). The UNCTAD secretariat has also prepared a document entitled "Export-processing free zones of sub-Saharan Africa" (UNCTAD/ECDC/220) which provides a systematic presentation of export processing free zones in nine countries in sub-Saharan Africa in terms of their legal status, organization, functioning and objectives.

B. UNIDO: international product standards

27. UNIDO has completed a study on the trends in international product standards and the implications for developing countries ("International product standards: trends and issues", UNIDO/PPD.182, 7 January 1991).

C. UNCTAD: trade in services

28. As part of the organizational reforms decided at UNCTAD's eighth Conference, a Standing Committee is to focus on examining difficulties particularly faced by developing countries in enhancing exports of services. The overall objective of the Committee's work on national policies is to analyse and assist, as appropriate, in the formulation of national policies aimed at strengthening the production, export and technological capacity of services sectors, taking into account their level of development in different countries, with a view to contributing to development and, thus, increasing the participation of developing countries in world trade in services. UNCTAD's mandate to provide technical assistance was considerably strengthened at its eighth Conference. The thrust of the new mandate is that the secretariat should concentrate on assisting countries to identify the best ways to utilize opportunities provided by the liberalization of trade in services to increase the competitiveness of their domestic service sector and to enhance their participation in international trade in services.

D. Guides and guidelines

1. UNIDO: guide to investors

29. Since 1990 UNIDO has added to its publications in this field two investor's guides, one for Hungary and another for the United Republic of Tanzania.

2. UNIDO: guides on industrial subcontracting

30. In the framework of this programme, legal, tax and custom aspects related to industrial subcontracting operations in the Arab region have been surveyed. A Guide is presently being prepared. A similar survey is being prepared for the Latin American region. UNIDO has also surveyed the existing nomenclatures and terminologies and recommended the use of several of them which have been either designed or applied by the EC. Among these is the Combined Nomenclature on the Tariff and Statistical Nomenclature and on the Common Customs Tariff (Commission—EC Regulation No. 2472/90 of 31 July 1990).

3. UNIDO: Manual on Technology Transfer Negotiations

31. The Manual on Technology Transfer Negotiations under preparation by UNIDO is intended to serve the purpose as a teaching tool for technology transfer negotiation courses, for developing the skills of trainers of negotiators and as a working tool for negotiators. It covers, in a comprehensive manner, the range of subjects that entrepreneurs, decision-makers and government officials dealing with technology acquisition are likely to be confronted with in the various phases of the technology transfer process. These subjects include not only those directly related to the evaluation and negotiation of contracts but also the aspects that influence technology options, the behaviour of parties and the results of negotiations.

4. UNIDO: guidelines on the development, negotiation and contracting of BOT contractual arrangements

32. The Guidelines, currently under preparation, are intended to impart to users or potential users of the BOT (build-operate-transfer) scheme for project implementation with guiding principles on issues such as the legislative framework, tendering, basic and essential contractual features, the risk structure of parties involved, financing, insurance, period of operation and transfer of ownership. In addition, the Guidelines will aim to make all parties aware of the changing character of risks in a BOT scheme as compared to the standard traditional contractual structure used in the construction of large plants. Consequently, the Guidelines will point out the methods of meeting the new risks and differentiating between the risks which should be decreased or minimized and the risks which are unavoidable. The Guidelines will contain analyses of the BOT contractual structure from the point of view of all parties concerned (for more details see A/CN.9/378, paras. 2-5).

E. Joint ventures

1. AALCC: industrial joint ventures

33. The secretariat of AALCC prepared a preliminary version of the Guide on Legal Aspects of Industrial Joint Ventures in Asia and Africa and submitted it to the AALCC's Nairobi session held in February 1989. Subsequently, the secretariat revised and updated the preliminary version of the Legal Guide and presented it to the Cairo session held in April 1991. At that session, AALCC decided to adopt the revised version of the Guide. However, following the establishment of a computerized Data Collection Unit, further information on national laws on joint ventures was collected that made the further revision of the Guide necessary. The secretariat is, therefore, currently engaged in updating the Guide.

2. ICC: joint ventures

34. The current priority of the Working Party on Joint Ventures of the ICC Commission on Law and Practice

relating to Competition is the evaluation of industry experience with block exemptions and formulation of recommendations for improvement of the competition rules.

3. UNCTAD: joint ventures

35. The UNCTAD secretariat continued to prepare a series of publications whose purpose has been to describe and compile the regulations concerning foreign investments in developing countries. A new volume has been published relating to the regulations of Latin America and Caribbean countries (UNCTAD/ECDC/220). The UNCTAD secretariat has also continued to undertake studies on institutional and legal aspects relating to the promotion of multilateral and joint ventures among developing countries, such as "Andean joint enterprises: analytical compendium" (UNCTAD/ECDC/228) and "Arab multilateral enterprises" (UNCTAD/ECDC/223).

IV. PRIVATIZATION

A. AALCC

36. Privatization was included in the work programme of AALCC further to a recommendation made by the Trade Law Subcommittee at the Cairo session in April 1991. The secretariat is currently studying the legal issues involved in privatization with a view to preparing a guide on legal aspects of privatization in Asia and Africa. A questionnaire prepared by the secretariat was circulated to member States. A preliminary study was submitted to the Kampala session in February 1993.

B. ECE

37. The Working Party on International Contract Practices in Industry of the ECE Committee on the Development of Trade, prepared a guide on legal aspects of privatization in industry. The guide was published in 1992 (ECE/TRADE/180). A new guide entitled "Privatization and foreign investment in the countries of Central and Eastern Europe: a comparative analysis" has been prepared (TRADE/W.5/R.9) and is expected to be published in the spring of 1993. The Working Party is expected to complete drafting of another guide entitled "Guide on the financing of East-West trade/privatization in Central and Eastern Europe" by the forty-second session of the Committee to be held in December 1993.

C. UNDP

38. In 1991, a group of experts from developing countries working under the auspices of UNDP prepared the "Guidelines on privatization". The Guidelines deal with various issues arising during the process of privatization. It also contains a chapter on technical assistance describing various possibilities for Governments to obtain technical assistance with regard to their privatization programmes (for more details on the work of AALCC, ECE and UNDP on this topic see A/CN.9/378/Add.5, paras. 36 to 48).

V. TRANSFER OF TECHNOLOGY

A. UNCTAD: draft international code of conduct on the transfer of technology

39. In 1990, the UNCTAD secretariat prepared a study entitled "The relevance of recent developments in the area of technology to the negotiations on the draft international code of conduct on the transfer of technology" (TD/CODE/TOT/55). In 1990, 1991 and 1992, consultations were held by the Secretary-General of UNCTAD and interested Governments aimed at facilitating agreement on the Code. The General Assembly, in its resolution 47/182, invited the Secretary-General of UNCTAD to continue his consultations with Governments on the future course of action on the Code and to report to the General Assembly at its forty-eighth session on the outcome of those consultations.

B. UNCTAD: policies and instruments related to transfer and development of technology

40. Policies and instruments conducive to the transfer and development of technology continued to be an area of focus of UNCTAD's comparative analysis of the role of the national policies, laws and regulations in promoting investment, technological innovation and transfer of technology. In this respect, reference should be made to two studies concerning Brazil (UNCTAD/ITP/TEC/15) and the Republic of Korea (UNCTAD/ITP/TEC/16). Regarding the role of intellectual property systems in promoting technological innovation three studies have been prepared: (i) Historical trends in protection of technology in developed countries and their relevance for developing countries (UNCTAD/ITP/TEC/18); (ii) a case study of selected Swedish firms (UNCTAD/ITP/TEC/13); (iii) a case study of the United Republic of Tanzania (UNCTAD/ITP/TEC/17). As part of its work on the trade-related aspects of intellectual property rights (TRIPS), the UNCTAD secretariat reviewed the current international initiatives aimed at establishing higher standards of intellectual property protection and securing their effective improvement worldwide within the framework of the TRIPS negotiations in the Uruguay Round of Multilateral Trade Negotiations (see paragraph 56 below). Issues raised during these negotiations which are of concern to developing countries and possible implications of a TRIPS agreement for the economic and technological development of those countries were part of the *Trade and Development Report, 1991* (United Nations publication, Sales No. E.91.II.D15 (UNCTAD/TDR/11)).

VI. INDUSTRIAL AND INTELLECTUAL PROPERTY LAW

A. UNESCO: copyright and neighbouring rights

41. During the period 1990-1992, UNESCO's activities in the field of copyright and the so-called "neighbouring rights" were aimed at promoting the adherence of its member States to the international conventions in the field; encouraging its member States to adopt legal measures in conformity with certain international recommendations adopted by UNESCO's General Conference, in particular

with regard to the protection of translators and translations, the Statutes of the Artist and the Safeguarding of Folklore; introducing the teaching of copyright and neighbouring rights (on the basis of the Programme elaborated by UNESCO) at least at the main universities of all UNESCO member States; training of personnel, judges and magistrates playing a key role in law enforcement; and creating a database on international instruments, national legislation and case law (jurisprudence) and a bibliography in this field which is to be published in 1994-1995 in CD-ROM. The secretariat of UNESCO organized a number of seminars (see paragraphs 135-136 below). At present, the secretariat has prepared a study on the ways and means to combat piracy which will be submitted for discussion by the Intergovernmental Copyright Committee in June 1993. Certain articles on this subject were published in the UNESCO *Copyright Bulletin* in 1992.

B. WIPO: intellectual property; counterfeiting and patent classification

1. WIPO: the Patent Law Treaty

42. This is the tentative name, used since 1989, of this possible new treaty which earlier was called "Treaty on the Harmonization of Patent Law". Preparatory work started in 1983. The successive drafts, prepared by the International Bureau, were considered in 11 meetings of Committees of Experts. They dealt with a variety of subjects, including the determination of the filing date of patent application, the grace period (for the public disclosure of the invention without destroying the novelty otherwise required for the purposes of patenting it), the manner of describing and claiming an invention, the exclusive rights of a patent owner, the non-exclusion of certain kinds of inventions from the possibility of patenting, the duration of a patent, the prohibition of pre-grant opposition and giving the right to a patent, between two inventors having made the same invention, to the one who was the first to apply for a patent ("first to file") rather than the one who was the first to make the invention ("first to invent").

43. The Diplomatic Conference that, eventually, should adopt the Treaty met (in what was termed the first part of a two-part Conference) in The Hague in June 1991. Not concluding the task in The Hague was decided for two reasons: one was that the negotiations of the Uruguay Round of GATT, also dealing with many of the questions on the agenda of the Diplomatic Conference, were not yet completed; the other was that the Delegation of the United States of America had not yet concluded its consultations with the interested circles in its country. The question of the date when the Diplomatic Conference should be resumed will be considered by the Governing Bodies of WIPO in September 1993.

2. WIPO: revision of the Hague Agreement

44. A Committee of Experts held its first session in April 1991 to recommend solutions, including the possible revision of the Hague Agreement (International Deposit of Industrial Designs) or the establishment of a new system,

which should both increase the use of the Hague system of international deposit and permit more States to adhere to the Hague Agreement. At its second and third sessions, held in April 1992 and April 1993, the Committee of Experts considered a draft treaty on international deposit of industrial designs, prepared by the International Bureau, which is aimed at improving the Hague system and encouraging new States to accede to the Agreement.

3. WIPO: Madrid Agreement

45. As the Protocol relating to the Madrid Agreement Concerning the International Registration of Marks, adopted in Madrid on 27 June 1989, has not yet entered into force, a Working Group has been set up by WIPO to revise the regulations to implement the Protocol. The Working Group on the Application of the Madrid Protocol of 1989 held five sessions (in March and November 1990, May and November 1991 and October 1992), with the aim of preparing new Regulations which would apply both under the Madrid Agreement and the Madrid Protocol once the Madrid Protocol enters into force.

4. WIPO: harmonization of trade marks laws

46. The Committee of Experts on the Harmonization of Laws for the Protection of Marks held four sessions in 1991 and 1992 and its fifth session in June 1993. It examined a draft Treaty on the Simplification of Administrative Procedures Concerning Marks, prepared by the International Bureau.

5. WIPO: Possible Protocol to the Berne Convention and Possible Instrument on the Protection of Rights of Performers and Producers of Phonograms

47. Three sessions of the Committee of Experts on a Possible Protocol to the Berne Convention have been held (November 1991, February 1992 and June 1993). The said Committee is examining questions relating to copyright protection of computer programs and databases, rental right, non-voluntary licenses for the sound recording of musical works and for primary broadcasting and satellite communication, distribution right, including importation right, duration of protection of photographic works, communication to the public by satellite broadcasting, enforcement of rights, and national treatment. A Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms met in June 1993 and examined questions relating to the effective international protection of the rights of performers and producers of phonograms.

6. WIPO: Model Law on the Protection of Producers of Sound Recordings

48. In June 1992, the first session of the Committee of Experts on a WIPO Model Law on the Protection of Producers of Sound Recordings considered a draft Model Law prepared by the International Bureau. The Committee recommended that the Model Law also cover the rights of performers. That recommendation was approved in Sep-

tember 1992 by the Assembly of the Berne Union. A second session of the Committee of Experts is scheduled for November 1993.

7. WIPO: international registration of audiovisual works

49. The Film Register Treaty (Treaty on the International Registration of Audiovisual Works) adopted at Geneva on 18 April 1989, has entered into force on 27 February 1991. Eight States were parties to the Treaty as of 15 June 1993 (Argentina, Austria, Brazil, Burkina Faso, Czech Republic, France, Mexico, and Slovakia). The Treaty establishes, under the auspices of WIPO, an international register of audiovisual works. Nationals of a contracting State, or one that has paid the prescribed fee, may apply to have statements concerning audiovisual works and rights thereon entered into the International Register. Any statement recorded must be considered true until proven otherwise. The Treaty thus creates a rebuttable presumption as to the veracity of the statements contained in the International Register. The Register is an administrative unit of the International Bureau of WIPO. It began receiving applications on 1 September 1991.

8. WIPO: dispute settlement

50. In 1990, a WIPO Committee of Experts started working on a draft treaty on the settlement of intellectual property disputes between States. It met five times in 1990, 1991, 1992 and 1993. The draft treaty provides for direct consultations between the parties to a dispute and submission of the dispute to a panel procedure. Optional submission of a dispute to good offices, conciliation and mediation or to arbitration is also provided for. A sixth session of the Committee of Experts is scheduled to take place in March 1994, together with a preparatory meeting for a Diplomatic Conference, the date of which has not yet been fixed. The preparatory meeting will decide on the States and organizations to be invited to the Diplomatic Conference, the provisional agenda and the provisional rules of procedures.

51. The International Bureau continued to study the possibility of providing services of arbitration and mediation for the settlement of intellectual property disputes between private parties. Three meetings of a Working Group of non-governmental organizations have been held (in May and November 1992 and in June 1993). The meetings considered the desirability of the provision of such services by WIPO, as well as the type of services that could be provided. Among the procedures that were discussed were arbitration, expedited arbitration and mediation. The International Bureau prepared a memorandum setting forth draft rules concerning each of those procedures.

C. International protection of cultural property

1. UNESCO

52. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Owner-

ship of Cultural Property of 1970 provides for cooperation to hinder the trade in stolen and illegally exported cultural property. In implementation of this Convention, UNESCO assisted States in drafting legislation controlling the import and export of cultural property in conformity with the Convention, assisted in drafting a model bilateral treaty on the subject, took action to coordinate databases on stolen cultural property and circulated notes of stolen cultural property. As a result of a report commissioned by UNESCO in 1983, UNESCO asked UNIDROIT to draft a text dealing with some of the issues of private law not resolved in the 1970 UNESCO Convention.

2. UNIDROIT

53. A study group of experts prepared a text of a preliminary draft Convention on Stolen or Illegally Exported Cultural Objects. The most important provisions of that text stipulate that any stolen property of artistic, historical, spiritual, ritual or other cultural significance, whether in private or public hands, whether taken from a collection or an individual item, whether inventoried or not, must be returned. The text was considered by the Governing Council of UNIDROIT at its sixty-ninth session in April 1990. The Governing Council endorsed the draft approved by the Study Group on the International Protection of Cultural Property, as a basis for future work. It also decided that the secretariat should communicate the draft Convention to Governments and other interested organizations and it authorized the secretariat to convene a first session of a Committee of Governmental Experts. The Committee held three sessions (May 1991, January 1992 and November 1992). During the first two sessions, the Committee proceeded to two readings of the text of the preliminary draft Convention. During the second session, the most recent proposal for an EC Council Directive on the approximation of laws, regulations and administrative provisions of the member States relating to the return of cultural objects unlawfully removed from the territory of a member State was also made available. At the third session, the Committee reviewed a revised draft prepared by the secretariat. The timing of a Diplomatic Conference for the adoption of the future Convention, most likely in the latter half of the triennial period 1993-1995, will to a large extent depend on whether further sessions of the Committee will prove necessary.

D. International sales of work of art

1. UNESCO

54. At the request of a UNESCO Committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation, work is currently proceeding for a Code of Ethics for dealers in cultural property.

2. ICC

55. ICC published volumes II and III of its *International Sales of Works of Art* publication. Volume II examines legal restrictions and provides legal advice to dealers on

how to purchase or sell works of art abroad. Tax laws as well as export and import terms are also described in charts. Volume III describes the ways by which an art collection can be moved from one EC country to another. It also reviews the legal and commercial issues in the international art market, containing also a number of national reports describing the situation in several countries. Volume IV is scheduled to be published in 1993.

E. GATT: intellectual property

56. In the context of the Uruguay Round negotiations, a Draft Final Act was issued in December 1991. This document, which embodies 27 Agreements laying down the results of these multilateral trade negotiations, is still under consideration by Governments. The Draft Final Act includes the establishment of a Multilateral Trade Organization (MTO) as the legal framework for all these Agreements and a unified system for the settlement of disputes between Governments. One of the covered texts is the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), including Trade in Counterfeit Goods. The TRIPS Agreement has five main elements. First, it lays down certain general obligations, the most important of which is the obligation to give foreigners treatment no less favourable than one's own nationals (national treatment). Second, it establishes the minimum norms and standards countries must provide for in respect of a number of categories of intellectual property. Third, the Agreement obliges the countries to provide effective means by which right holders can enforce their rights and specifies in some detail the procedure and remedies that must be available to right holders. Fourth, in respect of disputes arising between member Governments, the unified dispute settlement system which is being created within the framework of the MTO will be available. And fifth, the Agreement includes transitional arrangements which provide more time for developing than for developed countries to bring their domestic laws into conformity with the Agreement.

VII. INTERNATIONAL PAYMENTS

A. UNCITRAL: Model Law on International Credit Transfers

57. The UNCITRAL Model Law on International Credit Transfers was adopted on 15 May 1992. The Model Law is designed to assist legislators in preparing improved and internationally harmonized legislation on international credit transfers. It contains four chapters. Chapter I establishes the sphere of application and defines key terms. Chapter II deals with obligations of the sender of a payment order, the time when payment by the sender of a payment order to the receiving bank is deemed to occur, acceptance or rejection of a payment order, obligations of a receiving bank, obligations of the beneficiary's bank, time limit for the execution of a payment order and revocation of a payment order. Chapter III deals with consequences of failed, erroneous or delayed credit transfers, including the question of bank liability and limits on bank liability. Chapter IV deals with completion of the credit transfer.

B. Guarantees and letters of credit

1. ICC: guarantees and letters of credit

58. ICC published the *Uniform Rules for Demand Guarantees* (ICC publication No. 458). The ICC Commission on Banking Technique and Practice set up a working group to consider revising the Uniform Customs and Practices for Documentary Credits (UCP 400). It distributed a draft UCP 500 (ICC document No. 470-37/104). The working group met on 9 August, and on 19 and 20 November 1992, and reviewed the comments of the various National Committees on the proposed UCP 500 articles. A formal edited final version will be submitted to the Banking Commission for approval at its meeting on 10 May 1993. It is expected that, if approved at that time by the Banking Commission, and by the ICC Executive Board, the UCP 500 will be implemented as of 1 January 1994. FIATA is also partly involved in the UCP 400 revision.

2. UNCITRAL: guarantees and stand-by letters of credit

59. At its fourteenth session held from 3 to 14 September 1990, the Working Group on International Contract Practices examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67) and considered the issues discussed in the note by the Secretariat relating to amendment, transfer, expiry and obligations of guarantor (A/CN.9/WG.II/WP.68). At its fifteenth session from 13 to 24 May 1991, the Working Group considered some remaining issues relating to the obligations of the guarantor and, based on notes by the Secretariat (A/CN.9/WG.II/WP.70 and 71), fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction. At its sixteenth session from 4 to 15 November 1991, the Working Group examined draft articles 14 to 27 of the uniform law (A/CN.9/WG.II/WP.73 and Add. 1) and requested the Secretariat to revise the draft articles of the uniform law taking into account the deliberations and decisions of the Working Group (A/CN.9/361). At its eighteenth session from 30 November to 11 December 1992, the Working Group reviewed draft articles 1 to 8 (A/CN.9/WG.II/WP.76 and Add.1) and requested the Secretariat to revise those articles for its consideration after completion of the review of the remaining articles, which would be resumed at the nineteenth session (24 May to 4 June 1993).

VIII. INTERNATIONAL TRANSPORT

A. Transport by sea and related matters

1. UNCITRAL: Convention on Liability of Operators of Transport Terminals in International Trade

60. Following General Assembly Resolution A/44/33 of 4 December 1989, a Diplomatic Conference was held at Vienna from 2 to 19 April 1991 in order to consider the adoption of the draft Convention on Liability of Operators of Transport Terminals. The Convention was adopted on 17 April 1991, and two days later opened for signature. It

remained open until 30 April 1992. By that date, five countries had signed on as Contracting States. In order to become effective, five States must ratify, accept or approve of the Convention. Any such instruments of ratification or accession must be deposited with the Secretary General at United Nations Headquarters in New York. The Convention establishes a uniform legal regime governing the liability of an operator of a transport terminal for loss of damage to goods and for delay in handing goods over. The applicability of the Convention is determined on the basis of the transport-related services enterprises such as stevedores, longshoremen or dockers perform irrespective of the name of the enterprise. The liability of the operator under the Convention is based on the principle of presumed fault or neglect (for the Official Records of the Conference see United Nations publication, Sales No. E.93.X1.3).

2. UNCTAD: *United Nations Convention on Conditions for Registration of Ships (1986)*

61. The United Nations Convention on Conditions for Registration of Ships was signed by 16 countries. As of 31 December 1992, eight countries had become contracting parties to the Convention.

3. UNCTAD: *Guidelines on the United Nations Convention on a Code of Conduct for Liner Conferences*

62. The resumed session of the Review Conference on the United Nations Convention on a Code of Conduct for Liner Conferences was convened from 21 May to 7 June 1991 and adopted a resolution (TD Code:2/13—Res.II) that sets forth a number of guidelines relating to the working and implementation of the Convention. The Guidelines deal with issues such as membership of container slot/space-charter operators in conferences, the application of the Convention to the international sea-leg of multimodal transport services, transshipment operations, participation of national shippers or shippers' organizations in the consultation machinery, and measures necessary to ensure implementation of the Convention. Resolution II calls upon all parties, including the governmental authorities at the two ends of the trade to which the Code applies, to hold consultations in order to find mutually acceptable solutions to problems relating to the working and implementation of the Convention.

4. UNCTAD/UNCITRAL: *study on the economic and commercial implications of the entry into force of the Hamburg Rules and the Multimodal Transport Convention*

63. A joint UNCITRAL/UNCTAD study, combining TD/B/C.4/315, Parts I and II, was published in 1991 (United Nations publication, Sales No. E.91.II.D.8). Part I discusses the background of the Hamburg Rules, the economic and commercial implications of the entry into force of the Hamburg Rules (1 November 1992) and contains an article-by-article commentary on the Hamburg Rules. Part II presents information on the Multimodal Transport Convention.

5. FIATA: *study on the impact of the Hamburg Rules on international freight forwarding*

64. A special task group of FIATA conducted in February 1993 a study on the impact of the coming into force of the Hamburg Rules on the Convention on International Freight Forwarding. The results of that study are expected to be presented to the FIATA Headquarters session in April 1993.

6. UNCTAD/ICC: *Rules for Multimodal Transport Documents*

65. Pending the entry into force of the 1980 United Nations Convention on International Multimodal Transport of Goods, and pursuant to resolution 60(XII) of the former UNCTAD Committee on Shipping, the UNCTAD secretariat and ICC jointly prepared a set of Rules for Multimodal Transport Documents which came into effect on 1 January 1992. The Rules follow the network liability principle. The multimodal transport operator (MTO) and the consignor may invoke the mandatory liability rules of international Conventions and national law, which would have applied if a separate and direct contract had been made for the particular stage of the transport where the loss, damage or delay occurred. The general basis of liability is expressed in Rule 5.1 as a liability for "presumed fault or neglect". The MTO is also liable for acts or omissions on the part of his servants or agents or any other person whose services he makes use of for the performance of the contract (Rule 4.2).

7. FIATA: *Combined Transport Bill of Lading (FBL)*

66. After the UNCTAD/ICC Rules for Multimodal Transport Documents came into effect, FIATA started revising its FBL based on the ICC Uniform Rules for a Combined Transport Document (ICC publication No. 298). The revision of the FIATA FBL according to the new UNCTAD/ICC Rules has practically been completed and, depending on approval by ICC, the new FIATA FBL, which will be named "FIATA Multimodal Transport Bill of Lading" is expected to be introduced in July 1993.

8. UNCTAD/IMO/CMI: *maritime liens and mortgages*

67. Following General Assembly resolution 46/213, a United Nations/IMO Conference of Plenipotentiaries has been scheduled to be held in Geneva from 19 April to 7 May 1993 for the consideration and adoption of a Convention on Maritime Liens and Mortgages. The draft Convention on Maritime Liens and Mortgages (LEG/MLM/27-JIGE(V1)8) was prepared by the Joint UNCTAD/IMO Intergovernmental Group of Experts during its six sessions held between 1986 and 1989. The Joint Working Group of Experts has used as the basis of its work the draft Convention adopted by the CMI Conference in 1985 at Lisbon. CMI has given special assistance to the Joint Working Group in respect of the work on the draft Convention. The objectives of the draft Convention are: (i) to provide a generally acceptable legal framework governing the recog-

dition and enforcement of maritime liens and mortgages and thus to promote international uniformity, and (ii) to strengthen the international position of the mortgagees and financiers of shipbuilders and ship purchasers and thereby improve conditions for ship financing at the international level. The new Convention would replace the 1926 and 1967 Conventions for the unification of certain rules relating to maritime liens and mortgages.

9. UNCTAD: charter-parties

68. The twelfth session of the UNCTAD Working Group on International Shipping Legislation (WGISL) was held in October 1990 and considered the subject of charter-parties. The WGISL had before it the report prepared by the secretariat entitled "Charter parties—a comparative analysis" (TD/B/C.4/ISL/55). The report highlighted some of the problems and disputes arising from: the use of out-dated charter-party forms; the interpretation of their wording; the application of different liability regimes to the charter-party and to bills of lading, as well as problems caused by contractual incorporation of the Hague-Visby Rules into the charter-party through a paramount clause.

10. UNCTAD: general average

69. The thirteenth session of the UNCTAD Working Group on International Shipping Legislation was held in November 1991 to examine the subject of general average. The report prepared by the UNCTAD secretariat ("General average—a preliminary review" (TD/B/C.4/ISL/58)) reviewed, *inter alia*, the arguments for and against the general average system. It concluded that in view of a long history of calls for abolition of the system going back to 1877, it would seem premature to consider questions of reform until the technical problems had been thoroughly discussed by the insurance interests concerned. The Working Group decided to request the secretariat, in close collaboration with CMI, to approach the insurance industry and other interested organizations in order to study the extent to which insurance arrangements could simplify the operation of the general average system. Investigations are presently under way for the preparation of the requested report.

11. UNCTAD: marine insurance/minimum standards for shipping agents

70. The UNCTAD Model Clauses on Marine Hull and Cargo Insurance and the Minimum Standards for Shipping Agents are being promoted through seminars and technical assistance projects.

12. UNCTAD: harmonization and modernization of maritime legislation

71. The secretariat is currently involved in updating and harmonizing the maritime legislation of various countries at the regional level (MINCONMAR member States—Western and Central African States—and Central Ameri-

can countries) and national level (Ethiopia), with the aim of providing a legal framework for more effective maritime transport. Training of nationals of these States forms an integral part of the projects.

13. IMO: Protocol of 1990 to Amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974

72. The Protocol of 1990 to Amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, was adopted at a Diplomatic Conference held in London from 26 to 30 March 1990 (LEG/CONF.8/10). As of 2 December 1992, one State had acceded to the Protocol.

14. IMO: International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990

73. The International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 was adopted at a Diplomatic Conference held in London from 19 to 30 November 1990 (OPPR/CONF/25). The Treaty is designed to improve the ability of nations to cope with a sudden pollution emergency. Even though the Convention is not in force, some provisions adopted by the Diplomatic Conference have been used as the basis for IMO's response to the massive oil pollution in the Persian Gulf. As of 2 December 1992 the Convention had been ratified by six States.

15. IMO: consideration of a possible convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea

74. In 1990, the IMO Council and the Assembly assigned the highest priority to the consideration of a draft convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea (HNS). The purpose of this convention is to create an international liability regime based on the principle of strict liability which would provide for adequate compensation to the victims of damage caused in connection with the carriage of hazardous and noxious substances by sea. The damage to be covered by the convention would include loss of life and personal injury, loss or damage to property, as well as the loss or damage caused by contamination of the marine environment. The draft convention (LEG.67/3) regulates the main features of a first tier of compensation based upon the liability of the shipowner and a second tier which would regulate the establishment and operation of an international scheme to be contributed by HNS cargo interests. It is hoped that a final draft HNS convention will be submitted for the consideration of a diplomatic conference in the 1994-1995 biennium.

16. IMO: revision of the 1969 Civil Liability Convention and the 1971 Fund Convention

75. In 1984, two Protocols were adopted under the auspices of IMO to revise the 1969 Civil Liability Convention

and the 1971 Fund Convention especially to increase the level of compensation provided for victims of pollution damage. The IMO secretariat estimates that there are no prospects for the conditions for entry into force of these Protocols to be met. In view of the strong support expressed by Governments for the compensation regime based upon the two treaties and in order to ensure its continued viability through the entering into force of the substantive provisions of the 1984 Protocols, a Diplomatic Conference on the revision of the 1969 Civil Liability Convention and the 1971 Fund Convention was held at IMO headquarters from 23 to 27 November 1992. At the end of its deliberations the Conference adopted the 1992 Protocol to the Civil Liability Convention, 1969, and the 1992 Protocol to the Fund Convention 1971 (LEG/CONF.9/16 and LEG/CONF.9/17).

17. *CMI: carriage of goods by sea*

76. During the 34th International Conference of the CMI held in Paris from 24 to 28 June 1990, a draft study entitled "Uniformity of the Law of the Carriage of Goods by Sea in the 1990's" was discussed and approved, with some amendments, as a basis for future work. The topic was again on the agenda of the International Conference on Current Issues in Maritime Transportation, held at Genoa on 25 and 26 June 1992.

18. *CMI: sea waybills*

77. The 34th International Conference of CMI adopted the CMI Uniform Rules for Sea Waybills. These Rules apply to cases where they are adopted by a contract of carriage which is not covered by a bill of lading or a similar document of title.

19. *CMI: electronic transfer of rights to goods in transit*

78. The 34th International Conference of CMI considered and adopted the CMI Rules for Electronic Bills of Lading which had been drafted by an international subcommittee. The Rules create a system of communicating transport data and legal functions without using traditional paper documents (for more details see A.CN.9/350, paras. 54, 69 and 104-108).

20. *CMI: York Antwerp Rules 1974*

79. Following the revision of article VI of the York Antwerp Rules at the 34th International Conference of CMI, it was decided to review the York Antwerp Rules in general. CMI has entrusted an International Subcommittee with the task. On the basis of the first report it was decided to revise the York Antwerp Rules. The Subcommittee is preparing a draft of revised Rules which will be submitted to the International Conference of CMI at Sydney in 1994.

21. *CMI: assessment of damage to the marine environment*

80. A Working Group and a Subcommittee of CMI is studying methods and procedures of assessment of damage to the marine environment in the context of civil liability for pollution damage. The studies are in particular based on the experiences gained in connection with oil pollution damage caused by the carriage of oil by sea. The first results of the studies were discussed at the Colloquium of CMI on Assessment of Damage to the Marine Environment held at Genoa on 18 and 19 September 1992. A draft of such guidelines will be submitted to the International Conference of CMI at Sydney in 1994.

22. *CMI: offshore mobile craft*

81. The CMI Conference at Rio de Janeiro 1977 adopted a draft Convention on Offshore Mobile Craft. The draft was submitted to IMO for consideration and put on the long-term work programme of the Legal Committee of IMO. Due to the heavy work schedule of the Legal Committee of IMO the draft has not yet been discussed. Since the Legal Committee of IMO is now considering to work on the subject, IMO has requested CMI to review the draft in the light of developments since 1977. In response to the request CMI has set up a Subcommittee that is entrusted with the task to review the 1977 Rio draft.

23. *CMI: third-party liability in maritime law*

82. CMI has set up a Study Group for reviewing the Conventions concerning third-party liability including limitation of liability in maritime law. The subject was included in the long-term work programme. It is expected that a first report will be presented to the International Conference of CMI at Sydney 1994.

24. *CMI: maritime agents*

83. CMI is studying the possibility of harmonization of the law governing the activities of maritime agents. Depending on the results of the study, the subject may be discussed at the International Conference of CMI at Sydney in 1994.

25. *CMI: Voyage Charter-party Interpretation Rules (1992)*

84. In a joint effort of CMI, the Baltic International Maritime Council (BIMCO), the International Federation of Shipbrokers and Agents (FONASBA), International Chamber of Shipping and the International Association of Dry Cargo Shipowners (INTERCARGO) a draft of "Voyage Charter-party Interpretation Rules 1992" was prepared. The Rules offer definitions and interpretations of terms frequently used in charter-parties. CMI will continue the work on Charter-party Rules and discuss the subject at the International Conference of CMI at Sydney in 1994. An International Subcommittee of CMI will be set up for the preparation of further work on the item.

B. Transport by air

ICAO

85. The ICAO secretariat prepared and sent in January to States a circular letter on the "Warsaw System", to which was attached a "Text of Convenience" of the Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, by the Additional Protocol No. 3 of Montreal, 1975, and by Protocol No. 4 of Montreal, 1975. The current General Work Programme of ICAO's Legal Committee, as approved by the Council on 18 November 1992, gives priority No. 2 to the item "Action to expedite ratification of Montreal Protocols Nos. 3 and 4 of the Warsaw System" and priority No. 3 to the item "Study of the instruments of the Warsaw System".

C. Transport overland and related issues

1. OTIF: Convention concerning International Transport by Rail (COTIF)

86. The Revision Committee set up by OTIF to review the COTIF decided, at its first and second sessions (14-21 December 1989 and 28-31 May 1990 respectively), to amend the COTIF. The amendments decided by the Revision Committee at its first session entered into force on 1 January 1991, and those decided at its second session entered into force on 1 June 1991. The 1990 Protocol to amend the COTIF has been ratified, accepted or approved by ten States. The Protocol will come into force only if it has been ratified, accepted or approved by more than two thirds of the 34 member States.

2. OTIF: Regulations concerning the International Carriage of Dangerous Goods by Rail (RID)

87. The RID is under a constant revision process. Following the adoption of numerous amendments decided by the Committee of Experts on the Carriage of Dangerous Goods at its twenty-eighth session (2-12 April 1991), a consolidated version of RID has been published with effect as of 1 January 1993.

3. CIT: electronic consignment note

88. CIT continued its work for the replacement of the international railway consignment note through an electronic consignment note (DOCIMEL project). The project will be implemented in stages, with the first application expected to take place in 1995. As a first step, CIT prepared draft uniform tariffs regulations that will be reviewed in the near future. CIT prepared also a model uniform transport document for use by the railway systems applying the COTIF (for information on EDI-related topics see paragraphs 107-110 below).

4. IRU: model contract between car transport companies and hotel keepers

89. IRU, in cooperation with the International Association of Hotel owners (AIH), is preparing a model contract con-

taining general conditions on accommodation and a code of driving matters, harmonizing the existing relevant practices.

5. IRU: electronic transport contract

90. A comparative study has been prepared in order to consider the possibilities and the problems arising with regard to the conclusion of a transport contract by electronic means of communication. In this respect, IRU is developing a draft communication agreement, in cooperation with FIATA and ICC.

6. UNIDROIT: civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels

91. The Convention on Civil Liability for Damage Caused During the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels was adopted at Geneva in 1989 under the auspices of ECE. By March 1993 no State had ratified the Convention.

IX. INTERNATIONAL COMMERCIAL ARBITRATION

A. AALCC: regional arbitration centres

92. The AALCC regional arbitration centres are involved in the dissemination of information relating to international commercial arbitration (see paragraph 120 below).

B. ICC: international arbitration

93. The current priorities of the ICC Commission on International Arbitration are: examination of issues relating to multi-party arbitration, examination of Model ICC Arbitration Clause and jurisprudence related to arbitration clauses, revision of ICC's Rules for Technical Expertise and preparation of a report on how to optimize the use of Terms of Reference. The Commission has set up working parties for each of those priority topics. Further to the decision of its Working Party on Multi-party Arbitration, ICC published *Multi-party Arbitration* (ICC publication No. 480). It contains the views of specialists in international arbitration on issues such as drafting of arbitral agreements, appointment of arbitral tribunal, organization of arbitral proceedings and consolidation in case where there are multiple claimants or defendants. ICC also published *Taking of Evidence in International Arbitral Proceedings* (ICC publication No. 440/8), which describes in detail the different national procedural rules in arbitration which can apply under common as well as civil law systems. It also suggests solutions as to how these systems can be reconciled when, e.g., parties to a dispute come from countries which have different systems for the taking of evidence. Finally, ICC plans to publish soon a book on arbitration and competition law.

C. FIATA/IRU: arbitration rules

94. FIATA elaborated jointly with IRU arbitration rules according to article 33 of the CMR Convention.

D. ICCA: publications and congresses

95. ICCA continued to publish its *Yearbook: Commercial Arbitration*. The *Yearbook* provides comprehensive and up-to-date worldwide information on commercial arbitration. The *Yearbook* includes national reports on arbitration law and practice, court decisions on the application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, abstracts of arbitral awards from arbitral institutions and ad hoc arbitrations, and articles on arbitration rules and practice. The *Yearbook* entered its 17th year in 1992. The last national report was published in *Yearbook XIV—1988*. The national reports are now presented exclusively in ICCA's *International Handbook on Commercial Arbitration*, a loose leaf series of arbitration statutes and national reports. By the end of 1992, 13 supplements have been published (for training and assistance activities see paragraph 126 below).

E. ILA: transnational rules of law

96. The 64th Conference of the ILA, held in Australia in August 1990, reviewed the preliminary reports of the rapporteurs of the Committee on International Commercial Arbitration and invited the Committee to identify possible areas in the field of international commercial arbitration in which the application of rules of transnational nature may be of significance, to undertake a study in those areas and report on its work to the 65th Conference of the Association.

X. PRIVATE INTERNATIONAL LAW

A. Hague Conference: law applicable to negotiable instruments

97. At the sixteenth session of the Conference, the Permanent Bureau submitted a report (preliminary document No. 8) identifying the problems arising with regard to the revision of the Geneva Conventions of 1930 and 1931 and the specific conflict of laws issues that the United Nations Convention on International Bills of Exchange and International Promissory Notes might raise. The Special Commission, which met in June 1992 in order to examine the status of the work in progress and to prepare the decisions that are to be taken at the seventeenth session in May 1993, agreed that the topic was not of such importance as to convene an extraordinary session to deal with it. However, the Commission, in view of the imperfections of the Geneva Conventions and the possibility of renewed interest on the part of the States in the UNCITRAL Convention, decided to maintain the topic on the agenda for the Conference's work, but without any priority.

B. Hague Conference: contract practices studies

98. The Hague Conference has been working for a number of years on several topics in the area of contract practices. The Special Commission which met in June 1992 recommended that the seventeenth session strike from UNIDROIT's agenda the topic of the law applicable to

licensing agreements and transfer of technology, because of continuing doubts about the viability of this topic. The Commission recommended to the seventeenth session that the topic of the law applicable to unfair competition be retained because of its inherent and continuing interest, but without priority, as there was doubt as to whether there was a pressing need for a convention, especially in view of the growing trend in case law and legislation towards uniformity of conflicts treatment.

C. Hague Conference: law applicable to contractual obligations

99. The Commission considered a report (preliminary document No. 7) prepared by the Permanent Bureau and recommended that this topic be struck from the agenda for future work.

D. Hague Conference: law applicable to multimodal transport

100. It was realized during the meeting of the Special Commission that the work that UNCTAD and ICC have undertaken on this topic has minimized its interest from a conflict of laws view. The Special Commission, therefore, recommended that work on this topic be discontinued.

E. Hague Conference: EDI

101. The Permanent Bureau prepared a report (preliminary document No. 3) dealing with EDI. The Commission recommended that the topic be retained on the agenda for future work and that the Permanent Bureau be charged with continuing the study of the EDI-related problems, remaining in contact with other organizations working on this topic (for information on EDI-related work see paragraphs 108-111 below).

F. Hague Conference: credit transfers

102. The Permanent Bureau prepared and submitted to the Special Commission a report analysing the conflict of laws problems arising in connection with credit transfers. A questionnaire was circulated to banks and international payment systems and it is expected that the Conference will consider at its seventeenth session the question whether a convention on the law applicable to credit transfers should be prepared.

G. Hague Conference: conventions on civil procedure and on international judicial and administrative cooperation

103. A number of conventions are discussed under this heading, such as the Conventions on Service of Documents Abroad and on Taking of Evidence Abroad. In particular, attention was drawn to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Con-

vention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. A Special Commission meeting was held to study the operation of these Conventions and a report was issued. The second edition of the *Practical Handbook on the Operation of the Convention on Service of Documents Abroad* was issued in 1992.

H. Hague Conference: new topics

104. In view of the UNCITRAL work on bank guarantees and stand-by letters of credit the Permanent Bureau prepared a report dealing with the conflict of laws problems arising with regard to bank guarantees (preliminary document No. 2). The Permanent Bureau submitted also a report on the law applicable to civil liability for environmental damage (preliminary document No. 9). The Special Commission decided to recommend to the seventeenth session that both topics be included in the agenda for future work, the latter with high priority. The attention of the Special Commission was also drawn to the possible drafting of a convention on recognition and enforcement of decisions in civil and commercial matters. The Special Commission decided that a working group would be set up, which would meet before the seventeenth session and submit its conclusions about the possibility and feasibility of drafting a convention on this topic to the seventeenth session. The working group met in November 1992 and unanimously concluded that negotiating through the Hague Conference a general convention on jurisdiction and enforcement of judgements was both desirable and feasible.

XI. TRADE FACILITATION

A. Administrative procedures relating to goods and documents

1. GATT: pre-shipment inspection

105. At GATT, in the context of the Uruguay Round, agreement was reached, on an *ad referendum* basis, at the Brussels Ministerial Meeting in December 1990, on an Agreement on Pre-shipment Inspection. That text forms part of the overall package in the Draft Final Act of the Uruguay Round Negotiations, a package that will be finally adopted once agreement has been reached in all areas of negotiations.

2. UNCTAD: pre-shipment inspection

106. UNCTAD prepared a comprehensive paper on pre-shipment inspection (PSI) for the ECE Working Party on Facilitation of International Trade Procedures (TRADE/WP.4/R.821), including comments on the agreement on PSI reached in the Uruguay Round Negotiations.

B. Electronic Data Interchange

1. UNCITRAL

107. At its twenty-fourth session in 1991 the Commission was agreed that the matter of EDI needed detailed consid-

eration by a working group. Pursuant to that decision the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI (A/CN.9/360). At its twenty-fifth session the Commission considered the report of the Working Group and endorsed the recommendations contained therein, reaffirmed the need for active cooperation between all international organizations active in the field and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange. The Working Group, at its twenty-fifth session held from 4 to 15 January 1993, considered the issues discussed in a note prepared by the secretariat (A/CN.9/WG.IV/WP.55) and requested the secretariat to prepare, on the basis of the deliberations and conclusions, a first draft set of articles, with possible variants, on the issues discussed.

2. ICC

108. ICC has established a Working Party on EDI with a view to developing legal support for open EDI, that is electronic communications conducted without a written interchange agreement. It has also circulated to EDI legal experts around the world a number of papers dealing with EDI-related legal problems, along with a questionnaire, in order to determine whether sufficient input could be anticipated to bring the ICC EDI project to fruition. ICC published *Interbank Transfer Techniques* (ICC publication No. 497). This publication presents the EDI progress to date, an analysis of the industrial community's financial EDI requirements and an assessment of the legal problems related with EDI, together with the impact of various EFT systems and regulations on capital adequacy and money laundering.

3. CCC

109. CCC has set up a subcommittee on EDI matters. The subcommittee has developed and approved customs-related EDI messages. It has also finalized a new guideline on the legal aspects of EDI. The secretariat has also published in 1991 a booklet entitled *An Introduction to EDI in Customs*. Also, the CCC/UPU Contact Committee examined, at its 15th meeting in October 1990, *inter alia*, the topic of harmonization of EDI transmission rules.

4. ECE

110. The Working Party on Trade Facilitation has set up a legal ad hoc working group which has issued several recommendations. A special work programme has been agreed upon which identifies legal problems in the field of trade facilitation and outlines projects in various sectors. These include legal aspects of electronic data interchange, legal aspects of trade documents, national legal and commercial barriers to trade, electronic authentication (defining electronic messages and their "signature") and coordination with other bodies. High priority is given to the development of a standard "interchange agreement" to be used by trading partners who wish to utilize EDI, the development

of a questionnaire for analysing national barriers which may exist with respect to the use of EDI, the solution of the problem of authentication of messages transmitted by EDI and the coordination of the activities of the Working Party on Facilitation of International Trade Procedures (WP.4) with other international organizations (for information on the CIT electronic consignment work and the IRU electronic transport contract see paragraphs 88 and 90 above respectively).

XII. OTHER TOPICS OF INTERNATIONAL TRADE LAW

A. CTC: draft Code of Conduct on Transnational Corporations

111. CTC continued its work on the draft Code of Conduct on Transnational Corporations. While work has progressed, consultations have not been completed between interested delegations in order to reach consensus on a number of outstanding issues. The Code of Conduct represents a major endeavor to establish a balanced, comprehensive and multilateral framework that spells out the ground rules for relations between Governments and transnational corporations. CTC publications and studies have continued to give major focus to the role and impact of transnational corporations (TNCs) on national and regional investment and in specific sectors. In detailed analyses, examination is made of legal, economic and social factors impacting on TNCs in host countries. Relevant legal issues are observed and analysed, as well as their trends and implementation. The harmonization/nationalization of national and regional laws and regulations are monitored by CTC, and are coordinated on a global basis.

B. UNCTAD: restrictive business practices

112. The Intergovernmental Group of Experts on Restrictive Business Practices held its ninth and tenth sessions from 23 to 27 April 1990 and 21 to 25 October 1991. The ninth session was devoted to preparations for the Second United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. During that session, it was recommended that a third Review Conference be convened in 1995. Pursuant to General Assembly resolution 41/167, the Second United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was convened from 26 November to 7 December 1990. The Conference adopted a resolution entitled "Strengthening the implementation of the Set" (TD/RPB/CONF.3/9) which, *inter alia*, calls upon States to implement fully all provisions of the Set in order to ensure its effective application by adopting and effectively enforcing national restrictive business practices legislation and calling upon them to adopt, improve and effectively enforce appropriate legislation and to implement judicial and administrative procedures. During its tenth session, the Intergovernmental Group of Experts reviewed the operation and implementation of the Set of Principles and Rules on Restrictive Business Practices.

C. UNIDROIT: hotel keepers contract

113. The Governing Council at its seventieth session decided that work on this item should not be further pursued in view of the limited support for it.

D. AALCC: Data Collection Unit

114. During the Nairobi session of AALCC in February 1989, the establishment of a Centre for Research and Development for the Harmonization of International Trade Law in the Afro-Asian region was proposed. Studies were prepared and submitted to the Beijing session in March 1990 and to the Cairo session in 1991. The latter study justified the establishment of the proposed Centre but, in view of the high cost involved, the establishment of the Centre was envisaged as a long term objective. As a first step towards this long term objective the AALCC decided at its Islamabad session in 1992 to set up a computerized Data Collection Unit as an integral part of the secretariat for an initial period of two years. The main function of the Unit is to collect information on the laws and regulations of member States with the final objective of attaining a possible harmonization of their legal regimes in the economic field. A number of Governments were approached and some have already provided information on their legal systems.

E. Cartagena Agreement: free trade and tariffs

115. The Board of the Cartagena Agreement has since 1990 issued a series of decisions dealing with the integration of Trade Law in the region. Those decisions are mandatory for the member States and they aim at consolidating the common rules to be applied in the region on matters such as free trade, tariffs and incentives for exports.

F. ILA: securities regulation and other matters

116. The 64th Conference of the ILA, held in Australia in August 1990, reviewed the interim report of the Committee on International Securities Regulation on the scope of its work and the relevant work of the European Communities and the Council of Europe. It also invited the Committee to report on its work to the 65th Conference of the Association. The Committee on International Trade Law, recently established, plans to study and report on selected legal issues arising from the efforts to establish an effective multilateral trading system, in particular through the Uruguay Round of the GATT, such as institutional reform and dispute settlement, trade in services and trade-related intellectual property rights.

G. UNIDROIT: Uniform Law Review

117. Four volumes of the *Review* were published in 1990, the second volume for 1987, the two volumes for 1988 and the first volume for 1989. The second volume of the 1989 *Review* and the first issue of the 1990 *Review* were pub-

lished in December 1991 and January 1992 respectively. In January 1993 the first volume of the 1991 *Review* was published.

H. IBRD

1. Multilateral Investment Guarantee Agency (MIGA)

118. MIGA has concluded legal protection agreements with six countries that will make it easier for MIGA to issue investment guarantees.

2. International Centre for Settlement of Investment Disputes (ICSID)

119. The International Centre for the Settlement of Investment Disputes (ICSID) is an international organization established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was opened for signature in 1965 and entered into force the following year. ICSID seeks to encourage greater flows of international investment by providing facilities for the conciliation and arbitration of disputes between Governments and foreign investors. To further its investment-promotion activities, ICSID also carries out a range of research and publication activities in the field of foreign-investment law. ICSID's foreign investment law publications include a semi-annual law journal, "ICSID Review-Foreign Investment Journal" and the multi-volume collection *Investment Laws of the World and Investment Treaties*. Two issues of the law journal and three releases of the investment laws and treaties collections are usually published each year.

XIII. TRAINING AND ASSISTANCE

A. AALCC

120. The Kuala Lumpur Centre organized, in January 1992, a two-day workshop for the training of potential arbitrators from the Asia-Pacific region as part of an ongoing arbitration development programme. The Cairo Centre hosted or co-sponsored the following conferences: (i) the Congress of International Federation of Commercial Arbitration Institutions held on 20 and 21 February 1992; (ii) the Cairo-Alexandria Arbitration Conference held from 11 to 15 October 1992; the first part held at Cairo was devoted to the new Egyptian Draft Law on Arbitration which is modelled on the UNCITRAL Model Law; the second part was held at Alexandria to inaugurate the opening of a new branch of the Cairo Centre to handle maritime arbitration cases; and (iii) a seminar on resolving disputes in international construction contracts through ADR techniques, held in Geneva on 12 and 13 November 1992.

B. CCC

121. The Training Unit of the CCC secretariat has organized its second EDI seminar in October 1990. The seminar was aimed at the more technical issues of EDI implemen-

tation. The Training Unit also has a fellowship programme, which was recently expanded to include nationals of countries converting to free market economies.

C. ESCAP

122. ESCAP has an ongoing training and assistance project funded by the Government of the Netherlands. The project aims at extending advisory services to interested developing countries from the ESCAP region, with a view to devise and implement trade and customs facilitation measures; it also aims at training national officials in training facilitation methodology and acquainting them with the use of EDI in trade. In January-February 1990, ESCAP organized at Manila the Second Meeting of National Trade Facilitation Bodies. In December 1990, ESCAP organized at Singapore a workshop on computerization and electronic data interchange in trade and customs. In 1991 and 1992, a series of national seminars and workshops on trade facilitation were held in Bangladesh, Bhutan, Mongolia, Myanmar and Pakistan. In 1993, a series of similar seminars are being organized for Lao People's Democratic Republic, Maldives and Viet Nam. Advisory services on trade facilitation were made available to India in 1991 and to Mongolia in 1992.

D. IBRD

123. In the context of its promotional and advisory services programme the Multilateral Investment Guarantee Agency (MIGA) of the World Bank has worked with a number of countries as they have liberalized their laws applying to foreign investments. Several developing countries have enacted new statutes that provide for international arbitration to settle investment disputes and many have entered into bilateral treaties for the protection and promotion of foreign investments. In addition, 24 advisory projects were completed by the Foreign Investment Advisory Service (FIAS). FIAS worked in 32 countries during 1992, of which approximately one third were in Africa, one third in Asia and one third in the rest of the world.

E. ICAO

124. A workshop of 15 States was held at Montreal in February/March 1991 with the participation of IATA and the ICAO secretariat, during a Conference on International Air Law, to assist the expediting of the ratification of Protocols Nos. 3 and 4. Another workshop of 14 States was held at Montreal in May 1992, during the twenty-eight session of the Legal Committee, with the same objective. In addition, a regional seminar on air law was held at Curaçao in November 1992, during which the subject of the "Warsaw System" was extensively examined.

F. ICC

125. In 1990, ICC established an Institute which has already conducted nine 5-day seminars (260 participants from over 40 countries) directed at nationals of countries

whose economies are in development or transition to the market-economy system. European experts in the fields of international contract negotiation and international commercial arbitration use the case-study method to teach international techniques and methods. In the context of its Ten Years Programme the ICC Institute plans to expand this programme with the assistance of UNDP and EEC/PHARE.

G. ICCA

126. In 1991, ICCA held at Stockholm (28-31 May 1990) its Tenth International Congress. The proceedings were published as volume 5 of the ICCA Congress Series. The subjects of this Congress were "Preventing delay or disruption of arbitration" and "Effective proceedings in construction cases". An ICCA Conference was held at Bahrain (14-16 February 1993), the subject of which was "International arbitration in a changing world".

H. OTIF

127. OTIF organized at Berne from 18 to 29 November 1991 a two-week training programme on international railway transport law. Participants from 15 member States attended the meeting and underwent successfully the final examination. Another one-week training course was organized at Ankara in June 1992. This course was specially designated for Turkish railways specialists.

I. SIECA

128. The secretariat of SIECA organized a number of seminars on "Harmonized systems and tariff and customs instruments" and on "Rules of origin", "Commercial restrictive practices" and other issues of the GATT Uruguay Round. It has also published a number of papers on those issues.

J. UNCITRAL

129. Since the statement of the Commission at its twentieth session (1987) that "training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past" (A/42/17, para. 335), the secretariat has conducted a more extensive programme of training and assistance than had been previously carried out.

130. In 1990, two seminars on international trade law were held; the first, at Conakry, Guinea, from 27 to 29 March 1990, was attended by 120 participants; and the second, in Moscow, from 17 to 21 April 1990, covered training of 21 participants from 19 different developing countries. A series of seminars on the Hamburg Rules were also held in five Latin American countries in cooperation with the Comisión Centroamericana de Transporte Marítimo (COCATRAM), from 3 to 13 September 1990. In 1991 three seminars on the legal texts that emanated from UNCITRAL were held; the first, at Douala,

Cameroon, from 14 to 18 January 1991, was attended by 50 participants from 17 francophone countries of northern, western and equatorial Africa; the second, at Quito, Ecuador, from 19 to 21 February 1991, was jointly organized by the Federación Subregional Andina de Usuarios del Transporte Internacional de Cargo (FECUTI) and the Acuerdo de Cartagena; and the third, at Suva, Fiji, from 21 to 25 October 1991, organized in cooperation with the South Pacific Forum. A symposium on international trade law was also held during the second week of the twenty-fourth session of the Commission, from 17 to 21 June 1991. Lectures were given by delegates to the Commission session and by UNCITRAL staff. Funds from the UNCITRAL Symposia Trust Fund were made available for the travel and stay in Vienna of 30 participants from developing countries.

131. In 1992, four seminars on legal texts that emanated from the Commission were held; the first, at Mexico City, from 20 to 21 February 1992, was organized in cooperation with the Mexican Ministry of External Relations and was attended by 80 ministry officials, practitioners and teachers of law; national seminars were held in Indonesia, Singapore and Thailand during November 1992. A Congress on Uniform Commercial Law in the 21st Century was held in New York from 18 to 22 May 1992, in conjunction with the twenty-fifth session of the Commission, as a contribution to the United Nations Decade of International Law. Sixty-five speakers from different regions of the world and legal systems presented to almost 600 participants from all over the world a panoramic view of development in major areas of international commercial law. In 1993, national seminars on UNCITRAL legal texts were held in Bangladesh, Pakistan, Poland, Slovenia, Sri Lanka and Ukraine. Further seminars are being planned for Eastern Europe, the Commonwealth of Independent States and Africa.

K. UNCTAD

132. UNCTAD has continued to promote the use of the Harmonized System (HS) commodity codes. Since February 1990, UNCTAD organized seminars in Singapore (September 1990), in Brunei (March 1991) and Bhutan (October 1992) on national nomenclatures based on these commodity codes. Moreover, in collaboration with UN/ESCAP, UNCTAD has organized trade facilitation seminars on EDIFACT data interchange standards in Bangladesh, Bhutan, Mongolia, Myanmar and Pakistan, pointing to the advantages of its adoption and recommending its use by all parties involved in international trade.

133. In addition, UNCTAD has been active in training and assistance in the area of transfer and development of technology. Within the context of a regional project, a workshop on "Technology transfer and management" for selected countries in Asia and the Pacific was organized at Manila, the Philippines, in December 1990. One of the main themes of the workshop dealt with channels and mechanisms for transfer of technology and negotiating technology transactions. Similarly, another workshop was organized for selected countries of the Asia-Pacific region at Kathmandu, Nepal, in December 1991. The workshop, devoted to "Technology transfer arrangements", examined the questions re-

lated to technology transactions, negotiating technology agreements, and policy instruments conducive to the promotion of foreign investments and transfer of technology. In addition, part of the discussion in the workshops was based on a series of country surveys of policies and arrangements in respect to the importation of technology in the Maldives (UNCTAD/ITP/TEC/23), Fiji (UNCTAD/ITP/TEC/30) and Myanmar (UNCTAD/ITP/TEC/33).

L. UNESCO

134. UNESCO has organized regional workshops and seminars in order to train administrators in the control of illicit traffic in cultural property. UNESCO's principal office for Asia and the Pacific at Bangkok organized a five-day regional workshop from 24 to 28 February 1992, at Jomtien, Thailand, in cooperation with the SEAMEO Regional Centre for Archaeology and Fine Arts (SPAFA), Bangkok. UNESCO also organized a national workshop at Phnom Penh from 13 to 27 July 1992, on measures to protect cultural property against theft and illicit export. A national workshop on the illicit traffic of cultural property will be held at Hollokö, Hungary, from 20 to 24 March 1993, for countries of Central and Eastern Europe on legislative and administrative steps to control illicit trade in cultural property.

135. In addition, a seminar on counterfeiting was held in September 1992 at UNESCO Headquarters in Paris by the International Federation of Senior Police Officers in cooperation with UNESCO. An international seminar whose main topic was the fight against piracy was held in Romania in October 1992. Finally, in November 1992, UNESCO held a "Reflection meeting on the challenges of copyright on the eve of the 21st century". Well-known authors of literary, scientific, musical and artistic works, performers, lawyers, economists and sociologists took part.

M. UNIDO

136. UNIDO held an expert group meeting from 18 to 20 March 1992. In the context of six key sectors, the meeting reviewed a number of issues in connection with the measures being taken in the European Community to achieve the single market.

N. UNIDROIT

137. UNIDROIT held at Rome in September 1990 and 1991 an instruction course with the International Development Law Institute (IDLI), which provided to participants (lawyers from French-speaking countries) information regarding the Institute and its activities, in particular its current work relating to the international protection of cultural property. In 1991 members of the secretariat of UNIDROIT spoke at the Second International Seminar, held at Suceava under the patronage of UNCTAD/GATT, on Romanian business and the challenge of international competition; a member of the UNIDROIT secretariat addressed the issue of "Modern methods of international commerce: franchising, leasing, factoring"; and at the

Fourth Meeting of Law Officers of Small Commonwealth Jurisdictions organized by the Commonwealth secretariat at Nicosia, the Secretary-General of UNIDROIT addressed the advantages offered by the unification process to such jurisdictions. In February 1992 the International Association of Young Lawyers (AIJA) organized a seminar on cross-border leasing, during which a member of the UNIDROIT secretariat introduced the UNIDROIT Convention and gave information regarding its implementation.

138. In the context of its work programme for the triennial period 1993-1995 UNIDROIT plans to enlarge its legal assistance programme to encompass not only developing countries but also countries restructuring their economies. In particular, UNIDROIT plans to organize, most probably in 1994, a coordination meeting on legal assistance to developing countries. This meeting would allow stock to be taken of the existing situation and broad guidelines to be drawn up aimed at improved consultation and a rationalization of efforts in this field. UNIDROIT also plans to hold seminars in developing countries, participating in seminars jointly organized with other organizations. UNIDROIT has also announced a programme of three-month research scholarships for lawyers from developing countries and countries restructuring their economies. UNIDROIT further plans to hold during the second half of the triennium 1993-1995 a Fourth International Congress on Private Law. A subcommittee of the UNIDROIT Governing Council is expected to meet before the seventh-second session to consider a secretariat paper dealing with the content of the Congress, its timing and venue.

O. WIPO

139. In October 1991, WIPO and the United Nations Conference on Environment and Development (UNCED) jointly organized a meeting of experts which discussed and clarified legal and technical aspects of intellectual property issues relating to the transfer of technology that had bearing on environmental protection, as part of the preparations for the United Nations Conference on Environment and Development held at Rio de Janeiro in 1992. In addition, WIPO and the European Patent Office (EPO) jointly organized a symposium on patents at Budapest for the government and private sectors of Czechoslovakia, Hungary and Poland, as well as member States of EPO. WIPO also organized a national seminar on intellectual property with the Government of Romania.

140. In 1992, WIPO organized a total of 95 courses, workshops and seminars at national, subregional, regional and global levels. They provided basic knowledge of industrial property or copyright, or specialized information in areas such as computerization of industrial property office administration, the use of computerized patent information databases, legal and economic aspects of industrial property, the administration of the collection and distribution of copyright royalties and the promotion of technological inventiveness. In addition, 90 missions comprising WIPO officials and 88 outside consultants employed by WIPO were undertaken to some 40 developing countries. Those missions afforded advice, *inter alia*, to government authorities on the upgrading of administrative procedures, compu-

terization, the provision of patent information services and the setting up of organizations for the collective administration of rights under copyright law. In 1993, the International Bureau of WIPO plans to continue giving special attention to the needs of Central and Eastern European countries, in particular through a special unit, the Central and Eastern Europe Section, which was set up at the International Bureau. There are also plans for seminars and other meetings to be organized at the national and interna-

tional levels on various aspects of intellectual property, including a seminar in Romania for Central and Eastern European countries on service inventions, and a meeting of those countries and potential donor countries at the headquarters of WIPO to discuss questions of common interest. Finally, the International Bureau contributed, in an advisory capacity, to the legislative changes that took place or were being planned in Central and Eastern European countries in the intellectual property field.

VI. STATUS OF UNCITRAL TEXTS

Status of Conventions: note by the Secretariat (A/CN.9/381) [Original: English]

1. At its thirteenth session the Commission decided that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.^a

2. The present note is submitted pursuant to that decision. The annex hereto sets forth the state of signatures, ratifications, accessions and approvals as of 13 July 1993 to the following conventions: Convention on the Limitation Period in the International Sale of Goods (New York, 1974); Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991); and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York,

1958). The latter Convention, which has not emanated from the work of the Commission, has been included because of the close interest of the Commission in it, particularly in connection with the Commission's work in the field of international commercial arbitration. In addition, the annex sets forth those jurisdictions that have enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration (1985).

3. Since the most recent report in this series showing the status of conventions as of 28 April 1992 (A/CN.9/368), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) received one more accession (Mexico) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has received four additional accessions (Bangladesh, Barbados, Slovenia and Turkey). Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Peru and Tunisia.

4. The names of the States that have ratified or acceded to the conventions since the preparation of the last report are in italics, including those new States that have deposited instruments of succession.

^aReport of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 163.

ANNEX

1. Convention on the Limitation Period in the International Sale of Goods (New York, 1974)*

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval</i>	<i>Entry into force</i>
Argentina		9 October 1981	1 August 1988
Belarus	14 June 1974		
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Costa Rica	30 August 1974		
Dominican Republic		23 December 1977	1 August 1988
Egypt		6 December 1982	1 August 1988
Germany*			
Ghana	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991	1 August 1991
Hungary	14 June 1974	16 June 1983	1 August 1988
Mexico		21 January 1988	1 August 1988
Mongolia	14 June 1974		
Nicaragua	13 May 1975		
Norway ¹	11 December 1975	20 March 1980	1 August 1988
Poland	14 June 1974		

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval</i>	<i>Entry into force</i>
Romania		23 April 1992	1 November 1992
Russian Federation**	14 June 1974		
Slovakia***		28 May 1993	1 January 1993
Uganda		12 February 1992	1 September 1992
Ukraine	14 June 1974		
Yugoslavia		27 November 1978	1 August 1988
Zambia		6 June 1986	1 August 1988

Signatures only: 9; ratifications and accessions: 13*

*The Convention was concluded in authentic Chinese, English, French, Russian and Spanish texts. On 11 August 1992, the Secretary-General, in accordance with a request of the United Nations Commission on International Trade Law, circulated a proposal for the adoption of an authentic Arabic text of the Convention. No objections having been raised, the Arabic text was deemed adopted on 9 November 1992 with the same status as that of the other authentic texts referred to in the Convention.

*The Convention was signed by the former German Democratic Republic on 14 June 1974, ratified by it on 31 August 1989 and entered into force on 1 March 1990.

**The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

***The Convention was signed by the former Czechoslovakia on 29 August 1975 and an instrument of ratification was deposited on 26 May 1977, with the Convention entering into force for the former Czechoslovakia on 1 August 1988. On 28 May 1993, Slovakia deposited an instrument of succession with effect from 1 January 1993, the date of succession of States.

Declarations and reservations

¹Upon signature Norway declared, and confirmed upon ratification, that in accordance with article 34 the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Denmark, Finland, Iceland, Norway and Sweden).

2. Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980)

<i>State</i>	<i>Accession</i>	<i>Entry into force</i>
Argentina	19 July 1983	1 August 1988
Egypt	6 December 1982	1 August 1988
Germany*		
Guinea	23 January 1991	1 August 1991
Hungary	16 June 1983	1 August 1988
Mexico	21 January 1988	1 August 1988
Romania	23 April 1992	1 November 1992
Slovakia**	28 May 1993	1 January 1993
Uganda	12 February 1992	1 September 1992
Zambia	6 June 1986	1 August 1988

In accordance with articles XI and XIV of the Protocol, the Contracting States to the Protocol are considered to be Contracting Parties to the Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol in relation to one another and Contracting Parties to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

*The Protocol was acceded to by the former German Democratic Republic on 31 August 1989 and entered into force on 1 March 1990.

**The Protocol was acceded to by the former Czechoslovakia on 5 March 1990, with effect from 10 October 1990.¹ On 28 May 1993, Slovakia deposited an instrument of succession, with effect from 1 January 1993, the date of succession of States.

Declarations and reservations

¹Upon accession, Czechoslovakia declared that, pursuant to article XII, it did not consider itself bound by article I.

3. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Austria	30 April 1979		
Barbados		2 February 1981	1 November 1992
Botswana		16 February 1988	1 November 1992
Brazil	31 March 1978		
Burkina Faso		14 August 1989	1 November 1992
Chile	31 March 1978	9 July 1982	1 November 1992
Denmark	18 April 1979		
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	1 November 1992
Finland	18 April 1979		
France	18 April 1979		
Germany	31 March 1978		
Ghana	31 March 1978		
Guinea		23 January 1991	1 November 1992
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	1 November 1992
Kenya		31 July 1989	1 November 1992
Lebanon		4 April 1983	1 November 1992
Lesotho		26 October 1989	1 November 1992
Madagascar	31 March 1978		
Malawi		18 March 1991	1 November 1992
Mexico	31 March 1978		
Morocco		12 June 1981	1 November 1992
Nigeria		7 November 1988	1 November 1992
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982	1 November 1992
Senegal	31 March 1978	17 March 1986	1 November 1992
Sierra Leone	15 August 1978	7 October 1988	1 November 1992
Singapore	31 March 1978		
Slovakia*	28 May 1993		
Sweden	18 April 1979		
Tunisia		15 September 1980	1 November 1992
Uganda		6 July 1979	1 November 1992
United Republic of Tanzania		24 July 1979	1 November 1992
United States of America	30 April 1979		
Venezuela	31 March 1978		
Zaire	19 April 1979		
Zambia		7 October 1991	1 November 1992

Signatures only: 22; ratifications and accessions: 20

*The Convention was signed by the former Czechoslovakia on 6 March 1979.¹ On 28 May 1993, Slovakia deposited an instrument of succession to the signature.

Declarations and reservations

¹Upon signing the Convention the former Czechoslovakia declared in accordance with article 26 a formula for converting the amounts of liability referred to in paragraph 2 of that article into the Czechoslovak currency and the amount of the limits of liability to be applied in the territory of Czechoslovakia as expressed in the Czechoslovak currency.

4. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval Acceptance</i>	<i>Entry into force</i>
Argentina ¹		19 July 1983	1 January 1988
Australia		17 March 1988	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989

State	Signature	Ratification Accession Approval Acceptance	
			Entry into force
Belarus ¹		9 October 1989	1 November 1990
Bulgaria		9 July 1990	1 August 1991
Canada ²		23 April 1991	1 May 1992
Chile ¹	11 April 1980	7 February 1990	1 March 1991
China ³	30 September 1981	11 December 1986	1 January 1988
Denmark ⁴	26 May 1981	14 February 1989	1 March 1990
Ecuador		27 January 1992	1 February 1993
Egypt		6 December 1982	1 January 1988
Finland ⁴	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982	1 January 1988
Germany ^{*,5}	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Guinea		23 January 1991	1 February 1992
Hungary ^{1,6}	11 April 1980	16 June 1983	1 January 1988
Iraq		5 March 1990	1 April 1991
Italy	30 September 1981	11 December 1986	1 January 1988
Lesotho	18 June 1981	18 June 1981	1 January 1988
Mexico		29 December 1987	1 January 1989
Netherlands	29 May 1981	13 December 1990	1 January 1992
Norway ⁴	26 May 1981	20 July 1988	1 August 1989
Poland	28 September 1981		
Romania		22 May 1991	1 June 1992
Russian Federation ^{**,1}		16 August 1990	1 September 1991
Singapore	11 April 1980		
Slovakia ^{***}		28 May 1993	1 January 1993
Spain		24 July 1990	1 August 1991
Sweden ⁴	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990	1 March 1991
Syrian Arab Republic		19 October 1982	1 January 1988
Uganda		12 February 1992	1 March 1993
Ukraine ¹		3 January 1990	1 February 1991
United States of America ⁷	31 August 1981	11 December 1986	1 January 1988
Venezuela	28 September 1981		
Yugoslavia	11 April 1980	27 March 1985	1 January 1988
Zambia		6 June 1986	1 January 1988

Signatures only: 4; ratifications, accessions, approvals and acceptances: 34

*The Convention was signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990.

**The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

***The Convention was signed by the former Czechoslovakia on 1 September 1981 and an instrument of ratification was deposited on 5 March 1990, with the Convention entering into force for the former Czechoslovakia on 1 April 1991.⁷ On 28 May 1993, Slovakia deposited an instrument of succession, with effect from 1 January 1993, the date of succession of States.

Declarations and reservations

¹Upon ratifying the Convention the Governments of Argentina, Belarus, Chile, Hungary, Russian Federation and Ukraine stated, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in their respective States.

²Upon accession the Government of Canada declared that, in accordance with article 93 of the Convention, the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. Upon accession the Government of Canada also declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by article 1(1)(b) of the Convention. In a notification received on 31 July 1992, the Government of Canada withdrew the latter declaration. In a declaration received on 9 April 1992 the Government of Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to Yukon.

³Upon approving the Convention the Government of China declared that it did not consider itself bound by subparagraph (b) of paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11.

⁴Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by part two of the Convention (Formation of the contract). Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden further declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

⁵Upon ratifying the Convention the Government of Germany declared that it would not apply article 1(1)(b) in respect of any State that had made a declaration that that State would not apply article 1(1)(b).

⁶Upon ratifying the Convention the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

⁷Upon ratifying the Convention the Governments of Czechoslovakia and of the United States of America declared that they would not be bound by subparagraph (1)(b) of article 1.

5. United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Canada	7 December 1989		
Guinea		23 January 1991	
Mexico		11 September 1992	
Russian Federation*	30 June 1990		
United States of America	29 June 1990		

Signatures only: 3; ratifications and accessions: 2; ratifications and accessions necessary to bring the Convention into force: 10

*The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

6. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
France	15 October 1991		
Mexico	19 April 1991		
Philippines	19 April 1991		
Spain	19 April 1991		
United States of America	30 April 1992		

Signatures only: 5; ratifications and accessions necessary to bring the Convention into force: 5

7. UNCITRAL Model Law on International Commercial Arbitration (1985)

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia, Bulgaria, Canada (by the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, Hong Kong, Nigeria, *Peru*, Scotland, *Tunisia* and, within the United States of America, California, Connecticut, Oregon and Texas.

**8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(New York, 1958)**

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>
Algeria ^{1, 2}		7 February 1989
Antigua and Barbuda ^{1, 2}		2 February 1989
Argentina ^{1, 2, 7}	26 August 1958	14 March 1989
Australia		26 March 1975
Austria		2 May 1961
Bahrain ^{1, 2}		6 April 1988
Bangladesh		6 May 1992
Barbados ²		16 March 1993
Belgium ¹	10 June 1958	18 August 1975
Belarus ^{1, 3}	29 December 1958	15 November 1960
Benin		16 May 1974
Botswana ^{1, 2}		20 December 1971
Bulgaria ^{1, 3}	17 December 1958	10 October 1961
Burkina Faso		23 March 1987
Cambodia		5 January 1960
Cameroon		19 February 1988
Canada ¹		12 May 1986
Central African Republic ^{1, 2}		15 October 1962
Chile		4 September 1975
China ^{1, 2}		22 January 1987
Colombia		25 September 1979
Costa Rica	10 June 1958	26 October 1987
Côte d'Ivoire		1 February 1991
Cuba ^{1, 2, 3}		30 December 1974
Cyprus ^{1, 2}		29 December 1980
Czechoslovakia ^{1, 3}	3 October 1958	10 July 1959
Denmark ^{1, 2}		22 December 1972
Djibouti		14 June 1983
Dominica		28 October 1988
Ecuador ^{1, 2}	17 December 1958	3 January 1962
Egypt		9 March 1959
El Salvador	10 June 1958	
Finland	29 December 1958	19 January 1962
France ¹	25 November 1958	26 June 1959
Germany*, ¹	10 June 1958	30 June 1961
Ghana		9 April 1968
Greece ^{1, 2}		16 July 1962
Guatemala ^{1, 2}		21 March 1984
Guinea		23 January 1991
Haiti		5 December 1983
Holy See ^{1, 2}		14 May 1975
Hungary ^{1, 2}		5 March 1962
India ^{1, 2}	10 June 1958	13 July 1960
Indonesia ^{1, 2}		7 October 1981
Ireland ¹		12 May 1981
Israel	10 June 1958	5 January 1959
Italy		31 January 1969
Japan ¹		20 June 1961
Jordan	10 June 1958	15 November 1979
Kenya ¹		10 February 1989
Kuwait ¹		28 April 1978
Latvia		14 April 1992
Lesotho		13 June 1989
Luxembourg ¹	11 November 1958	9 September 1983
Madagascar ^{1, 2}		16 July 1962
Malaysia ^{1, 2}		5 November 1985
Mexico		14 April 1971
Monaco ^{1, 2}	31 December 1958	2 June 1982
Morocco ¹		12 February 1959
Netherlands ¹	10 June 1958	24 April 1964
New Zealand ¹		6 January 1983
Niger		14 October 1964
Nigeria ^{1, 2}		17 March 1970
Norway ^{1, 5}		14 March 1961
Pakistan	30 December 1958	

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>
Panama		10 October 1984
Peru		7 July 1988
Philippines ^{1, 2}	10 June 1958	6 July 1967
Poland ^{1, 2}	10 June 1958	3 October 1961
Republic of Korea ^{1, 2}		8 February 1973
Romania ^{1, 2, 3}		13 September 1961
Russian Federation ^{**} , 1, 3	29 December 1958	24 August 1960
San Marino		17 May 1979
Singapore ¹		21 August 1986
Slovenia ^{1, 2}		25 June 1991***
South Africa		3 May 1976
Spain		12 May 1977
Sri Lanka	30 December 1958	9 April 1962
Sweden	23 December 1958	28 January 1972
Switzerland	29 December 1958	1 June 1965
Syrian Arab Republic		9 March 1959
Thailand		21 December 1959
Trinidad and Tobago ^{1, 2}		14 February 1966
Tunisia ^{1, 2}		17 July 1967
Turkey ^{1, 2}		2 July 1992
Uganda ¹		12 February 1992
Ukraine ^{1, 3}	29 December 1958	10 October 1960
United Kingdom of Great Britain and Northern Ireland ¹		24 September 1975
United Republic of Tanzania ¹		13 October 1964
United States of America ^{1, 2}		30 September 1970
Uruguay		30 March 1983
Yugoslavia ^{1, 2, 6}		26 February 1982

Signatures only: 2; ratifications and accessions: 90

*The Convention was acceded to by the former German Democratic Republic on 20 February 1975 with reservations 1, 2 and 3.

**The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

***Instrument of succession received on 6 July 1992.

Declarations and reservations

(Excludes territorial declarations and certain other reservations and declarations of a political nature)

¹State will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

²State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

³With regard to awards made in the territory of non-contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

⁴The Government of Canada has declared that Canada will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.

⁵State will not apply the Convention to differences where the subject-matter of the proceedings is immovable property situated in the State, or a right in or to such property.

⁶State will apply the Convention only to those arbitral awards which were adopted after the coming into effect of the Convention.

⁷The present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.

VII. TRAINING AND ASSISTANCE

Training and technical assistance: note by the Secretariat (A/CN.9/379) [Original: English]

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INTRODUCTION

1. At the twentieth session of the Commission (1987), it was decided that increased emphasis should be given both to training and assistance and to the promotion of the legal texts prepared by the Commission, especially in developing countries. It was recognized that the holding of seminars and symposia in developing countries would increase the awareness of universally acceptable international trade law instruments that offer the benefit of removing impediments to international trade caused by disparities and inadequacies of national laws. Accordingly, it was noted that "training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past".¹

2. Pursuant to that decision of the Commission, the Secretariat has endeavoured, in particular in the most recent years, to devise a more extensive programme of training

and assistance than had been previously carried out. The programme is designed primarily to acquaint lawyers, government officials, the commercial and trading community, and scholars, particularly from developing countries, with the work of UNCITRAL and with the legal texts that have emanated from its work and to explain the benefits that might be derived from adopting and using those trade law instruments. During the UNCITRAL Congress on International Trade Law, which was held in the context of the twenty-fifth session of the Commission (1992), particular emphasis was placed by lecturers and participants at the Congress on the need to further increase the training and technical assistance activity. This note sets out activities of the Secretariat subsequent to the twenty-fifth session of the Commission (1992) and discusses possible future activities. It may be noted, at the outset, that while the Secretariat did every effort during that period to accommodate the increasing demand for training and technical assistance, particularly from developing countries and newly independent States, it was unable to fully meet the demand and the needs of those countries, due to a severe shortage of financial resources.

¹Report of the United Nations Commission on International Trade Law on the work of its twentieth session, *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

I. NATIONAL SEMINARS

3. The experience of the Secretariat in recent years has shown that, in many cases, national seminars may be more cost-effective than regional seminars. It may be recalled that in the context of a regional seminar the United Nations bears the costs of transportation of participants from their respective countries and the costs of accommodation of participants at the location chosen for holding the seminar. A consequence is that the number of participants normally has to be limited to two or three participants from each of the selected countries, with only rare exceptions where participants can attend the seminar at no cost to the United Nations. Such exceptions are generally limited to participants from the country which hosts the seminar. In the context of national seminars, the Secretariat typically organizes a mission of two or three lecturers, usually including lecturers from within and from outside of the Secretariat, to countries where the local authorities have accepted to provide accommodation for the seminar and to arrange for the invitation of participants. The costs borne by the host country are very limited since it is normally possible to ensure that a seminar is held in places where most interested persons and potential participants from that country have their residence. Thus, national seminars make it possible to obtain the participation of a maximum number of participants at a relatively low cost and to ensure particularly active involvement of the local authorities and other sponsoring organizations in the preparation and conduct of a seminar. For those reasons, the Secretariat has in the recent period emphasized national seminars.

4. In the recent series of national seminars, the lectures provided information on the basic elements of the major subject areas of international trade law. These areas included international sale of goods, international transport and storage of goods, international dispute settlement and international payments. In relation to those areas of trade law, the following legal texts formulated by UNCITRAL were presented for examination and discussion. In the area of sales, the texts included: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); Convention on the Limitation Period in the International Sale of Goods (New York, 1974) as amended by the 1980 Protocol; UNCITRAL Legal Guide on International Countertrade Transactions. In the area of transport, the texts included: United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991). In the area of banking and international payments, the texts included: United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); UNCITRAL Model Law on International Credit Transfers (1992); the current work by UNCITRAL on a model law on procurement and a draft convention on guarantees and stand-by letters of credit. In the area of settlement of commercial disputes, the texts included: UNCITRAL Model Law on International Commercial Arbitration (1985); UNCITRAL Arbitration Rules; UNCITRAL Conciliation Rules; and, though predating the creation of UNCITRAL, but of crucial importance to the work of the Commission in this area, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York, 1958). In the area of government purchasing, the texts included: draft UNCITRAL Model Law on Procurement; UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. In addition to texts emanating from the work of UNCITRAL, a number of legal texts resulting from the work of other international organizations were also presented including the following: the Agency, Factoring and Leasing Conventions, prepared by the International Institute for the Unification of Private Law (UNIDROIT); the Uniform Customs and Practice for Documentary Credits, INCOTERMS and the Uniform Rules for Demand Guarantees, prepared by the International Chamber of Commerce; and the Convention on the Law Applicable to Contracts of Sale, adopted by the Hague Conference on Private International Law.

5. The lectures were generally given by two members of the Secretariat, one or two external consultants and by experts from the host countries. All seminars were attended by government officials, practising lawyers, members of the commercial and trading community and academics.

6. After the seminars, the UNCITRAL secretariat has remained in close contact with participants to the seminar in order to provide the host countries with the maximum possible support during the contemplation and legislative process relating to the adoption and use of UNCITRAL legal texts.

7. The following is a list of the seminars that have taken place since the previous session:

(a) *Bangkok, Thailand (3-5 November 1992)*, held in cooperation with the Ministry of Foreign Affairs and attended by approximately 150 participants;

(b) *Jakarta and Surabaya, Indonesia (9-10, 12-13 November 1992)*, held in cooperation with the Ministry of Foreign Trade and attended by approximately 150 participants;

(c) *Lahore, Pakistan (4-6 January 1993)*, held in cooperation with the Export Promotion Bureau and the Research Society for International Law and attended by approximately 75 participants;

(d) *Colombo, Sri Lanka (9-11 January 1993)*, held in cooperation with the Attorney-General's Department, the Bar Association of Sri Lanka and the University of Colombo, and attended by approximately 160 participants;

(e) *Dhaka, Bangladesh (16-18 January 1993)*, held in cooperation with the Export Promotion Bureau and the Bangladesh Institute of Law and International Affairs and attended by approximately 70 participants;

(f) *Kiev, Ukraine (7-10 February 1993)*, held in cooperation with the Ministry of Foreign Economic Relations and attended by approximately 30 participants;

(g) *Warsaw, Poland (22-23 February 1993)*, held in cooperation with the Polish Chamber of Commerce and attended by approximately 40 participants;

(h) *Rogaska Slatina, Slovenia (22-24 April 1993)*, held in cooperation with the Law School of Maribor and Slovenian government authorities and attended by approximately 90 participants.

II. FIFTH UNCITRAL SYMPOSIUM ON INTERNATIONAL TRADE LAW

8. As announced to the twenty-fourth session of the Commission (1991),² the Secretariat is organizing the Fifth UNCITRAL Symposium on International Trade Law to be held on the occasion of the twenty-sixth session of the Commission (Vienna, 12-16 July 1993). The Symposium is designed to acquaint young lawyers with UNCITRAL as an institution and with the legal texts that have emanated from its work. It may be noted that until late April 1993, it was uncertain whether sufficient funds would be available from the UNCITRAL Trust Fund for Symposia to finance the costs of the usual number of participants (approximately 35). It later became clear that only 20 participants could benefit from such financing. That situation resulted from a reduction in the number and level of contributions to the Trust Fund.

9. As was the case at the Fourth Symposium in 1991, lecturers have been invited primarily from representatives to the twenty-sixth session and from members of the Secretariat. In order to save on the costs of interpretation and to be able to increase the communication between participants themselves, the Symposium will be held in French and English only. It is expected that the Sixth Symposium, which is planned for 1995, will be held in English and Spanish.

10. The travel costs of 20 participants from African countries will be paid from the UNCITRAL Trust Fund for Symposia. In addition, a number of individuals will attend at their own-cost. The number of such participants is expected to equal the number of those whose travel costs are being paid.

III. OTHER SEMINARS, COURSES AND WORKSHOPS

11. Members of the UNCITRAL secretariat have participated as speakers in the following seminars and courses where UNCITRAL legal texts were presented for examination and discussion: SIGMA Workshop on Public Procurement Systems (Vienna, October 1992), jointly organized by OECD and the European Communities (EC); Conference on Cooperation between the European Communities (EC) and CIS countries in Forming a Market Economy Legal System (Kiev, 11-13 November 1992); consultations with trade officials in Singapore on all UNCITRAL legal texts and with the Singapore International Arbitration Centre and interested lawyers and arbitrators concerning the UNCITRAL Model Law on International Commercial Arbitration (Singapore, 16 November 1993); SIGMA Workshop on Practical Aspects of Implementing Public Procurement Systems (Paris, 12-16 April 1993); International Trade Law Post-Graduate Course held by the International Training Centre of the International Labour Organisation (ILO) and the University of Turin Institute of European Studies (Turin, 10-11 May 1993).

IV. TECHNICAL ASSISTANCE

12. Expanding awareness of the UNCITRAL legal texts in many countries, in particular developing countries, has led to an increase in requests for technical assistance from individual Governments or regional organizations. This has normally consisted of comments in writing on reports and draft legislation, preparation of "accession kits", or a comparison of the UNCITRAL legal text with the existing law of a given country and a discussion of its advantages and disadvantages in comparison to the existing law. Since the last session, the Secretariat has, for example, reviewed in a number of countries and commented on draft legislation based on the UNCITRAL Model Law on International Commercial Arbitration and the draft UNCITRAL Model Law on Procurement. The Secretariat has also provided assistance to regional organizations, for example, by reviewing laws of member States of an organization with a view to harmonization and possible unification, and by providing a consultant.

V. CONFERENCES AND MEETINGS OF OTHER ORGANIZATIONS

13. Members of the UNCITRAL secretariat have participated in the following conferences and meetings of other organizations at which information about UNCITRAL legal texts was presented and activities relating to the unification and harmonization of trade law were discussed: UNCTAD Ad Hoc Working Group on Trade Efficiency (Geneva, 16-20 November 1992); Preferential Trade Area for Eastern and Southern African States (PTA) Policy Organs Meeting and Tenth Anniversary Celebrations (Lusaka, 7-22 January 1993); Asian-African Legal Consultative Committee (AALCC) Annual Conference (Kampala, 1-6 February 1993); Conference on International Arbitration in a Changing World held by the International Council for Commercial Arbitration (ICCA) (Bahrain, 14-16 February 1993); Arbitrators' Symposium of London Court of International Arbitration (London, 23-25 April 1993).

VI. FUTURE ACTIVITIES

A. Training

14. The Secretariat expects to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law, especially for developing countries and newly independent States. For the remainder of 1993, additional seminars are being planned for Argentina, Azerbaijan, Belarus, Brazil, Georgia, Mongolia, Republic of Moldova, and Uzbekistan. It is planned that additional requests for seminars that have been received from various African, Latin American and Caribbean countries will be met in 1994. It should be emphasized that the ability of the Secretariat to implement these plans is contingent upon the receipt of sufficient funds in the form of contributions to the Trust Fund.

15. The Secretariat has been given a significant role in the upcoming LAWASIA '93 Conference taking place at Colombo, Sri Lanka, from 12 to 16 September 1993.

²Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session, *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17)*, para. 337.

LAWASIA is an international organization of lawyers from the public and private sectors from countries in the region. The biannual LAWASIA Conference is designed to update participants on a wide range of major domestic and international law issues and to provide lawyers with an opportunity to meet their counterparts in neighbouring countries. It is expected this year to draw approximately 1,000 legal professionals from countries in the region, including high-ranking government law officials, judges and private sector legal practitioners. As an integral part of the Conference programme, from 13 to 16 September 1993, the UNCITRAL secretariat will conduct a special four-day workshop designed to acquaint participants with UNCITRAL legal texts. All those attending the Conference will be provided with a set of UNCITRAL documents.

16. The Secretariat has agreed to co-sponsor the three-month International Trade Law Post-Graduate Course to be organized in 1994 by the University Institute of European Studies (Turin, Italy) and the International Training Centre of the International Labour Organisation at Turin. In 1993, which was the third year in which the Course was offered, 19 of the participants were from Italy and 19 were from outside of Italy, with 12 of those being from developing countries. Issues of harmonization of international trade law and various items on the Commission's work programme are covered in the Course.

B. Coordination of training and technical assistance with other organizations

17. In line with the Secretary-General's policy of developing an integrated approach for the development assistance activities of the United Nations system, the Secretariat has initiated contacts with the United Nations Development Programme (UNDP), the main United Nations body responsible for the coordination of technical assistance. The aim of such coordination is to identify ways in which UNCITRAL can contribute to the efforts by the United Nations to provide countries with a comprehensive, consistent and integrated package of assistance for development. It is hoped that such coordination will ensure that the training and technical assistance activities of UNCITRAL are appropriately integrated into United Nations technical assistance programmes, in particular in the area of law reform.

18. With a view to coordination of training and technical assistance activities, the Secretariat has also initiated contacts with the recently established entity within the United Nations Secretariat, Legal Advisory Services for Development (LASD). Furthermore, the Secretariat is also in contact with organizations outside of the United Nations system. Such coordination has already been initiated, for example, with the SIGMA programme of OECD in the area of procurement, and with the Pacific Economic Cooperation Council (PECC), regarding an action programme on harmonization of trade law in the Pacific basin.

VII. INTERNSHIP PROGRAMME

19. The internship programme offers to persons who have recently obtained a law degree, or who have nearly completed their work towards such a degree, the opportunity

to serve as interns in the International Trade Law Branch. Interns are assigned specific tasks in connection with projects being worked on by the Secretariat. Persons participating in the programme are able to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law. In addition, the Secretariat occasionally accommodates scholars and legal practitioners for a limited period of time. Unfortunately, no funds are available to the Secretariat to assist the interns to cover their travel and other expenses. The interns are often sponsored by an organization, university or a government agency, or they meet their expenses from their own means. During the past year the Secretariat has received seven interns, from the following countries: Australia, China, France, Germany, Sudan and United States of America.

VIII. FINANCIAL AND ADMINISTRATIVE CONSIDERATIONS

20. The programme of training and assistance, in particular the holding of regional or national seminars, depends on the continued availability of sufficient financial resources. No funds for the travel expenses of participants or lecturers are provided for in the regular budget. As a result expenses have to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia. Of particular value are the contributions made to the UNCITRAL Trust Fund for Symposia on a multi-year basis, because they permit the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such contributions have been received from Canada and Finland. In addition, the annual contributions from France and Switzerland have been used for the seminar programme. A financial contribution was also made by Cyprus. A specific contribution to the funding of the Fifth UNCITRAL Symposium was received from Denmark. The Commission may wish to express its appreciation to those States and organizations that have contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars.

21. As noted above in the discussion of the planning for the Fifth UNCITRAL Symposium on International Trade Law (see paragraph 8), at a time when the demand from developing and newly independent States for UNCITRAL training and technical assistance activities is increasing sharply, the planning and implementation of such activities have been hampered by the fact that no additional States have made contributions, some existing contributors have reduced the level of their contributions, and some other States have discontinued their contributions or have informed the Secretariat that contributions would be discontinued in the future. Particular attention may be drawn to the fact that the funds needed for efficient training and technical assistance in the area of international trade law are of comparatively small amounts, while the benefits to be drawn from modernization and progressive harmonization of legal rules in the area of trade are considerable, not only to those countries that benefit from training and assistance, but also to the flow and development of trade.

22. In an effort to secure the financial, personnel and administrative support necessary to place the training and technical assistance programme on a firm footing, the Secretariat is exploring means to further reduce the costs of its training and assistance programme and to obtain support for the programme from multilateral and bilateral aid agencies that appear increasingly to regard law reform and modernization as an essential component of their assistance

activities. The Commission may wish to appeal to all States to consider making contributions to the UNCITRAL Trust Fund for Symposia so as to enable the Secretariat to meet the increasing demands in developing countries and newly independent States for training and assistance. The Commission may also wish to appeal to aid agencies, particularly those in the United Nations system, for increased support, cooperation and coordination.

VIII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

User Guide

(A/CN.9/SER.C/GUIDE/1) [Original: English]

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I. SCOPE AND PURPOSES OF THE INFORMATION SYSTEM

1. Based on a decision by the United Nations Commission on International Trade Law (UNCITRAL) at its twenty-first session (A/43/17, paras. 98-109), the Secretariat has established a system for collecting, and disseminating information on, court decisions and arbitral awards relating to Conventions and Model Laws that have emanated from the work of the Commission. The acronym for the system is "CLOUT" ("Case law on UNCITRAL texts").

2. The purpose of the system is to promote international awareness of such legal texts elaborated or adopted by the Commission, to enable judges, arbitrators, lawyers, parties to commercial transactions and other interested persons to take decisions and awards relating to those texts into account in dealing with matters within their responsibilities and to promote the uniform interpretation and application of those texts.

3. At present, the following legal texts are covered by the system:

- Convention on the Limitation Period in the International Sale of Goods (New York, 1974), and as amended by the Protocol of 1980
 - United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
 - UNCITRAL Model Law on International Commercial Arbitration (1985)
 - United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg).
4. The system will also cover the following, and any future, conventions and model laws when they enter into force or are implemented by States:
- United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)
 - United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)
 - UNCITRAL Model Law on International Credit Transfers (1992).

5. The system relies on a network of national correspondents, designated by those States that are parties to a Convention or have enacted legislation based on a Model Law (hereinafter referred to as "implementing States"). A list of national correspondents is provided in annex I to this guide. The national correspondents collect court decisions and arbitral awards, and prepare abstracts of them in one of the official languages of the United Nations (i.e., Arabic, Chinese, English, French, Russian, Spanish). The Secretariat stores the decisions and awards. The abstracts will be translated by the Secretariat into the other five United Nations languages and published in all six languages as part of the regular documentation of UNCITRAL (under the identifying symbol: A/CN.9/SER.C/ABSTRACTS/...). Documents containing abstracts will be published whenever a sufficient number of abstracts has been received to justify the cost of publication. The abstracts will thus be published at irregular intervals.

6. It should be noted that in view of the nature of the system neither a national correspondent nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for errors or omissions that may occur in relation to any aspect of the system or its execution.

II. COLLECTION OF DECISIONS AND AWARDS

7. The system aims at decisions and arbitral awards that are relevant to the interpretation or application of an UNCITRAL legal text. This includes those decisions and awards that interpret or apply a specific provision or provisions, as well as those that do not refer to a specific provision but relate to the legal text in general. For instance, decisions to the effect that a text is not applicable to the case at hand would be included.

8. The primary task of national correspondents is to collect decisions issued by courts of their respective implementing States. National correspondents may also collect other relevant decisions or awards, including those relating to a national law that is closely modelled on the text of a Convention elaborated by UNCITRAL even if the State is not party to the Convention. Ordinarily, only final decisions of courts and arbitral tribunals are being collected; where a decision that is subject to appeal or review is included in the collection, the abstract would indicate that the decision is subject to appeal or review.

9. Special considerations apply to the collection of arbitral awards. The accessibility of arbitral awards varies considerably and is, as a rule, rather limited. Often, their availability is restricted by requirements of confidentiality. Their accessibility may also be restricted by the general usage of an arbitral institution. The availability of awards issued by tribunals in arbitration proceedings that are not administered by an arbitral institution is likely to be even more limited. Thus, arbitral awards will be included in the collection only in so far as they come to the attention of national correspondents and in the form in which they are made available to them.

10. In many cases, the complete court decision or arbitral award, in its original language, will be forwarded to the

Secretariat. Often, however, a certain portion of a decision or arbitral award will be omitted for reasons, for example, of confidentiality or of a lack of relevance to an UNCITRAL text of the portion omitted, or because the portion is not available to the national correspondent.

11. The Secretariat will store the decisions and awards in the form in which they are forwarded to the Secretariat by the national correspondents. They will be made available in that form, subject to possible copyright restrictions, to any interested person upon request and against payment of a fee covering the cost of copying and mailing (see below, paragraphs 20-25).

III. STRUCTURE AND PURPOSE OF ABSTRACTS

12. Each abstract will bear a case number, based upon the order in which the abstracts are published, irrespective of the legal text to which the decision or award relates or of the country of its origin. After the case number, the provisions of the relevant convention or model law dealt with in the decision or award will be listed, using the short title presented in the list of short titles in annex II to this guide (e.g., "CISG 1(1)(a),(b); 99(6); 100(2)").

13. Thereafter, further identification data will be given, indicating the court or arbitral tribunal, the date of the decision or award, the names of the parties where these are available and any other means of identifying the decision or arbitral award using the official or customary means of expressing that data in a given jurisdiction.

14. Reference will also be made to the source from which a decision or award that has been published was obtained. If the decision or award included in the collection is a copy of the original decision or award, the notation "original" will be given. If the decision or award is taken from a publication, the notation will be "published in: . . .". After the reference to the source, the language of the decision or award will be indicated.

15. Finally, additional information will be given on the following points: the author of the abstract where the author of the abstract is a person other than the national correspondent of the country of origin; whether the original case is stored by the Secretariat in any form other than paper form, including any reference to its storage in any outside database; references to reproductions of the decision or arbitral award subsequent to its original issuance or publication; any translation of the decision or award into languages other than its original language; and published notes or commentaries specifically on the decision or award. Any later publications on the decision or arbitral award will be referenced in subsequent documents under the original case number. It may be noted that in references to publications, abbreviations of such publications will not be used.

16. The abstracts are intended merely to provide sufficient information to enable readers to decide whether it is worthwhile to obtain and examine the complete decision or arbitral award that is the subject of the abstract. They will usually be no longer than one half of a page, in view of the expected large number of decisions and arbitral awards to be

collected and of the costs of publishing the abstracts. Exceptions may be made where a decision or award is particularly complex or deals with several provisions of the relevant UNCITRAL text. In view of the necessity for brevity, the substantive part of the abstract will ordinarily not be a complete summary of the full decision or award, but should suffice as a "pointer" to the specific issues concerning the application and interpretation of the relevant UNCITRAL text in a given decision or arbitral award.

17. Guided by that purpose, the following points would usually be included in an abstract: the reasons for applying or interpreting the provision of the UNCITRAL text in the way that it is interpreted, including any specific reliance on a principle or other provision of that text, on previous case law, on relevant contract clauses and particular facts; the claim or relief sought by the claimant and any other factor describing the procedural context within which the case was decided; the countries of the parties and the type of trade or other transactions involved. The summary may be accompanied by a headnote containing propositions of law found in the case.

IV. LATER PUBLICATION OF INDICES

18. With a view to enhancing the usefulness of the system, the Secretariat intends to publish at an appropriate time separate indices for the UNCITRAL legal texts covered by the system. Depending on the amount of abstracts relating to a given UNCITRAL legal text, the first index may be published in about three years and then updated by a consolidated index, probably on an annual basis.

19. Each index will be based on a classification scheme ("thesaurus" as prepared by the Secretariat) that follows the order of the provisions of the respective text, with additional subcategories of issues where appropriate. It will list under those provisions and subcategories the case number of any relevant, previously published abstract, with an indication of the country of origin and of the year of the decision or award. In this way, a person interested in the application or interpretation of a given provision or any term used therein would be able to trace all relevant abstracts.

V. POSSIBLE COPYRIGHT RESTRICTIONS

20. As indicated above (paragraph 11), all decisions and arbitral awards stored by the Secretariat will be made available to the public upon individual request, subject to any copyright restrictions attendant to the decisions and awards. Where, exceptionally, the source or publisher of the original decision or award does not allow the distribution of copies of the original decision to the public, the Secretariat would not make available any copy of the original case. The abstract would indicate the prohibition and refer the user to the source or publication of the case.

21. Copyright protection will be sought for the abstracts and the indices from the United Nations Publications Board in accordance with the United Nations regulations governing copyright in United Nations publications. Every publication of such materials will bear a copyright notice.

22. As stated in the copyright notice, Governments and governmental institutions may reproduce or translate the copyrighted material without permission, but are requested to inform the United Nations of such reproduction or translation. All requests by others for permission to reproduce or translate copyrighted publications or parts thereof should be referred to the Secretary of the United Nations Publications Board, United Nations Headquarters, New York, N.Y. 10017. Before deciding on such requests, the Publications Board would normally consult with the UNCITRAL secretariat. The national correspondents and the UNCITRAL secretariat, when advising the Publications Board, will be guided by the objectives of the information system to provide worldwide awareness of the application of UNCITRAL legal texts and will thus be favourably disposed to requests for reproducing or translating abstracts or indices.

VI. ADMINISTRATIVE PROCEDURES FOR INDIVIDUAL CLOUT-USERS

23. As indicated above (paragraph 11), copies of decisions and arbitral awards available to the public will be sent to interested persons upon request, against a fee covering the cost of copying and mailing. The fee, which will depend on the type of copy sought, will be determined by the Secretariat. Additional charges will be made for any requested fax transmission or use of a courier service.

24. For administrative reasons, the Secretariat prefers not to levy such fees or charges for each individual request. Therefore, it is suggested that users of the system, when making their first request for copies, make a down payment of thirty (30) United States dollars and, once that amount is exhausted, an additional down payment and so forth. In addition, users will be required to agree in writing to comply with any copyright restrictions as to the use of the copies and other materials.

25. The subscription-type procedure outlined in the previous paragraph will accord to any person or entity complying therewith the status of a "CLOUT-user" with the following additional benefits. CLOUT-users will receive all documents that are published as part of the system and generally distributed only to Governments, international organizations, depository libraries and similar recipients of United Nations documents. CLOUT-users will thus directly receive all instalments of the series of abstracts as well as the indices on all UNCITRAL legal texts covered by the system. In addition, they will receive any information on changes in the system and similar information on points of interest to them. Administrative details on how to obtain the CLOUT publications may be obtained by writing to the UNCITRAL secretariat at the following address:

UNCITRAL secretariat
Vienna International Centre
P.O. Box 500
A-1400 Vienna
Austria
Fax No.: (43-1) 237485
Telex No.: 135612 uno a
Telephone No.: (43-1) 21131-4061

ANNEX I

National correspondents

ARGENTINA	Sra. Ana Isabel PIAGGI de VANOSI Juez Nacional Camara Apelaciones Comercial Profesora de Derecho Comercial y Derecho Económico en la Universidad de Buenos Aires Avda. Figueroa Alcorta 3255 1425 BUENOS AIRES	EGYPT	H.E. Ambassador Ibrahim YOUSRI Director of the Legal and Treaties Department Ministry of Foreign Affairs 35 Twenty-first Street Maadi, CAIRO
AUSTRALIA	Mr. Warwick SMITH Principal Legal Officer International Trade Law Section Business Affairs Division Attorney-General's Department National Circuit BARTON ACT 2600	FINLAND	Mr. Thomas WILHELMSSON Professor University of Helsinki Yksityisoikenden laitot Vuorikatu 5 C 00100 HELSINKI
AUSTRIA	Mr. Alfred DUCHEK Advocate General Federal Ministry of Justice Museumstrasse 12 1016 VIENNA	FRANCE	Bureau du droit international et de l'entraide judiciaire internationale en matière civile et commerciale du Service des affaires européennes et internationales Place Vendôme F-75042 PARIS Cedex 01
BARBADOS	Mr. Carlisle S. PAYNE Deputy Solicitor General BRIDGETOWN	GERMANY	Mr. Reinhard RENGGER Federal Ministry of Justice Heinemannstrasse 6 D-5300 BONN 2
BOTSWANA	Mr. P. T. C. SKELEMANI Attorney General Attorney General's Chambers Private Bag 009 GABORONE	GHANA	Mr. D. R. K. SANKAH Barrister-at-Law Acting Editor of the Council for Law Reporting P.O. Box M.165 ACCRA
BURKINA FASO	M. Ambroise Marie BALIMA Conseiller des Affaires économiques et Directeur des Relations économiques extérieures à la Direction générale du Commerce extérieur Ministère du Commerce et de l'Approvisionnement du Peuple 01 B.P. 517 OUAGADOUGOU	ITALY	Mr. Michael Joachim BONELL Professor of Law Faculty of Law University "La Sapienza" Piazzale Aldo Moro I-00100 ROME
CANADA	Constitutional and International Law Section Department of Justice OTTAWA	MEXICO	Sr. José Maria ABASCAL ZAMORA Profesor, Abogado Cerrada Flor de Agua 11 01030 MEXICO D.F.
CHINA	Mr. ZHANG Yuqing Deputy Division Chief Department of Treaties and Law Ministry of Foreign Economic Relations and Trade 2 Dong Chang An Ave. BEIJING	MOROCCO	La Direction des Affaires juridiques et des Traités du Ministère des Affaires étrangères et de la Coopération RABAT
CYPRUS	Ms. Eleni LOIZIDES Counsel of the Republic of Cyprus Appelis Str. Ay. Omoloyitai NICOSIA	NIGERIA	Mrs. T. Doherty Federal Ministry of Justice International and Comparative Law Department P.M.B. 12517 Marina, LAGOS
DENMARK	Mr. Michael ELMER Head of Division Ministry of Justice Slotsholmgade 10 DK-1216 COPENHAGEN K	NORWAY	Mr. Stein ROGNLIEN Retired Director General Department of Law Ministry of Justice P.O. Box 8005 Dep. N-0030 OSLO 1
DOMINICAN REPUBLIC	Sr. José Rafael ALVAREZ Avenida Sarasota 120 SANTO DOMINGO	SIERRA LEONE	Mr. H. M. JOKO-SMART Professor of Law, Fourah Bay College University of Sierra Leone Kiwi Chambers 76 Pademba Road FREETOWN
		SWEDEN	Mr. Lars JANSSON Associate Judge of Appeal Ministry of Justice Enh L2 S-10333 STOCKHOLM

SWITZERLAND	Mme Monique JAMETTI GREINER Advocate Office fédéral de la justice CH-3003 BERN	CLP	Convention on the Limitation Period in the International Sale of Goods (New York, 1974, as amended by Vienna 1980 Protocol) (Short title: Limitation Convention)
UNITED STATES OF AMERICA	Professor John O. Honnold University of Pennsylvania School of Law 3400 Chestnut Street PHILADELPHIA, PENNSYLVANIA 19104-6204 Professor Peter Winship School of Law Southern Methodist University DALLAS, TEXAS 75275-0116	CLOT	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) (Short title: Terminal Operators Convention)
		HR	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (Short title: Hamburg Rules)
		MAL	UNCITRAL Model Law on International Commercial Arbitration (1985) (Short title: UNCITRAL Model Arbitration Law)
		MIC	UNCITRAL Model Law on International Credit Transfers (1992) (Short title: UNCITRAL Credit Transfer Law)
		UAR	UNCITRAL Arbitration Rules (1976)
		UBNC	United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) (Short title: UNCITRAL Bills and Notes Convention)
		UCR	UNCITRAL Conciliation Rules (1980)

ANNEX II

Abbreviations and short titles for UNCITRAL legal texts

CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (Short title: United Nations Sales Convention)
CLP (74)	Convention on the Limitation Period in the International Sale of Goods (New York, 1974)

I. UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

PREAMBLE

WHEREAS the [Government] [Parliament] of . . . considers it desirable to regulate procurement of goods and of construction so as to promote the objectives of:

- (a) maximizing economy and efficiency in procurement;
- (b) fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) promoting competition among suppliers and contractors for the supply of the goods or construction to be procured;
- (d) providing for the fair and equitable treatment of all suppliers and contractors;
- (e) promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application*

- (1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.
- (2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:
 - (a) procurement involving national defence or national security;
 - (b) . . . (the enacting State may specify in this Law additional types of procurement to be excluded); or
 - (c) procurement of a type excluded by the procurement regulations.
- (3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

Article 2. *Definitions*

For the purposes of this Law:

- (a) "procurement" means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves;
- (b) "procuring entity" means:
 - (i) *Option I for subparagraph (i)*
any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except . . .; (and)

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except . . .; (and)

- (ii) (the enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity");

(c) "goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity; (the enacting State may include additional categories of goods)

(d) "construction" means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract;

(e) "supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(f) "procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(g) "tender security" means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 30(1)(f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(h) "currency" includes monetary unit of account.

Article 3. *International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]*

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) treaty or other form of agreement to which it is a party with one or more other States,

(b) agreement entered into by this State with an intergovernmental international financing institution, or

(c) agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions, the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

Article 4. *Procurement regulations*

The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

Article 5. *Public accessibility of legal texts*

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

Article 6. *Qualifications of suppliers and contractors*

(1) (a) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

- (i) that they possess the technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;
- (ii) that they have legal capacity to enter into the procurement contract;
- (iii) that they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;
- (iv) that they have fulfilled their obligations to pay taxes and social security contributions in this State;
- (v) that they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(2) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1)(b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations.

(5) Subject to articles 8(1) and 32(4)(d), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality.

(6) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false.

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete.

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

Article 7. *Prequalification proceedings*

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III or IV, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum, the information required to be specified in the invitation to tender by article 23(1)(a) to (e), (h) and, if already known, (j), as well as the following information:

(a) instructions for preparing and submitting prequalification applications;

(b) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(c) any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(e) any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Article 8. *Participation by suppliers or contractors*

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 9. *Form of communications*

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement pro-

ceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7(4) and (6), 29(2)(a), 30(1)(d), 32(1), 33(3), 35(1) and 37(1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

Article 10. *Rules concerning documentary evidence provided by suppliers or contractors*

If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

Article 11. *Record of procurement proceedings*

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) a brief description of the goods or construction to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) the names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;

(c) information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;

(d) the price and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to article 32(4)(d);

(f) if all tenders were rejected pursuant to article 33, a statement to that effect and the grounds therefor, in accordance with article 33(1);

(g) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) the information required by article 13, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 16(2) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(j) in procurement proceedings in which the procuring entity, in accordance with article 8(1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(k) a summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to article 31(3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 31(3), the portion of the record referred to in subparagraphs (c) to (g), and (k), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (k), may be ordered at an earlier stage by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1)(e).

(4) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.

Article 12. *Public notice of procurement contract awards*

(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).

(3) Paragraph (1) is not applicable to awards where the contract price is less than [. . .].

Article 13. *Inducements from suppliers or contractors*

(Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

Article 14. *Rules concerning description of goods or construction*

(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

(2) To the extent possible, any specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the prequalification documents, solicitation documents or other documents for solicitation or proposals, offers or quotations;

(b) due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

Article 15. *Language*

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in . . . (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

(a) the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) the procuring entity decides, in view of the low value of the goods or construction to be procured, that only domestic suppliers or contractors are likely to be interested).

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 16. *Methods of procurement*

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) A procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 17, 18, 19 or 20, and, if it does, it shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that particular method of procurement.

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 36, or request for proposals in accordance with article 38, or competitive negotiation in accordance with article 39, in the following circumstances:

(a) it is not feasible for the procuring entity to formulate detailed specifications for the goods or construction and, in order to obtain the most satisfactory solution to its procurement needs,

- (i) it seeks proposals as to various possible means of meeting its needs; or,
- (ii) because of the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) when the procuring entity applies this Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 13, 32(3) or 33, and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) there is an urgent need for the goods or construction, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,

(b) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impractical to use other methods of procurement because of the time involved in using those methods.

Article 18. Conditions for use of restricted tendering

(Subject to approval by . . . (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 37, when:

(a) the goods or construction, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors; or

(b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods or construction to be procured.

Article 19. Conditions for use of request for quotations

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance

with article 40 for the procurement of readily available goods that are not specially produced to the particular specifications of the procuring entity and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

Article 20. Conditions for use of single-source procurement

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 41 when:

(a) the goods or construction are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods or construction, and no reasonable alternative or substitute exists;

(b) there is an urgent need for the goods or construction, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) the procuring entity, having procured goods, equipment or technology from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment or technology, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods in question;

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) the procuring entity applies this Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by . . . (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 32(4)(c)(iii), provided that procurement from no other supplier or contractor is capable of promoting that policy.

CHAPTER III. TENDERING PROCEEDINGS

Section I. Solicitation of tenders and of applications to prequalify

Article 21. Domestic tendering

In procurement proceedings in which

(a) participation is limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) the procuring entity decides, in view of the low value of the goods or construction to be procured, that only domestic suppliers or contractors are likely to be interested in submitting tenders, the procuring entity shall not be required to employ the procedures set out in articles 22(2), 23(1)(h), 23(1)(i), 23(2)(c), 23(2)(d), 25(j), 25(k), 25(s) and 30(1)(c) of this Law.

Article 22. *Procedures for soliciting tenders or applications to prequalify*

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in . . . (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation.

Article 23. *Contents of invitation to tender and invitation to prequalify*

(1) The invitation to tender shall contain, at a minimum, the following information:

- (a) the name and address of the procuring entity;
- (b) the nature and quantity, and place of delivery, of the goods to be supplied or the nature and location of the construction to be effected;
- (c) the desired or required time for the supply of the goods or for the completion of the construction;
- (d) the criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 6(1)(b);
- (e) a declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8(1), as the case may be;
- (f) the means of obtaining the solicitation documents and the place from which they may be obtained;
- (g) the price, if any, charged by the procuring entity for the solicitation documents;
- (h) the currency and means of payment for the solicitation documents;
- (i) the language or languages in which the solicitation documents are available;
- (j) the place and deadline for the submission of tenders.

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1)(a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

- (a) the means of obtaining the prequalification documents and the place from which they may be obtained;
- (b) the price, if any, charged by the procuring entity for the prequalification documents;
- (c) the currency and terms of payment for the prequalification documents;
- (d) the language or languages in which the prequalification documents are available;

(e) the place and deadline for the submission of applications to prequalify.

Article 24. *Provision of solicitation documents*

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

Article 25. *Contents of solicitation documents*

The solicitation documents shall include, at a minimum, the following information:

- (a) instructions for preparing tenders;
- (b) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 32(6);
- (c) the requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (d) the nature and required technical and quality characteristics, in conformity with article 14, of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; any incidental services to be performed; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;
- (e) the factors to be used by the procuring entity in determining the successful tender, including any margin of preference and any factors other than price to be used pursuant to article 32(4)(b), (c) or (d) and the relative weight of such factors;
- (f) the terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
- (g) if alternatives to the characteristics of the goods, construction, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;
- (h) if suppliers or contractors are permitted to submit tenders for only a portion of the goods or construction to be procured, a description of the portion or portions for which tenders may be submitted;
- (i) the manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods or construction themselves, such as transportation and insurance charges, customs duties and taxes;
- (j) the currency or currencies in which the tender price is to be formulated and expressed;
- (k) the language or languages, in conformity with article 27, in which tenders are to be prepared;
- (l) any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers

or contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) if a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) the manner, place and deadline for the submission of tenders, in conformity with article 28;

(o) the means by which, pursuant to article 26, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) the period of time during which tenders shall be in effect, in conformity with article 29;

(q) the place, date and time for the opening of tenders, in conformity with article 31;

(r) the procedures to be followed for opening and examining tenders;

(s) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 32(5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 42 or give rise to liability on the part of the procuring entity;

(u) the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) notice of the right provided under article 42 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) if the procuring entity reserves the right to reject all tenders pursuant to article 33, a statement to that effect;

(y) any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 35, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(z) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Article 26. *Clarifications and modifications of solicitation documents*

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for

the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

Section II. Submission of tenders

Article 27. *Language of tenders*

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

Article 28. *Submission of tenders*

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article 26, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) Subject to subparagraph (b), a tender shall be submitted in writing, signed and in a sealed envelope.

(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality.

(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Article 29. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

Article 30. Tender securities

(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

(a) the requirement shall apply to all such suppliers or contractors;

(b) the solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;

(c) notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set forth 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);

(d) prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) the procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor submitting the tender shall not relate to conduct other than:

- (i) withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;
- (ii) failure to sign the procurement contract if required by the procuring entity to do so;
- (iii) failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest:

- (a) the expiry of the tender security;
- (b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;
- (c) the termination of the tendering proceedings without the entry into force of a procurement contract;
- (d) the withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

Section III. Evaluation and comparison of tenders

Article 31. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

Article 32. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents.

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall not accept a tender:

(a) if the supplier or contractor that submitted the tender is not qualified;

(b) if the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b) of this article;

(c) if the tender is not responsive;

(d) in the circumstances referred to in article 13.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.

(b) The successful tender shall be:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.

(c) In determining the lowest evaluated tender in accordance with subparagraph (b)(ii) of this paragraph, the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods or construction;

(iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods being offered by suppliers or contractors, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [. . . (the enacting State may expand subparagraph (iii) by including additional factors)]; and

(iv) national defence and security considerations.

(d) If authorized by the procurement regulations, (and subject to approval by . . . (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring

entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article 25(s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4)(b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 33(1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

Article 33. *Rejection of all tenders*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval), and) if so specified in the solicitation documents, the procuring entity may reject all tenders at any time prior to the acceptance of a tender. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender the grounds for its rejection of all tenders, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have submitted tenders.

(3) Notice of the rejection of all tenders shall be given promptly to all suppliers or contractors that submitted tenders.

Article 34. *Prohibition of negotiations with suppliers or contractors*

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

Article 35. *Acceptance of tender and entry into force of procurement contract*

(1) Subject to articles 32(7) and 33, the tender that has been ascertained to be the successful tender pursuant to article 32(4)(b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(3) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 29(1) or the period of effectiveness of tender securities that may be required pursuant to article 30(1).

(4) Except as provided in paragraphs (2)(b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 32(4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 33(1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 36. *Two-stage tendering*

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering

proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods or construction as well as to contractual terms and conditions of their supply.

(3) The procuring entity may engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 13, 32(3) or 33 concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods or construction to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 32(4)(b).

Article 37. *Restricted tendering*

(1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in article 18(a), it shall solicit tenders from all suppliers and contractors from whom the goods or construction to be procured are available.

(b) When the procuring entity engages in restricted tendering on the grounds referred to in article 18(b), it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in . . . (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) The provisions of chapter III of this Law, except article 22, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

Article 38. *Request for proposals*

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) the relative managerial and technical competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected;

(c) the criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) the price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

Article 39. *Competitive negotiation*

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

Article 40. *Request for quotations*

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods themselves, such as transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

Article 41. *Single-source procurement*

In the circumstances set forth in article 20 the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single supplier or contractor.

CHAPTER V. REVIEW*

Article 42. *Right to review*

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 43 to [47].

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) the selection of a method of procurement pursuant to articles 16 to 20;

*States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

(b) the limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(c) a decision by the procuring entity under article 33(1) to reject all tenders;

(d) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 38(2);

(e) an omission referred to in article 25(t).

Article 43. *Review by procuring entity (or by approving authority)*

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure.) A reference in this Law to the head of the procuring entity (or the head of the approving authority) includes any person designated by the head of the procuring entity (or by the head of the approving authority, as the case may be).

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [44 or 47]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [44 or 47].

Article 44. *Administrative review**

(1) A supplier or contractor entitled under article 42 to seek review may submit a complaint to [insert name of administrative body]:

(a) if the complaint cannot be submitted or entertained under article 43 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days

after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

(b) if the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) pursuant to article 43(5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 43(4); or

(d) if the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 43, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]* one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) require the payment of compensation for

Option I

any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings

Option II

loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings

as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

(g) order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 47.

Article 45. *Certain rules applicable to review proceedings under article 43 [and article 44]*

(1) Promptly after the submission of a complaint under article 43 [or article 44], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case

*States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 44 and provide only for judicial review (article 47).

*Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

may be,) shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

Article 46. *Suspension of procurement proceedings*

(1) The timely submission of a complaint under article 43 [or article 44] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 44 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

Article 47. *Judicial review*

The [insert name of court or courts] has jurisdiction over actions pursuant to article 42 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time limit, under article 3 [or 44].

II. GUIDE TO ENACTMENT OF UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

(A/CN.9/393) [Original: English]

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INTRODUCTION

History and purpose of UNCITRAL Model Law on Procurement of Goods and Construction

1. The United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on Procurement of Goods and Construction (hereinafter referred to as the "Model Law") at its twenty-sixth session, held at Vienna in 1993. The Model Law is intended to serve as a model to countries for the evaluation and modernization of their procurement laws and practices and for the establishment of procurement legislation where none presently exists. The text of the Model Law is set forth in annex I to the report of UNCITRAL on the work of its twenty-sixth session (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*). At the same session, the Commission also adopted the present Guide as a companion to the Model Law.

2. The decision by UNCITRAL to formulate model legislation on procurement was taken in response to the fact that in a number of countries the existing legislation governing procurement is inadequate or outdated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds. While sound laws and practices for public sector procurement are necessary in all countries, this need is particularly felt in many developing countries, as well as in countries whose economies are in transition. In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy.

3. Furthermore, the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.

4. UNCITRAL is an organ of the United Nations General Assembly established to promote the harmonization and unification of international trade law, so as to remove unnecessary obstacles to the international trade caused by inadequacies and divergences in the law affecting trade. Over the past quarter of a century, UNCITRAL, whose membership consists of States from all regions and of all levels of economic development, has implemented its mandate by formulating international conventions (the United Nations Conventions on Contracts for the International Sale of Goods, on the Limitation Period in the International Sale of Goods, on Carriage of Goods by Sea ("Hamburg Rules"), on Liability of Terminal Operators in International Trade, and on International Bills of Exchange and International Promissory Notes), model laws (in addition to the UNCITRAL Model Law on Procurement of Goods and Construction, the UNCITRAL Model Laws on International Commercial Arbitration and International Credit Transfers), the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, and legal guides (on construction contracts, countertrade transactions and electronic funds transfers).

Purpose of this Guide

5. In preparing and adopting the Model Law, the Commission was mindful that the Model Law would be a more effective tool for States modernizing their procurement legislation if background and explanatory information would be provided to execu-

tive branches of Governments and parliaments to assist them in using the Model Law. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of procurement procedures in the Model Law.

6. The information presented in the Guide is intended to explain why the provisions in the Model Law have been included as essential minimum features of a modern procurement law designed to achieve the objectives set forth in the Preamble to the Model Law. Such information might assist States also in exercising the options provided for in the Model Law and in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances. For example, options have been included on issues that were expected in particular to be treated differently from State to State such as: the definition of the term "procuring entity", which involves the scope of application of the Model Law; imposition of the requirement of a higher approval for certain key decisions and actions in the procurement proceedings; methods of procurement other than tendering for exceptional cases; and the form of and remedies available under review procedures. Furthermore, taking into account that the Model Law is a "framework" law providing only a minimum skeleton of essential provisions and envisaging the issuance of procurement regulations, the Guide identifies and discusses possible areas to be addressed by regulation rather than by statute.

I. MAIN FEATURES OF THE MODEL LAW

A. Objectives

7. The objectives of the Model Law, which include maximizing competition, according fair treatment to suppliers and contractors bidding to do Government work, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement and for curbing abuses. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State may create an environment in which the public is assured that the Government purchaser is likely to spend public funds with responsibility and accountability and thus to obtain fair value, and an environment in which parties offering to sell to the Government are confident of obtaining fair treatment.

B. Scope of the Model Law

8. The Model Law as adopted by UNCITRAL at its twenty-sixth session is designed to be applicable to the procurement of goods and construction. Within that basic scope of application, the objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although there is provision made in the Model Law for exclusion of defence and security related procurement, as well as other sectors that might be indicated by the enacting State in the law or its implementing procurement regulations, an enacting State might decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law. In order to facilitate the widest possible application of the Model Law, it is provided in article 1(2) that, even in the excluded sectors, it is possible, at the discretion of the procuring entity, to apply the Model Law. It is also important to note that article 3 gives deference to the international obligations of the enacting State at the intergovernmental level. It provides that such international obligations (e.g., loan or grant agreements with multilateral and bilateral aid agencies containing specific procedural requirements for the funds involved; procurement directives of regional economic integration groupings) prevail over the Model Law to the extent of any inconsistent requirements.

9. The Model Law sets forth procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract. The Model Law does not purport to address the contract performance or implementation phase. Accordingly, one will not find in the Model Law provisions on issues arising in the contract implementation phase, issues such as contract administration, resolution of performance disputes or contract termination. The enacting State would have to ensure that adequate laws and structures are available to deal with the implementation phase of the procurement process.

10. The Model Law covers procurement of services only to the extent that such services are incidental to a contract for the procurement of goods or construction. UNCITRAL expects to complete formulation of the additional provisions needed to expand the scope of the Model Law to cover procurement of services at its twenty-seventh session (New York, 31 May to 17 June 1994). It may be expected that the provisions on the procurement of services to be formulated by UNCITRAL would be designed to foster the same objectives of good procurement as those set forth in the preamble to the UNCITRAL Model Law on Procurement of Goods and Construction.

C. A "framework" law to be supplemented by procurement regulations

11. The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. However, it is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement those procedures in an enacting State. Accordingly, the Model Law envisages the issuance by enacting States of "procurement regulations" to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State without compromising the objectives of the Model Law.

12. It should be noted that the procurement proceedings in the Model Law, beyond raising matters of procedure to be addressed in the implementing procurement regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law.

D. Procurement methods in the Model Law

13. The Model Law presents several procurement methods so as to enable the procuring entity to deal with the varying circumstances likely to be encountered by procuring entities. This enables an enacting State to aim for as broad an application of the Model Law as possible. As the rule for normal circumstances, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and efficiency in procurement, as well as the other objectives set forth in the Preamble. For the exceptional circumstances in which tendering is not appropriate or feasible, the Model Law offers methods other than tendering.

Tendering

14. Some of the key features of tendering as provided for in the Model Law include: as a general rule, unrestricted solicitation of participation by suppliers or contractors; comprehensive description and specification in solicitation documents of the goods or construction to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful

tender (i.e., price alone, or a combination of price and some other technical or economic criteria); strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; public opening of tenders at the deadline for submission of tenders; and disclosure of any formalities required for entry into force of the procurement contract.

Two-stage tendering, request for proposals, competitive negotiation

15. For cases in which it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings, as well as for a number of other special circumstances referred to in article 17(1), the Model Law offers three options for incorporation into national law. These are two-stage tendering, request for proposals, and competitive negotiation. All three of those methods of procurement have been included because practice varies as to the method used in circumstances of the type in question. A situation in which it is not feasible for the procuring entity to formulate precise or final specifications may arise in two types of cases. The first is when the procuring entity has not determined the exact manner in which to meet a particular need and therefore seeks proposals as to various possible solutions (e.g., it has not decided upon the type of material to be used for building a bridge). The second case is the procurement of high technology items such as large passenger aircraft or sophisticated computer equipment. In the latter type of exceptional case, because of the technical sophistication and complexity of the goods, it might be considered undesirable, from the standpoint of obtaining the best value, for the procuring entity to proceed on the basis of specifications it has drawn up in the absence of negotiations with suppliers and contractors as to the exact capabilities and possible variations of what is being offered.

16. No hierarchy has been assigned to the three methods set forth in article 17, and an enacting State, though it should incorporate at least one of those methods, may choose not to incorporate all of them into its procurement law. While each of those three methods shares the common feature of providing the procuring entity with an opportunity to negotiate with suppliers and contractors with a view to settling upon technical specifications and contractual terms, they employ different procedures for selecting a supplier or contractor.

17. Two-stage tendering, in its first stage, provides an opportunity for the procuring entity to solicit various proposals relating to the technical, quality or other characteristics of the goods or construction as well as to the contractual terms and conditions of their supply. Upon the conclusion of that first stage, the procuring entity finalizes the specifications for the goods or construction and, on the basis of those specifications, in the second stage, conducts a regular tendering proceeding subject to the rules set forth in chapter III of the Model Law. Request for proposals is a procedure in which the procuring entity typically approaches a limited number of suppliers or contractors and solicits various proposals, negotiates with them as to possible changes in the substance of their proposals, requests "best and final offers" from them and then assesses and compares those best and final offers in accordance with the pre-disclosed evaluation criteria, the relative weight and manner of application of which has also been pre-disclosed to the suppliers or contractors. By contrast to two-stage tendering, at no stage in request-for-proposals proceedings does a procuring entity conduct a tendering proceeding. Competitive negotiation differs from both two-stage tendering and request for proposals in that it is by its nature a relatively unstructured method of procurement, for which the Model Law therefore provides few specific procedures and rules, beyond those found in the applicable general provisions. The Model Law also provides, in article 17(2), that competitive negotiation may be used in cases of urgency as an alternative to single-source procurement (see comment 3 on article 17).

Restricted tendering

18. For two types of exceptional cases, the Model Law offers restricted tendering, a method of procurement that differs from tendering only in that it permits the procuring entity to extend the invitation to tender to a limited number of suppliers or contractors. These are the case of technically complex or specialized goods or construction available from only a limited number of suppliers and the case of procurement of such a low value that economy and efficiency is served by restricting the number of tenders that would have to be considered by the procuring entity.

Request-for-quotations, single-source procurement

19. For cases of low-value procurement of standardized goods, the Model Law offers the request-for-quotations method, which involves a simplified, accelerated procedure fitting the relatively low value involved. Under this method, which is sometimes referred to in practice as "shopping", the procuring entity solicits quotations from a small number of suppliers and selects the lowest-priced, responsive offer. Lastly, for exceptional circumstances such as urgency due to catastrophic events and the availability of goods or construction from only one supplier or contractor, the Model Law offers single-source procurement.

E. Qualifications of suppliers and contractors

20. The Model Law includes provisions designed to ensure that the suppliers and contractors with whom the procuring entity contracts are qualified to perform the procurement contracts awarded to them and that create a procedural climate conducive to fairness and participation by qualified suppliers and contractors in procurement proceedings. Article 6, in addition to requiring that, no matter which method of procurement is utilized, suppliers and contractors must be qualified in order to enter into a procurement contract, specifies the criteria and procedures that the procuring entity may use to assess the qualifications of suppliers and contractors, requires the pre-disclosure to suppliers and contractors of the criteria to be used for the evaluation of their qualifications, and requires the application of the same criteria to all suppliers or contractors participating in the procurement proceedings. While those provisions aim at equal treatment and prevention of arbitrariness, the procuring entity is afforded sufficient flexibility to determine the exact extent to which it is appropriate to examine qualifications in a given procurement proceeding. In addition to those basic provisions on qualifications, the Model Law provides procedures for pre-qualification of suppliers and contractors at early stages of procurement proceedings, as well as on reconfirmation at later stages of the qualifications of suppliers and contractors that had been pre-qualified.

F. Provisions on international participation in procurement proceedings

21. In line with the mandate of UNCITRAL to promote international trade, and with the notion underlying the Model Law that the wider the degree of competition the better the value received for expenditures from the public purse, the Model Law provides that, as a general rule, suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality and that foreign suppliers and contractors should not otherwise be subject to discrimination. In the context of tendering proceedings, that general rule is given effect by a number of procedures designed, for example, to ensure that invitations to tender and invitations to prequalify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors.

22. At the same time, the Model Law recognizes that enacting States may wish in some cases to restrict foreign participation

with a view in particular to protecting certain vital economic sectors of its national industrial capacity against deleterious effects of unbridled foreign competition. Such restrictions are subject to the requirement in article 8(1) that the imposition of the restriction by the procuring entity should be based only on grounds specified in the procurement regulations or should be pursuant to other provisions of law. That requirement is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation. The reference in article 8 to exclusions of suppliers or contractors on the basis of nationality pursuant to provisions in the procurement regulations or other provisions of law, supported also by article 3 on the primacy of international obligations of the enacting State, also permits the Model Law to take account of cases in which the funds being used are derived from a bilateral tied-aid arrangement that requires that procurement with the funds should be from suppliers and contractors in the donor country. Similarly, recognition is thereby given to restrictions on the basis of nationality that may result, for example, from regional economic integration groupings that accord national treatment to suppliers and contractors from other States members of the regional economic grouping, as well as to restrictions arising from economic sanctions imposed by the United Nations Security Council.

23. It may be noted that the Model Law provides in article 32(4)(d) for the use of the technique referred to as the "margin of preference" in favour of local suppliers and contractors. By way of this technique, the Model Law provides the enacting State with a mechanism for balancing the objectives of international participation in procurement proceedings and fostering national industrial capacity, without resorting to purely domestic procurement. The margin of preference permits the procuring entity to select the lowest-priced tender of a local supplier or contractor when the difference in price between that tender and the overall lowest-priced tender falls within the range of the margin of preference. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition. It is important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. Accordingly, the margin of preference could be a preferable means of fostering the competitiveness of local suppliers and contractors, not only as effective and economic providers for the procurement needs of the procuring entity, but also as a source of competitive exports.

24. Aside from cases of domestic procurement that result from requirements of law referred to above in paragraph 22, in which the procuring entity may dispense with the special measures in the Model Law designed to facilitate international participation, the Model Law also permits the procuring entity engaging in tendering proceedings to forgo those procedures in the case of low-value procurement in which there is unlikely to be interest on the part of foreign suppliers or contractors. At the same time, the Model Law recognizes that in such cases of low-value procurement the procuring entity would not have any legal or economic interest in precluding the participation of foreign suppliers and contractors, since a blanket exclusion of foreign suppliers and contractors in such cases might unnecessarily deprive it of the possibility of obtaining a better price.

G. Prior-approval requirement for use of exceptional procedures

25. The Model Law provides that certain important actions and decisions by the procuring entity, in particular those involving the use of exceptional procedures (e.g., use of a procurement method other than tendering), should be subject to prior approval by a

higher authority. The advantage of a prior-approval system is that it fosters the detection of errors and problems before certain actions and final decisions are taken. In addition, it may provide an added measure of uniformity in a national procurement system, particularly where the enacting State has an otherwise decentralized procurement system. However, the prior-approval requirement is presented in the Model Law as an option. This is because a prior-approval system is not traditionally applied in all countries, in particular where control over the procurement practices is exercised primarily through audit.

26. The references in the Model Law to approval requirements leave it up to the enacting State to designate the organ or organs responsible for issuing the various approvals. The authority exercised as well as the organ exercising the approval function may differ. An approval function may be vested in an organ or authority that is wholly autonomous of the procuring entity (e.g., ministry of finance or of commerce, or central procurement board) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. In the case of procuring entities that are autonomous of the governmental or administrative structure of the State, such as some State-owned commercial enterprises, States may find it preferable for the approval function to be exercised by an organ or authority that is part of the governmental or administrative apparatus in order to ensure that the public policies sought to be advanced by the Model Law are given due effect. In any case, it is important that the organ or authority be able to exercise its functions impartially and effectively and be sufficiently independent of the persons or department involved in the procurement proceedings. It may be preferable for the approval function to be exercised by a committee of persons, rather than by one single person.

H. Review procedures

27. An important safeguard of proper adherence to procurement rules is that suppliers and contractors have the right to seek review of actions by the procuring entity in violation of those rules. Such a review process, which is set forth in chapter V, helps to make the Model Law to an important degree self-policing and self-enforcing, since it provides an avenue for review to suppliers and contractors, who have a natural interest in monitoring compliance by procuring entities with the provisions of the Model Law.

28. The Model Law recognizes that, because of considerations relating to the nature and structure of legal systems and systems of administration, which are closely linked to the question of review of governmental actions, States might, to one degree or another, see fit to adapt the articles in chapter V in line with those considerations. Because of this special circumstance, the provisions on review are of a more skeletal nature than other portions of the Model Law. What is crucial is that, whatever the exact form of review procedures, an adequate opportunity and effective procedures for review should be provided. Furthermore, it is recognized that the articles in the Model Law on review may be used by the enacting State merely to measure the adequacy of existing review procedures.

29. As to their content, the provisions establish in the first place that suppliers and contractors have a right to seek review. In the first instance, that review is to be sought from the procuring entity itself, in particular where the procurement contract is yet to be awarded. That initial step has been included so as to facilitate economy and efficiency, since in many cases, in particular prior to the awarding of the procurement contract, the procuring entity may be quite willing to correct procedural errors, of which it may even not have been aware. The Model Law also provides for review by higher administrative organs of Government, where such a procedure would be consistent with constitutional, administrative and judicial structures. Finally, the Model Law affirms

the right to judicial review, but does not go beyond that to address matters of judicial-procedure law, which are left to the applicable national law.

30. In order to strike a workable balance between, on the one hand, the need to preserve the rights of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process, chapter V includes a number of restrictions on the review procedures that it establishes. These include: limitation of the right to review under the Model Law to suppliers and contractors; time limits for filing of applications for review and for disposition of cases, including any suspension of the procurement proceedings that may apply at the level of administrative review; exclusion from the review procedures of a number of decisions that are left to the discretion of the procuring entity and that do not directly involve questions of the fairness of treatment accorded suppliers and contractors (e.g., selection of a method of procurement; the limitation of participation in procurement proceedings on the basis of nationality in accordance with article 8).

I. Record requirement

31. One of the principal mechanisms for promoting adherence to the procedures set forth in the Model Law and for facilitating the accountability of the procuring entity to supervisory bodies in Government, to suppliers and contractors, and to the public at large is the requirement set forth in article 11 that the procuring entity maintain a record of the key decisions and actions taken by the procuring entity during the course of the procurement proceedings. Article 11 provides rules as to which specific actions and decisions are to be reflected in the record. It also establishes rules as to which portions of the record are, at least under the Model Law, to be made available to the general public, and which portions of the record are to be disclosed only to suppliers and contractors.

J. Other provisions

32. The Model Law also includes a variety of other provisions designed to support the objectives and procedures of the Model Law. These include provision on: public accessibility of laws and regulations relating to procurement; form of communications between the procuring entity and suppliers and contractors; documentary evidence provided by suppliers and contractors concerning their qualifications; public notification of procurement-contract awards; mandatory rejection of a tender or offer in case of improper inducements from suppliers and contractors; manner of formulating specifications for goods or construction to be procured; language of documents for solicitation of tenders, proposals, offers or quotations; procedures to be followed in the various procurement methods available under the Model Law (e.g., for tendering proceedings; provision on contents of solicitation documents; tender securities; opening of tenders; examination, evaluation and comparison of tenders; rejection of all tenders; and entry into force of the procurement contract).

K. Proper administrative structure for implementation of the Model Law

33. The Model Law sets forth only the procedures to be followed in selecting the supplier or contractor with whom the contract will be concluded. The Model Law assumes that the enacting State has in place, or will put into place, the proper institutional and bureaucratic structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law.

34. In addition to designating the organ or authority to perform the approval function referred to above in paragraphs 25 and 26, an enacting State may find it desirable to provide for the overall supervision of and control over procurement to which the Model Law applies. An enacting State may vest all of those functions in a single organ or authority (e.g., ministry of finance or of commerce, or central procurement board), or they may be allocated among two or more organs or authorities. The functions might include, for example, some or all of those mentioned here:

(a) *Supervising overall implementation of procurement law and regulations.* This may include, for example, issuance of procurement regulations, monitoring implementation of the procurement law and regulations, making recommendations for their improvement, and issuing interpretations of those laws. In some cases, e.g., in the case of high-value procurement contracts, the organ might be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the contract can enter into existence.

(b) *Rationalization and standardization of procurement and of procurement practices.* This may include, for example, coordinating procurement by procuring entities, and preparing standardized procurement documents, specifications and conditions of contract.

(c) *Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader government policies.* This may include, for example, examining the impact of procurement on the national economy, rendering advice on the effect of particular procurement on prices and other economic factors, and verifying that a particular procurement falls within the programmes and policies of the Government. The organ or authority may be charged with issuance of approvals for particular procurement prior to the commencement of the procurement proceedings.

(d) *Training of procurement officers.* The organ or authority could also be responsible for training the procurement officers and other civil servants involved in operating the procurement system.

35. The organ or authority to exercise administrative and oversight functions in a particular enacting State, and the precise functions that the organ or authority is to exercise, will depend, for example, on the governmental, administrative and legal systems in the State, which vary widely from country to country. The system of administrative control over procurement should be structured with the objectives of economy and efficiency in mind, since systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement proceedings could in some cases stifle their ability to act effectively.

36. It may be noted that a State enacting the Model Law does not thereby commit itself to any particular administrative structure; neither does the adoption of such legislation necessarily commit the enacting State to increased government expenditures.

37. It may be noted that a variety of the institutional, staff development and training, and policy issues affecting public procurement, in particular in developing countries, are discussed in *Improving Public Procurement Systems*, Guide No. 23, issued by the International Trade Centre UNCTAD/GATT (Geneva).

L. Assistance from UNCITRAL secretariat

38. In line with its training and assistance activities, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the UNCITRAL Model

Law on Procurement of Goods and Construction, as it may for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

39. Further information concerning the Model Law, as well as the Guide, and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

International Trade Law Branch
Office of Legal Affairs, United Nations
Vienna International Centre, P.O. Box 500
A-1400, Vienna, Austria
Telex: 135612 uno a
Fax: (43-1) 237485
Phone: (43-1) 21131-4060

II. ARTICLE-BY-ARTICLE REMARKS

Preamble

The reason for including in the Model Law a statement of objectives is to provide guidance in the interpretation and application of the Model Law. Such a statement of objectives does not itself create substantive rights or obligations for procuring entities or for contractors or suppliers. It is recommended that, in States in which it is not the practice to include preambles, the statement of objectives should be incorporated in the body of the provisions of the Law.

Chapter I. General provisions

Article 1. Scope of application

1. The purpose of article 1 is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide in principle for the coverage of all types of procurement, but at the same time to recognize that an enacting State may wish to exempt certain types of procurement from coverage. The provision limits exclusions of the Model Law to cases provided for either by the Law itself or by regulation. This is done so that exclusions would not be made in a secretive or informal manner. In order to expand as far as possible the application of the Model Law, article 1(2) provides for complete or partial application of the Model Law even to excluded sectors. It may be further noted that, despite the exclusion in article 1(2)(a) of procurement involving national defence or security, it is not the intent of the Model Law to suggest that an enacting State that was prepared as a general rule to apply the Model Law to such procurement should not do so.

2. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of the procurement regulations, since such exclusions by means of administrative rather than legislative action may be seen as negatively affecting the objectives of the Model Law. Furthermore, the broad variety of procedures available under the Model Law to deal with the different types of situations that may arise in procurement may make it less necessary to exclude the procedures provided in the Model Law. States excluding the application of the Model Law by way of procurement regulations should take note of article 5.

Article 2. Definitions

1. The Model Law is intended to cover primarily procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from State to State due to differences in the allocation of legislative competence among different levels of Government. Accordingly, subparagraph (b)(i), defining the term "procuring entity", presents options as to the levels of Government to be covered. Option I brings within the scope of the Model Law all governmental departments, agencies, organs and other units within the enacting State, pertaining to the central Government as well as to provincial, local or other governmental subdivisions of the enacting State. This option would be adopted by non-federal States, and by federal States that could legislate for their subdivisions. Option II would be adopted by States that enact the Model Law only with respect to organs of the national Government.

2. In subparagraph (b)(ii), the enacting State may extend application of the Model Law to certain entities or enterprises that are not considered part of the Government, if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law. In deciding which, if any, entities to cover, the enacting State may consider factors such as the following:

(a) whether the Government provides substantial public funds to the entity, provides a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract;

(b) whether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity;

(c) whether the Government grants to the entity an exclusive licence, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

(d) whether the entity is accountable to the Government or to the public treasury in respect of the profitability of the entity;

(e) whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity;

(f) whether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally mandated public purpose and whether the public law applicable to government contracts applies to procurement contracts entered into by the entity.

3. Editorial language has been included in subparagraph (c) at the end of the definition of "goods" indicating that a State may wish to specifically refer in its procurement law to categories of items that would be treated as goods and whose status as goods might otherwise be unclear. The intent of this technique is to provide clarity with respect to what is and what is not to be considered "goods", and not to limit the scope of application of the Model Law.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

1. An enacting State may be subject to international agreements or obligations with respect to procurement. For example, a number of States are parties to the GATT Agreement on Government Procurement, and the members of the European Union are bound by directives on procurement applicable throughout the geographic region. Similarly, the members of regional economic groupings in other parts of the world may be subject to procurement directives applied by their regional groupings. In addition,

many international lending institutions and national development funding agencies have established guidelines or rules governing procurement with funds provided by them. In their loan or funding agreements with those institutions and agencies, borrowing or recipient countries undertake that proceedings for procurement with those funds will conform to the respective guidelines or rules. The purpose of subparagraphs (a) and (b) is to provide that the requirements of the international agreement, or other international obligation at the intergovernmental level, are to be applied; but in all other respects the procurement is to be governed by the Model Law.

2. Optional subparagraph (c) permits a federal State enacting the Model Law to give precedence over the Model Law to intergovernmental agreements concerning matters covered by the Model Law concluded between the national Government and one or more subdivisions of the State, or between any two or more such subdivisions. Such a clause might be used in enacting States in which the national Government does not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

Article 4. Procurement regulations

1. As noted in paragraphs 6 and 11 of section I of the Guide, the Model Law is a "framework law", setting forth basic legal rules governing procurement that are intended to be supplemented by regulations promulgated by the appropriate organ or authority of the enacting State. The "framework law" technique enables an enacting State to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances within the overall framework established by the Law. Thus, various provisions of the Model Law expressly provide for supplementation by procurement regulations. Furthermore, the enacting State may decide to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the regulations should be consistent with the Model Law.

2. Examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: application of the Model Law to excluded sectors (article 1(2)); prequalification proceedings (article 7(3)(e)); the manner of publication of the notice of procurement-contract awards (article 12); limitation of the quantity of procurement carried out in cases of urgency using a procurement method other than tendering (to the quantity that is required to deal with the urgent circumstances); details concerning the procedures for soliciting tenders or applications to prequalify (article 22); and requirements relating to the preparation and submission of tenders (article 25(z)).

3. In some cases failure to issue procurement regulations when the regulations are referred to in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: limitation of participation in procurement proceedings on the ground of nationality (article 8(1)); use of the request-for-quotations method of procurement, since that method may be used only below threshold levels set in the procurement regulations (article 19); and authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 32(4)(d)).

Article 5. Public accessibility of legal texts

1. This article is intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts. Inclusion of this article may be considered important not only in States in which

such a requirement is not already found in its existing administrative law, but even in States in which such a requirement was already found in the existing applicable law. In the latter case, the legislature may consider that a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers and contractors on the requirement of adequate public disclosure of legal texts concerned with procurement procedures.

2. In many countries there exist official publications in which laws, regulations and administrative rulings and directives are routinely published. The texts referred to in the present article could be published in those publications. Where there do not exist publications for one or more of those categories of texts, the texts should be promptly made accessible to the public, including foreign contractors and suppliers, in another appropriate manner.

Article 6. Qualifications of suppliers and contractors

The function and broad outlines of article 6 have been noted in paragraph 20 of section I of the Guide. Paragraph (1)(b)(v) of article 6 refers to disqualification of suppliers and contractors pursuant to administrative suspension or disbarment proceedings. Such administrative proceedings—in which alleged wrongdoers should be given some procedural rights such as an opportunity to disprove the charges—are commonly used to suspend or disbar suppliers and contractors found guilty of wrongdoing such as faulty accounting, default in contractual performance, or fraud. It may be noted that the Model Law leaves it to the enacting State to determine the period of time for which a criminal offence of the type referred to in paragraph (1)(b)(v) should disqualify a supplier or contractor from being considered for a procurement contract.

Article 7. Prequalification proceedings

1. Prequalification proceedings are intended to eliminate, early in the procurement proceedings, suppliers or contractors that are not suitably qualified to perform the contract. Such a procedure may be particularly useful for the purchase of complex or high-value goods or construction, and may even be advisable for purchases that are of a relatively low value but involve very specialized goods or construction. The reason for this is that the evaluation and comparison of tenders, proposals and offers in those cases is much more complicated, costly and time-consuming. The use of prequalification proceedings may narrow down the number of tenders, proposals or offers that the procuring entity must evaluate and compare. In addition, competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the tender may be high, if the competitive field is too large and where they run the risk of having to compete with unrealistic tenders submitted by unqualified or disreputable suppliers or contractors.

2. The prequalification procedures set forth in article 7 are made subject to a number of important safeguards. These safeguards include the subjugation of prequalification procedures to the limitations contained in article 6, in particular as to assessment of qualifications, and the procedures found in paragraphs (2) through (7) of article 7. This set of procedural safeguards is included to ensure that prequalification procedures are conducted only on non-discriminatory terms and conditions that are fully disclosed to participating suppliers or contractors, and that otherwise ensure at least a required minimum level of transparency and facilitate the exercise by a supplier or contractor that has not been prequalified of its right to review.

3. The purpose of article 7(8) is to provide for reconfirmation, at a later stage of the procurement proceedings, of the qualifica-

tions of suppliers or contractors that had been prequalified. Such "post-qualification proceedings" are intended to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of pre-qualification remains valid and accurate. The procedural requirements for post-qualification are designed to safeguard both the interests of suppliers and contractors in receiving fair treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors.

Article 8. Participation by suppliers and contractors

As noted in paragraphs 21 to 24 of section I of the Guide, making provision for international procurement proceedings has important advantages. Therein is found a description of the general approach and rationale of the provisions in the Model Law on international participation of suppliers and contractors in procurement proceedings, including the manner in which the general principle of international participation may be limited to take into account differing applicable legal obligations and the margin of preference in favour of local suppliers and contractors.

Article 9. Form of communications

1. Article 9 is intended to provide certainty as to the required form of communications between the procuring entity and suppliers and contractors provided for under the Model Law. The essential requirement, subject to other provisions of the Model Law, is that a communication must be in a form that provides a record of its content. This approach is designed not to tie communication to the use of paper. This takes account of the fact that communications are increasingly carried out through means such as electronic data interchange ("EDI"). In view in particular of the as yet uneven availability and use of non-traditional means of communication such as EDI, paragraph (3) has been included as a safeguard against discrimination against or among suppliers and contractors on the basis of the form of communication that they use.

2. Obviously, article 9 does not purport to answer all the technical and legal questions that may be raised by the use of EDI or other non-traditional methods of communication in the context of procurement proceedings, and different areas of the law would apply to ancillary questions such as the electronic issuance of a tender security and other matters that are beyond the sphere of "communications" under the Model Law.

3. In order to permit the procuring entity and suppliers and contractors to avoid unnecessary delays, paragraph (2) permits certain specified types of communications to be made on a preliminary basis through means, in particular telephone, that do not leave a record of the content of the communication, provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the content of the confirming communication.

Article 10. Rules concerning documentary evidence provided by suppliers and contractors

1. In order to facilitate participation by foreign suppliers and contractors, article 10 bars the imposition of any requirements as to the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than those provided for in the laws of the enacting State relating to the legalization of documents of the type in question. The article does not require that all documents provided by contractors and suppliers are to be legalized. Rather, it recognizes that States have laws concerning

the legalization of documents and establishes the principle that no additional formalities specific to procurement proceedings should be imposed.

2. It may be noted that the expression "the laws of this State" is meant to refer not only to the statutes, but also to the implementing regulations as well as to the treaty obligations of the enacting State. In some States such a general reference to "laws" would suffice to indicate that all of the above-mentioned sources of law were being referred to. However, in other States a more detailed reference to the various sources of law would be warranted in order to make it clear that reference was being made not merely to statutes.

Article 11. Record of procurement proceedings

1. One of the most important ways to promote transparency and accountability is to include provisions requiring that the procuring entity maintain a record of the procurement proceedings. A record summarizes key information concerning the procurement proceedings. It facilitates the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds.

2. An aspect of enacting record requirements is to specify the extent and the recipients of the disclosure. Setting the parameters of disclosure involves balancing factors such as: the general desirability, from the standpoint of the accountability of procuring entities, of broad disclosure; the need to provide suppliers and contractors with information necessary to permit them to assess their performance in the proceedings and to detect instances in which there are legitimate grounds for seeking review; and the need to protect the confidential trade information of suppliers and contractors. In view of these considerations, article 11 provides two levels of disclosure. It mandates disclosure to any member of the general public of the information referred to in article 11(1)(a) and (b)—basic information geared to the accountability of the procuring entity to the general public. Disclosure of more detailed information concerning the conduct of the procurement proceedings is mandated for the benefit of suppliers and contractors, since that information is necessary to enable them to monitor their relative performance in the procurement proceedings and to monitor the conduct of the procuring entity in implementing the requirements of the Model Law.

3. As mentioned above, among the necessary objectives of disclosure provisions is to avoid the disclosure of confidential trade information of suppliers and contractors. That is true in particular with respect to what is disclosed concerning the evaluation and comparison of tenders, proposals, offers and quotations, as excessive disclosure of such information may be prejudicial to the legitimate commercial interests of suppliers and contractors. Accordingly, the information referred to in paragraph (1)(e) involves only a summary of the evaluation and comparison of tenders, proposals, offers or quotations, while paragraph (3)(b) restricts the disclosure of more detailed information that exceeds what would be disclosed in such a summary.

4. The purpose of requiring disclosure to the suppliers or contractors at the time when the decision is made to accept a particular tender, proposal or offer is to give efficacy to the right to review under article 42. Delaying disclosure until entry into force of the procurement contract might deprive aggrieved suppliers and contractors of a meaningful remedy.

5. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the applicability to certain parts of the record of other statutes in the enacting State that confer on the public at large a general right to obtain access to government records. Disclosure of the information in the record to legislative or parliamentary oversight bodies may be mandated pursuant to the law applicable in the enacting State.

Article 12. Public notice of procurement contract awards

1. In order to promote transparency in the procurement process, and the accountability of the procuring entity to the public at large for its use of public funds, article 12 requires publication of a notice of award of the procurement contract. This obligation is separate from the notice of award required to be given pursuant to article 35(6) to suppliers and contractors that have participated in the tendering proceedings, and independent from the requirement that information of that nature in the record should be made available to the general public under article 11(2). The Model Law does not specify the manner of publication of the notice, which is left to the enacting State and which paragraph (2) suggests may be dealt with in the procurement regulations.

2. In order to avoid the disproportionately onerous effects that such a publication requirement might have on the procuring entity were the notice requirement to apply to all procurement contracts no matter how low their value, the enacting State is given the option in paragraph (3) of setting a monetary-value threshold below which the publication requirement would not apply.

Article 13. Inducements from suppliers or contractors

1. Article 12 contains an important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity. A procurement law cannot be expected to eradicate completely such abusive practices. However, the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. In addition, the enacting State should have in place generally an effective system of sanctions against corruption by government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process.

2. To guard against abusive application of article 13, rejection is made subject to approval, to a record requirement and to a duty of prompt disclosure to the alleged wrongdoer. The latter is designed to permit exercise of the right to review.

Article 14. Rules concerning description of goods or construction

The purpose of including article 14 is to make clear the importance of the principle of clarity, completeness and objectivity in the description of the goods or construction to be procured in prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations. Descriptions with those characteristics encourage participation by suppliers and contractors in procurement proceedings, enable suppliers and contractors to formulate tenders, proposals, offers and quotations that meet the needs of the procuring entity, and enable suppliers and contractors to forecast the risks and costs of their participation in procurement proceedings and of the performance of the contracts to be concluded, and thus to offer their most advantageous prices and other terms and conditions. For example, properly prepared descriptions in solicitation documents enable

tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity. Furthermore, application of the rule that specifications should be written so as not to favour particular contractors or suppliers will make it more likely that the procurement needs of the procuring entity may be filled by a greater number of suppliers or contractors, thereby facilitating the use of as competitive a method of procurement as is feasible under the circumstances and in particular helping to limit abusive resort to single-source procurement.

Article 15. Language

1. The function of the bracketed language at the end of the *chapeau* is to facilitate participation in procurement proceedings by helping to make the prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations understandable to foreign suppliers and contractors. The reference to a language customarily used in international trade need not be adopted by an enacting State whose official language is one customarily used in international trade. Subparagraphs (a) and (b) have been incorporated in order to provide the procuring entity with the flexibility needed to waive application of the foreign language requirement in cases in which participation is restricted to domestic suppliers or contractors and in cases in which, while there is no such restriction imposed, foreign suppliers or contractors are not expected to be interested in participating.

2. In States in which solicitation documents are issued in more than one language, it would be advisable to include in the procurement law, or in the procurement regulations, a rule to the effect that a supplier or contractor should be able to base its rights and obligations on either language version. The procuring entity might also be called upon to make it clear in the solicitation documents that both language versions are of equal weight.

Chapter II. Methods of procurement and their conditions for use

Article 16. Methods of procurement

1. Article 16 establishes the use of tendering proceedings as the method of procurement to be used normally. This is because tendering proceedings generally maximize economy and efficiency in procurement, in addition to promoting the other objectives set forth in the Preamble. However, the Model Law also provides a number of other methods of procurement for exceptional circumstances in which tendering proceedings would not be feasible or, even if feasible, might not be judged by the procuring entity to be the procurement method most likely to provide the best value.

2. Article 16(2) sets forth the requirement that a decision to use a method of procurement other than tendering should be supported in the record by a statement of the grounds and circumstances underlying the decision. That requirement is included because the decision to use a method of procurement potentially less competitive than tendering should not be made secretly or informally.

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

1. As noted in paragraph 15 of section I of the Guide, for the circumstances specified in article 17(1), the Model Law provides the enacting State with a choice among three different methods of procurement other than tendering—two-stage tendering, request

for proposals, and competitive negotiation. As further noted in paragraph 16 of section I of the Guide, an enacting State need not necessarily enact each of the three methods for the common circumstances referred to in article 17 or even enact more than one of them. An enacting State might decide not to enact more than one of the methods in view of the uncertainty likely to be encountered by procuring entities in trying to discern the most appropriate method from among two or three similar methods. In deciding which of the three methods to enact, a decisive criterion for the enacting State might be that, from the standpoint of transparency, competition and objectivity in the selection process, two-stage tendering and request for proposals are likely to offer more than competitive negotiation, with its high degree of flexibility and possibly higher risk of corruption. At least one of the three methods should be enacted, since the cases in question might otherwise only be dealt with through the least competitive of the procurement methods, single-source procurement.

2. It may be noted that in the cases referred to in article 17(1)(a), in which it is not feasible for the procuring entity to formulate specifications, the procuring entity, before deciding to opt for a method of procurement other than tendering, might wish to consider whether the specifications could be prepared with the assistance of consultants.

3. Subparagraphs (b) and (c) of article 20 (single-source procurement), referring, respectively, to cases of non-catastrophic and catastrophic urgency, are identical to subparagraphs (a) and (b) of article 17(2), which permit the use of competitive negotiation in such cases of urgency. The purpose of this overlap is to permit the procuring entity to decide which of the two methods best suits the circumstances at hand. For both procurement methods, the urgency cases contemplated are intended to be truly exceptional, and not merely cases of convenience. In the application of the Model Law to procurement involving national defence or national security and in cases of research contracts for the procurement of a prototype, the procuring entity is, for similar reasons, given a choice between the methods of procurement provided for in article 17 and single-source procurement. Thus, an enacting State may, even if it does not enact competitive negotiation for the circumstances referred to in paragraph (1), enact competitive negotiation for the circumstances referred to in paragraph (2).

Article 18. Conditions for use of restricted tendering

1. Article 18 has been included in order to enable the procuring entity, in exceptional cases, to solicit participation only from a limited number of suppliers or contractors. Inclusion of this method in the Model Law is not intended to encourage its use. On the contrary, strict and narrow conditions for use have been included for restricted tendering since the unjustified resort to that method of procurement would impair fundamentally the objectives of the Model Law.

2. In order to give effect to the purpose of article 18 to limit the use of restrictive tendering to truly exceptional cases while maintaining the appropriate degree of competition, minimum solicitation requirements are set forth in article 37(1) that are tailored specifically to each of the two types of cases reflected in the conditions for use in article 18. When resort is made to restricted tendering on the ground, referred to in article 18(a), of a limited number of suppliers or contractors being available, all the suppliers or contractors that could provide the goods or construction are required to be invited to participate; when the ground is the low value of the procurement contract, the case referred to in article 18(b), suppliers or contractors should be invited in a non-discriminatory manner and in a sufficient number to ensure effective competition.

Article 19. Conditions for use of request for quotations

1. The request-for-quotations method of procurement provides a procedure method of procurement appropriate for low-value purchases of standardized goods. In such cases, engaging in tendering proceedings, which can be costly and time-consuming, may not be justified. Article 19(2), however, strictly limits the use of this method to procurement of a value below the threshold set in the procurement regulations. In enacting article 19, it should be made clear that use of request for quotations is not mandatory for procurement below the threshold value. It may indeed be advisable in certain cases that fall below the threshold to use tendering or one of the other methods of procurement. This may be the case, for example, when an initial low-value procurement would have the long-term consequence of committing the procuring entity to a particular type of technological system.

2. Paragraph (2) gives added and important effect to the intended limited scope for the use of request for quotations. It does so by prohibiting the artificial division of packages of goods for the purpose of circumventing the general rule in article 16(1) requiring the use of tendering, a rule that is essential to the objectives of the Model Law.

Article 20. Conditions for use of single-source procurement

1. In view of the non-competitive character of single-source procurement, its use is strictly limited to the exceptional circumstances set forth in article 20.

2. Paragraph (2) has been included in order to permit the use of single-source procurement in cases of serious economic emergency in which such procurement would avert serious harm. A case of this type may be, for example, where an enterprise employing most of the labour force in a particular region or city is threatened with closure unless it obtains a procurement contract.

3. Paragraph (2) contains safeguards to ensure that it does not give rise to more than a very exceptional use of single-source procurement. As regards the approval requirement mentioned in paragraph (2), it may be noted that enacting States that incorporate the overall approval requirement for the use of single-source procurement might not necessarily have to incorporate the approval requirement referred to in paragraph (2). At the same time, however, it would have to be recognized that the decision to use single-source procurement in the economic emergency type of circumstance referred to would and should ordinarily be taken at the highest levels of Government.

Chapter III. Tendering proceedings

Section I. Solicitation of tenders and of applications to prequalify

Article 21. Domestic tendering

As pointed out in paragraph 24 of section I of the Guide, article 21 has been included in order to specify the exceptional cases in which application of various procedures in the Model Law to solicit foreign participation in the tendering proceedings would not be required.

Article 22. Procedures for soliciting tenders or applications to prequalify

1. In order to promote transparency and competition, article 22 sets forth the minimum publicity procedures to be followed for soliciting tenders and applications to prequalify from an audience

wide enough to provide an effective level of competition. Including these procedures in the procurement law enables interested suppliers and contractors to identify, simply by reading the procurement law, publications they may monitor in order to stay abreast of procurement opportunities in the enacting State. In view of the objective of the Model Law of fostering participation in procurement proceedings without regard to nationality and maximizing competition, article 22(2) requires publication of the invitations also in a publication of international circulation. One possible medium of such publication is the business edition of *Development Business*, published by the United Nations Department of Public Information and the United Nations University.

2. The publicity requirements in the Model Law are only minimum requirements. The procurement regulations may require procuring entities to publicize the invitation to tender or the invitation to prequalify by additional means that would promote widespread awareness by suppliers and contractors of procurement proceedings. These might include, for example, posting the invitation on official notice boards, and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity.

Article 23. Contents of invitation to tender and invitation to prequalify

In order to promote efficiency and transparency, article 23 requires that invitations to tender as well as invitations to prequalify contain the information required for suppliers or contractors to be able to ascertain whether the goods or construction being procured are of a type that they can provide and, if so, how they can participate in the tendering proceedings. The specified information requirements are only the required minimum so as not to preclude the procuring entity from including additional information that it considers appropriate.

Article 24. Provision of solicitation documents

Solicitation documents are intended to provide suppliers or contractors with the information they need to prepare their tenders and to inform them of the rules and procedures according to which the tendering proceedings will be conducted. Article 24 has been included in order to ensure that all suppliers or contractors that have expressed an interest in participating in the tendering proceedings and that comply with the procedures set forth by the procuring entity are provided with solicitation documents. The purpose of including a provision concerning the price to be charged for the solicitation documents is to enable the procuring entity to recover its costs of printing and providing those documents, but to avoid excessively high charges that could inhibit qualified suppliers or contractors from participating in the tendering proceedings.

Article 25. Contents of solicitation documents

1. Article 25 contains a listing of the information required to be included in the solicitation documents. An indication in the procurement law of those requirements is useful to ensure that the solicitation documents include the information necessary to provide a basis for enabling suppliers and contractors to submit tenders that meet the needs of the procuring entity and that the procuring entity can compare in an objective and fair manner. Many of the items listed in article 25 are regulated or dealt with in other provisions of the Model Law. The enumeration in this article of items that are required to be in the solicitation documents, includ-

ing all items the inclusion of which is expressly provided for elsewhere in the Model Law, is useful because it enables procuring entities to use the article as a "check-list" in preparing the solicitation documents.

2. One category of items listed in article 25 concerns instructions for preparing and submitting tenders (subparagraphs (a), (i) through (r), and (t); issues such as the form, and manner of signature, of tenders and the manner of formulation of the tender price). The purpose of including these provisions is to limit the possibility that qualified suppliers or contractors would be placed at a disadvantage or even rejected due to lack of clarity as to how the tenders should be prepared. Other items in article 25 concern in particular the manner in which the tenders will be evaluated; their disclosure is required to achieve transparency and fairness in the tendering proceedings.

3. The Model Law recognizes that, for the procurement of goods or construction that are separable into two or more distinct elements (e.g., the procurement of different types of laboratory apparatus; the procurement of a hydroelectric plant consisting of the construction of a dam and the supply of a generator), a procuring entity may wish to permit suppliers or contractors to submit tenders either for the entirety of the goods or construction or for one or more portions thereof. That approach might enable the procuring entity to maximize economy by procuring either from a single supplier or contractor or from a combination of them, depending on which approach the tenders revealed to be more cost effective. Permitting partial tenders may also facilitate participation by smaller suppliers or contractors, that may have the capacity to submit tenders only for certain portions of the procurement. Article 25(h) is included to make the tender evaluation stage as objective, transparent and efficient as possible, since the procuring entity should not be permitted to divide the entirety of the goods or construction to be procured into separate contracts merely as it sees fit after tenders are submitted.

Article 26. Clarifications and modifications of solicitation documents

1. The purpose of article 26 is to establish procedures for clarification and modification of the solicitation documents in a manner that will foster efficient, fair and successful conduct of tendering proceedings. The right of the procuring entity to modify the solicitation documents is important in order to enable the procuring entity to obtain goods or construction that meet its needs. Article 26 provides that clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated by the procuring entity to all suppliers or contractors to whom the procuring entity provided solicitation documents. It would not be sufficient to simply permit them to have access to clarifications upon request since they would have no independent way of finding out that a clarification had been made.

2. The rule governing clarifications is meant to ensure that the procuring entity responds to a timely request for clarification in time for the clarification to be taken into account in the preparation and submission of tenders. Prompt communication of clarifications and modifications also enables suppliers or contractors to exercise their right under article 29(3) to modify or withdraw their tenders prior to the deadline for submission of tenders, unless that right has been superseded by a stipulation in the solicitation documents. Similarly, minutes of meetings of suppliers or contractors convened by the procuring entity must be communicated to them promptly so that those minutes too can be taken into account in the preparation of tenders.

Section II. Submission of tenders

Article 27. Language of tenders

Article 27 provides that tenders may be formulated in any language in which the solicitation documents have been formulated or in any other language specified in the solicitation documents. This rule, which is linked to the general language rule in article 15, has been included in order to facilitate participation by foreign suppliers and contractors.

Article 28. Submission of tenders

1. An important element in fostering participation and competition is the granting to suppliers and contractors of a sufficient period of time to prepare their tenders. Article 28 recognizes that the length of that period of time may vary from case to case, depending upon a variety of factors such as the complexity of the goods or construction to be procured, the extent of subcontracting anticipated, and the time needed for transmitting tenders. Thus, it is left up to the procuring entity to fix the deadline by which tenders must be submitted, taking into account the circumstances of the given procurement. An enacting State may wish to establish in the procurement regulations minimum periods of time that the procuring entity must allow for the submission of tenders.

2. In order to promote competition and fairness, paragraph (2) requires the procuring entity to extend the deadline in the exceptional case of late issuance of clarifications or modifications of the solicitation documents, or of minutes of a meeting of suppliers or contractors. Paragraph (3) permits, but does not compel, the procuring entity to extend the deadline for submission of tenders in other cases, i.e., when one or more suppliers or contractors are unable to submit their tenders on time due to any circumstances beyond their control. This is designed to protect the level of competition when a potentially important element of that competition would otherwise be precluded from participation. It may be noted that an extension of the deadline in the circumstances referred to in paragraph (2) is required rather than discretionary, and would thus be subject to the right to review. By contrast, an extension under paragraph (3) is, as indicated in paragraph (3), absolutely discretionary and therefore intended to be beyond the right to review provided for in article 42.

3. The requirement in paragraph (5)(a) that tenders are to be submitted in writing is subject to the exception in subparagraph (b) permitting the use of a form of communication other than writing, such as electronic data interchange (EDI), provided that the form used is one that provides a record of the content of the communication. Additional safeguards are included to protect the integrity of the procurement proceedings, as well as the particular interests of the procuring entity and of suppliers and contractors: that the use of a form other than writing must be permitted by the solicitation documents; that suppliers and contractors must always be given the right to submit tenders in writing, an important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as EDI; and that the alternative form must be one that provides at least a similar degree of authenticity, security and confidentiality. It may be further noted that the implementation of paragraph (5) to accommodate the submission of tenders in non-traditional forms would necessitate elaboration of special rules and techniques to guard the confidentiality of tenders and to prevent "opening" of the tenders prior to the deadline for submission of tenders, and to deal with other issues that might arise when a tender is submitted other than in writing (e.g., the form that the tender security would take).

4. The rule in paragraph (6) prohibiting the consideration of late tenders is intended to promote economy and efficiency in pro-

urement and the integrity of and confidence in the procurement process. Permitting the consideration of late tenders after the commencement of the opening might enable suppliers or contractors to learn of the contents of other tenders before submitting their own tenders. This could lead to higher prices and could facilitate collusion between suppliers or contractors. It would also be unfair to the other suppliers or contractors. In addition, it could interfere with the orderly and efficient process of opening tenders.

Article 29. Period of effectiveness of tenders; modification and withdrawal of tenders

1. Article 29 has been included to make it clear that the procuring entity should stipulate in the solicitation documents the period of time that tenders are to remain in effect.

2. It is of obvious importance that the length of the period of effectiveness of tenders should be stipulated in the solicitation documents, taking into account the circumstances peculiar to the particular tendering proceeding. It would not be a viable solution to fix in a procurement law a generally applicable long period of effectiveness hoping to cover the needs of most if not all tendering proceedings. This would be inefficient since for many cases the period would be longer than necessary. Excessively long periods of effectiveness may result in higher tender prices since suppliers or contractors would have to include in their prices an increment to compensate for the costs and risks to which they would be exposed during such a period (e.g., tied capacity and inability to tender elsewhere; the risks of higher manufacturing or construction costs).

3. Paragraph (2)(b) has been included to enable the procuring entity to deal with delays in the tendering proceedings by requesting extensions of the tender validity period. The procedure is not compulsory on suppliers and contractors, so as not to force them to remain bound to their tenders for unexpectedly long durations — a risk that would discourage suppliers and contractors from participating or drive up their tender prices. In order to prolong, where necessary, also the protection afforded by tender securities, it is provided that a supplier or contractor failing to obtain a security to cover the extended validity period of the tender is considered as having refused to extend the validity period of its tender.

4. Paragraph (3) is an essential companion of the provisions in article 26 concerning clarifications and modifications of the solicitation documents. This is because it permits suppliers and contractors to respond to clarifications and modifications of solicitation documents, or to other circumstances, either by modifying their tenders, if necessary, or by withdrawing them if they so choose. Such a rule facilitates participation, while protecting the interests of the procuring entity by permitting forfeiture of the tender security for modification or withdrawal following the deadline for submission of tenders. However, in order to take account of a contrary approach found in the existing law and practice of some States, paragraph (3) permits the procuring entity to depart from the general rule and to impose forfeiture of the tender security for modifications and withdrawals prior to the deadline for submission of tenders, but only if so stipulated in the solicitation documents. (See also the remarks under article 36.)

Article 30. Tender securities

1. The procuring entity may suffer losses if suppliers or contractors withdraw tenders or if a procurement contract with the supplier or contractor whose tender had been accepted is not concluded due to the fault of that supplier or contractor (e.g., the costs

of new procurement proceedings and losses due to delays in procurement). Article 30 authorizes the procuring entity to require the suppliers or contractors participating in the tendering proceedings to post a tender security so as to cover such losses and to discourage them from defaulting. Procuring entities are not required to impose tender security requirements in all tendering proceedings. Tender securities are usually important when the procurement is of high-value goods or construction. In the procurement of low-value items, though it may be of importance to require a tender security in some cases, the risks faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security—which will normally be reflected in the contract price—will be less justified.

2. Safeguards have been included to ensure that a tender-security requirement is only imposed fairly and for the intended purpose. That purpose is to secure the obligation of suppliers or contractors to enter into a procurement contract on the basis of the tenders they have submitted and to post a security for performance of the procurement contract, if required to do so.

3. Paragraph (1)(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were restricted to providing securities issued by institutions in the enacting State. However, there is optional language at the end of paragraph (1)(c) providing flexibility on this point for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law.

4. The reference to confirmation of the tender security is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. The reference, however, is not intended to encourage such a practice, in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in tendering proceedings (e.g., difficulties in obtaining the local confirmation prior to the deadline for submission of tenders and added costs for foreign suppliers and contractors).

5. Paragraph (2) has been included in order to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security. While the retention by the beneficiary of a guarantee instrument beyond the expiry date of the guarantee should not be regarded as extending the validity period of the guarantee, the requirement that the security be returned is of particular importance in the case of a security in the form of a deposit of cash or in some other similar form. The clarification is also useful since there remain some national laws in which, contrary to what is generally expected, a demand for payment is timely even though made after the expiry of the security, as long as the contingency covered by the security occurred prior to the expiry. As does article 29(3), paragraph (2)(d) reflects that the procuring entity may avail itself, by way of a stipulation in the solicitation documents, of an exception to the general rule that withdrawal or modification of a tender prior to the deadline for submission of tenders is not subject to forfeiture of the tender security.

Section III. Evaluation and comparison of tenders

Article 31. Opening of tenders

1. The rule in paragraph (1) is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders. Such gaps may create opportunities for misconduct (e.g., disclosure of the contents of tenders prior to the designated opening time) and deprive suppliers and contractors of an opportunity to minimize that risk by submitting a tender at the last minute, immediately prior to the opening of tenders.

2. Paragraph (2) sets forth the rule that the procuring entity must permit all suppliers or contractors that have submitted tenders, or their representatives, to be present at the opening of tenders. This rule contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers or contractors that have submitted tenders, as well as the prices of their tenders, are to be announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers or contractors that were not present or represented at the opening of tenders.

Article 32. Examination, evaluation and comparison of tenders

1. The purpose of paragraph (1) is to enable the procuring entity to seek from suppliers or contractors clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders, while making it clear that this should not involve changes in the substance of tenders. Paragraph (1)(b), which refers to the correction of purely arithmetical errors, is not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or to other errors not apparent on the face of the tender. Enactment of the related notice requirement is important since, in paragraph (3)(b), provision is made for the mandatory rejection of the tender if the correction is not accepted.

2. Paragraph (2) sets forth the rule to be followed in determining whether tenders are responsive and permits a tender to be regarded as responsive even if it contains minor deviations. Permitting the procuring entity to consider tenders with minor deviations promotes participation and competition in tendering proceedings. Quantification of such minor deviations is required so that tenders may be compared objectively in a way that reflects positively on tenders that do comply to a full degree.

3. Although ascertaining the successful tender on the basis of the tender price alone provides the greatest objectivity and predictability, in some tendering proceedings the procuring entity may wish to select a tender not purely on the basis of the price factor. Accordingly, the Model Law enables the procuring entity to select the "lowest evaluated tender", i.e., one that is selected on the basis of criteria in addition to price. Paragraph (4)(c)(ii) and (iii) list such criteria. The criteria in paragraph (4)(c)(iii) related to economic-development objectives have been included because, in some countries, particularly developing countries and countries whose economies are in transition, it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives. It is envisaged in the Model Law that some enacting States may wish to list additional such criteria. However, caution is advisable in expanding the list of non-price criteria set forth in paragraph (4)(c)(iii) in view of the risk that such other criteria may pose to the objectives of good procurement. Criteria of this type are sometimes less objective and more discretionary than those referred to in paragraph (4)(c)(i) and (ii), and therefore their use in evaluating and comparing tenders could impair competition and economy in procurement, and reduce confidence in the procurement process.

4. Requiring that the non-price criteria should be objective and quantifiable to the extent practicable, and that they be given a relative weight in the evaluation procedure or be expressed in monetary terms, is aimed at enabling tenders to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. The enacting State

may wish to spell out in the procurement regulations how such factors are to be formulated and applied. One possible method is to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the solicitation documents and to combine that quantification with the tender price. The tender resulting in the lowest evaluated price would be regarded as the successful tender. Another method may be to assign relative weightings (e.g., "coefficients" or "merit points") to the various aspects of each tender in relation to the criteria set forth in the solicitation documents. The tender with the most favourable aggregate weighting would be the lowest evaluated tender.

5. Paragraph (4)(d) permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rules for calculation to be set forth in the procurement regulations. (See paragraph 23 of section I of the Guide concerning the reasons for using a margin of preference as a technique for achieving national economic objectives while still preserving competition.) It should be noted, however, that States that are parties to the GATT Agreement on Government Procurement and member States of regional economic integration groupings such as the European Union may be restricted in their ability to accord such preferential treatment. In order to promote transparency, resort to the margin of preference may be made only if authorized by the procurement regulations and approved by the approving authority. Furthermore, the use of the margin of preference is required to be predisclosed in the solicitation documents and reflected in the record of the procurement proceedings.

6. The envisaged procurement regulations setting forth rules concerning the calculation and application of a margin of preference could also establish criteria for qualifying as a "domestic" contractor or supplier and for qualifying as "domestically produced" goods (e.g., that they contain a minimum domestic content or value added) and fix the amount of the margin of preference, which might be different for goods and for construction. As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the tender prices of all tenders import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting tender prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.

7. The rule in paragraph (5) on conversion of tender prices to a single currency for the purposes of comparison and evaluation of tenders is included to promote accuracy and objectivity in the decision of the procuring entity (see article 25(s)).

8. Paragraph (6) has been included in order to enable procuring entities to require the supplier or contractor submitting the successful tender to reconfirm its qualifications. This may be of particular utility in procurement proceedings of a long duration, in which the procuring entity may wish to verify whether qualification information submitted at an earlier stage remains valid. Use of reconfirmation is left discretionary since the need for it depends on the circumstances of each tendering proceeding. In order to make the reconfirmation procedure effective and transparent, paragraph (7) mandates the rejection of a tender upon failure of the supplier or contractor to reconfirm and establishes the procedures to be followed by the procuring entity to select a successful tender in such a case.

Article 33. Rejection of all tenders

1. The purpose of article 33 is to enable the procuring entity to reject all tenders. Inclusion of this provision is important because a procuring entity may need to do so for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the tendering proceedings, where the

procuring entity's need for the goods or construction ceases, or where the procurement can no longer take place due to a change in government policy or a withdrawal of funding. Public law in some countries may restrict the exercise of this right, e.g., by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice.

2. The requirement in paragraph (3) that notice of the rejection of all tenders be given to suppliers or contractors that submitted tenders, together with the requirement in paragraph (1) that the grounds for the rejection be communicated upon request to those suppliers or contractors, is designed to foster transparency and accountability. Paragraph (1) does not require the procuring entity to justify the grounds that it cites for rejection of all tenders. This approach is based on the premise that the procuring entity should be free to abandon the procurement proceedings on economic, social or political grounds which it need not justify. The protection of this power is further buttressed by the fact that the decision of the procuring entity to reject all tenders is not subject, in accordance with article 42(2)(c), to the right to review provided by the Model Law; it is also supported by paragraph (2), which provides that the procuring entity is to incur no liability towards contractors and suppliers, such as compensation for their costs of preparing and submitting tenders, solely by virtue of its invoking paragraph (1). The potentially harsh effects of article 33 are mitigated by permitting the procuring entity to reject all tenders only if the right to do so has been reserved in the solicitation documents.

Article 34. Negotiations with suppliers and contractors

Article 34 contains a clear prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender submitted by the supplier or contractor. This rule has been included because such negotiations might result in an "auction", in which a tender offered by one supplier or contractor is used to apply pressure on another supplier or contractor to offer a lower price or an otherwise more favourable tender. Many suppliers and contractors refrain from participating in tendering proceedings where such techniques are used or, if they do participate, raise their tender prices in anticipation of the negotiations.

Article 35. Acceptance of tender and entry into force of procurement contract

1. The purpose of paragraph (1) is to state clearly the rule that the tender ascertained to be the successful one pursuant to article 32(4)(b) is to be accepted and that notice of the acceptance is to be given promptly to the supplier or contractor that submitted the tender. Absent the provision in paragraph (4) on entry into force of the procurement contract, the entry into force of the procurement contract would be governed by general legal rules, which in many cases might not provide solutions appropriate for the procurement context.

2. The Model Law provides for different methods of entry into force of the procurement contract in the context of tendering proceedings, in recognition that enacting States may differ as to the preferred method and that, even within a single enacting State, different entry-into-force methods may be employed in different circumstances. Depending upon its preferences and traditions, an enacting State may wish to incorporate one or more of these methods.

3. Under one method (set forth in paragraph (4)), absent a contrary indication in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the supplier or contractor that submitted the successful tender. The second method (set forth in paragraph (2)), ties the entry into force of the procurement contract to the signature by

the supplier or contractor submitting the successful tender of a written procurement contract conforming to the tender. Paragraph (2) contains an optional reference to "the requesting ministry" as a signatory to the procurement contract in order to take into account that in some States the procurement contract is signed on behalf of the Government by the ministry for whose use the goods or construction were destined, but which did not itself conduct the procurement proceedings nor act as the procuring entity within the meaning of the Model Law. In States with such a procurement practice, procurement proceedings may be conducted by a central entity such as a central procurement or tendering board.

4. A third method of entry into force (set forth in paragraph (3)), provides for entry into force upon approval of the procurement contract by a higher authority. In States in which this provision is enacted, further details may be provided in the procurement regulations as to the type of circumstances in which the approval would be required (e.g., only for procurement contracts above a specified value). The reference in paragraph (3) to stipulation of the approval requirement in the solicitation documents is included to give a clear statement of the role of the solicitation documents in giving notice to suppliers or contractors of formalities required for entry into force of the procurement contract. The requirement that the solicitation documents disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the estimated time should not be deemed to extend the validity period of the successful tender or of any tender security are designed to establish a balance taking into account the rights and obligations of suppliers and contractors. They are designed in particular to exclude the possibility that a selected supplier or contractor would remain committed to the procuring entity for a potentially indefinite period of time with no assurance of the eventual entry into force of the procurement contract.

5. The rationale behind linking entry into force of the procurement contract to dispatch rather than to receipt of the notice of acceptance is that the former approach is more appropriate to the particular circumstances of tendering proceedings. In order to bind the supplier or contractor to a procurement contract, including to obligate it to sign any written procurement contract, the procuring entity has to give notice of acceptance while the tender is in force. Under the "receipt" approach, if the notice was properly transmitted, but the transmission was delayed, lost or misdirected owing to no fault of the procuring entity, so that the notice was not received before the expiry of the period of effectiveness of the tender, the procuring entity would lose its right to bind the supplier or contractor. Under the "dispatch" approach, that right of the procuring entity is preserved. In the event of a delay, loss or misdirection of the notice, the supplier or contractor might not learn before the expiration of the validity period of its tender that the tender had been accepted; but in most cases that consequence would be less severe than the loss of the right of the procuring entity to bind the supplier or contractor.

6. In order to promote the objectives of good procurement, paragraph (5) makes it clear that, in the event that the supplier or contractor whose tender the procuring entity has selected fails to sign a procurement contract in accordance with paragraph (2), the selection of another tender from among the remaining tenders must be in accordance with the provisions normally applicable to the selection of tenders, subject to the right of the procuring entity to reject all tenders.

Chapter IV. Procedures for procurement methods other than tendering

1. Articles 36 to 41 present procedures to be used for the methods of procurement other than tendering. As noted in paragraphs 15 and 16 of section I of the Guide, as well as in comment 1 on

article 17, there is an overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation, and enacting States might not wish to enact in their procurement laws each of those three methods. The decision as to which of those methods to enact will therefore determine which of articles 36 (procedures for two-stage tendering), 38 (procedures for request for proposals) and 39 (procedures for competitive negotiation) will be retained.

2. With respect to request for proposals, competitive negotiation, request for quotations and single-source procurement, chapter IV does not provide as full a procedural framework as chapter III does with respect to tendering proceedings. This is mainly because those methods of procurement involve more procedural flexibility than does tendering. Some of the questions that for tendering, as well as for two-stage tendering and restricted tendering, are answered in the Model Law (e.g., entry into force of the procurement contract) may be answered for those other methods of procurement in other bodies of the applicable law, which procuring entities will generally want to be the law of the State of the procuring entity. Where the applicable law is the United Nations Convention on Contracts for the International Sale of Goods, matters such as the formation of contract will be subject to the internationally uniform rules contained in the Convention. An enacting State may consider it useful to incorporate into the procurement law some of those solutions from other bodies of applicable law, as well as to supplement chapter IV with rules in the procurement regulations. It should also be noted that chapters I and V would also be generally applicable to the methods of procurement other than tendering.

Article 36. Two-stage tendering

The rationale behind the two-stage procedure used in this method of procurement is to combine two elements: the flexibility afforded to the procuring entity in the first stage by the ability to negotiate with suppliers or contractors in order to arrive at a final set of specifications for the goods or construction to be procured, and, in the second stage, the high degree of objectivity and competition provided by tendering proceedings under chapter III. The general thrust of the provisions of article 36, which establish the specific procedures that distinguish two-stage tendering from ordinary tendering proceedings, has been noted in paragraph 17 of section I of the Guide. They include the requirement in paragraph (4) that the procuring entity should notify all suppliers or contractors remaining for the second stage of any changes made to the original specifications and should permit suppliers or contractors to forgo submitting a final tender without forfeiture of any tender security that may have been required for entry into the first stage. The latter provision is necessary to make the two-stage procedure hospitable to participation by suppliers or contractors since, upon the deadline for submission of tenders in the first stage, the suppliers or contractors cannot be expected to know what the specifications will be for the second stage.

Article 37. Restricted tendering

1. As noted in comment 2 on article 18, article 37 sets forth solicitation requirements designed to ensure that, in the case of resort to restricted tendering on the grounds referred to in article 18(a), tenders are solicited from all suppliers or contractors from whom the goods or construction to be procured are available, and, in the case of resort to restricted tendering on the grounds referred to in article 18(b), from a sufficient number of suppliers or contractors to ensure effective competition. Incorporation of those solicitation requirements is an important safeguard to ensure that the use of restricted tendering would not subvert the objective of the Model Law of promoting competition.

2. Paragraph (2) promotes transparency and accountability as regards the decision to use restricted tendering by requiring publication of a notice of the restricted tendering in a publication to be specified by the enacting State in its procurement law. Also relevant in this regard is the generally applicable rule in article 16(2) that the procuring entity include in the record of procurement proceedings a statement of the grounds and circumstances relied upon to justify the selection of the method of procurement other than tendering.

3. The function of paragraph (3) is to provide that, beyond the specific procedures set forth in paragraphs (1) and (2), the procedures to be applied in restricted tendering are those normally applied to tendering proceedings, with the exception of article 22.

Article 38. Request for proposals

1. While request for proposals is a method in which the procuring entity typically solicits proposals from a limited number of suppliers or contractors, article 38 contains provisions designed to ensure that a sufficient number of suppliers or contractors have an opportunity to express their interest in participating in the proceedings and that a sufficient number actually do participate so as to foster adequate competition. In that regard, paragraph (1) requires the procuring entity to solicit proposals from as many suppliers or contractors as practicable, but from a minimum of three if possible. The companion provision in paragraph (2) is designed to potentially widen participation by requiring the procuring entity, unless this is not desirable on the grounds of economy and efficiency, to publish in a publication of international circulation a notice seeking expressions of interest in participating in the request-for-proposals proceedings. In order to protect the procurement proceedings from inordinate delays that might result if the procuring entity were obligated to admit all suppliers or contractors that responded to such a notice, publication of the notice does not confer any rights on suppliers or contractors.

2. The procurement regulations may set forth further rules for the procuring entity in this type of a notice procedure. For example, the practice in some countries is that a request for proposals is sent as a general rule to all suppliers or contractors that respond to the notice, unless the procuring entity decides that it wishes to send the request for proposals only to a limited number of suppliers or contractors. The rationale behind such an approach is that those suppliers or contractors that expressed an interest should be given an opportunity to submit proposals and that the number asked to submit proposals should be limited only when important administrative reasons can be established. A countervailing consideration is that, while the wider notification procedure should not be forgone casually, such a procedure might create an extra burden for the procuring entity at a time when it is already busy.

3. The remainder of article 38 sets forth the essential elements of request-for-proposals proceedings related to the evaluation and comparison of proposals and the selection of the winning proposal. They are designed to maximize transparency and fairness in competition, and objectivity in the comparison and evaluation of proposals.

4. The relative managerial and technical competence of the supplier or contractor is included in paragraph 3(a) as a possible evaluation factor since the procuring entity might feel more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal. This provision should be distinguished from the authority granted to the procuring entity by virtue of article 6 not to evaluate or pursue the proposals of suppliers or contractors deemed unreliable or incompetent.

5. The "best and final offer" procedure required by paragraph (8) is intended to maximize competition and transparency by providing for a culminating date by which suppliers or contractors are to make their best and final offers. That procedure puts an end to the negotiations and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict the undesirable situation in which the procuring entity uses the price offer made by one supplier or contractor to pressure another supplier or contractor to lower its price. In anticipation of such pressure, suppliers or contractors may be led to raise their initial prices.

Article 39. Competitive negotiation

1. Article 39 is a relatively short provision since, subject to the applicable general provisions and rules set forth in the Model Law and in the procurement regulations, and subject to any rules of other bodies of applicable law, the procuring entity may organize and conduct the negotiations as it sees fit. Those rules that are set forth in the present article are intended to allow that freedom to the procuring entity while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process, in particular by providing in paragraph (4) that the procuring entity should, at the end of the negotiations, request suppliers or contractors to submit best and final offers, on the basis of which the successful offer is to be selected.

2. The enacting State may wish to require in the procurement regulations that the procuring entity take steps such as the following: establish basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; prepare various documents to serve as a basis for the negotiations, including documents setting forth the desired technical characteristics of the goods or construction to be procured, and the desired contractual terms and conditions; and request the suppliers or contractors with whom it negotiates to itemize their prices so as to enable the procuring entity to compare what is being offered by one contractor or supplier during the negotiations with what is being offered by the others.

Article 40. Request for quotations

It is important to include in a procurement law minimum procedural requirements for request for quotations of the type set forth in the Model Law. They are designed to foster an adequate level and quality of competition. With respect to the requirement in paragraph (1) that suppliers from whom quotations are requested should be informed as to the charges to be included in the quotation, the procuring entity may wish to consider using recognized trade terms, in particular INCOTERMS.

Article 41. Single-source procurement

The Model Law does not prescribe procedures to be followed specifically in single-source procurement. This is because single-source procurement is subject to very exceptional conditions of use and involves a sole supplier or contractor, thus making the procedure essentially a contract negotiation which it would not be appropriate for the Model Law to specifically regulate. It may be noted, however, that the provisions of chapter I would be generally applicable to single-source procurement, including article 11 on record requirements and article 12 on publication of notices of procurement contract awards.

Chapter V. Review

1. An effective means to review acts and decisions of the procuring entity and procedures followed by the procuring entity is essential to ensure the proper functioning of the procurement

system and to promote confidence in that system. Chapter V of the Model Law sets forth provisions establishing a right to review and governing its exercise.

2. It is recognized that there exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. Certain important aspects of proceedings for review, such as the forum where review may be sought and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of State administration in every country. Many legal systems provide for review of acts of administrative organs and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity (hereinafter referred to as "hierarchical administrative review"). In legal systems that provide for hierarchical administrative review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the State administration. In the context of procurement, for example, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g., a central procurement board); in other States the review function is performed by the body that exercises financial control and oversight over operations of the Government and of the public administration. Some States provide for review by the Head of State in certain cases.

3. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialized independent administrative bodies whose competence is sometimes referred to as "quasi-judicial". Those bodies are not, however, considered in those States to be courts within the judicial system.

4. Many national legal systems provide for judicial review of acts of administrative organs and public entities. In several of those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

5. In view of the above, and in order to avoid impinging upon fundamental conceptual and structural aspects of legal systems and systems of State administration, the provisions in chapter V are of a more skeletal nature than other sections of the Model Law. As indicated in the asterisk footnote in the Model Law at the head of chapter V, some States may wish to incorporate the articles on review without change or with only minimal changes, while other States might not see fit, to one degree or another, to incorporate those articles. In the latter cases, the articles on review may be used to measure the adequacy of existing review procedures.

6. In order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems throughout the world, only basic features of the right of review and its exercise are dealt with. Procurement regulations to be formulated by an enacting State might include more detailed rules concerning matters that are not dealt with by the Model Law or by other legal rules in the State. In some cases, alternative approaches to the treatment of particular issues have been presented.

7. Chapter V does not deal with the possibility of dispute resolution through arbitration, since the use of arbitration in the context of procurement proceedings is relatively infrequent. Nevertheless, the Model Law does not intend to suggest that the procuring entity and the supplier or contractor are precluded from submitting to arbitration, in appropriate circumstances, a dispute relating to the procedures in the Model Law.

Article 42. Right to review

1. The purpose of article 42 is to establish the basic right to obtain review. Under paragraph (1), the right to review appertains only to suppliers and contractors, and not to members of the general public. Subcontractors have been intentionally omitted from the ambit of the right to review provided for in the Model Law. This limitation is designed to avoid an excessive degree of disruption, which might impact negatively on the economy and efficiency of public purchasing. The article does not deal with the capacity of the supplier or contractor to seek review or with the nature or degree of interest or detriment that is required to be claimed for a supplier or contractor to be able to seek review. Those and other issues are left to be resolved in accordance with the relevant legal rules in the enacting State.

2. The reference in paragraph (1) to article 47 has been placed within square brackets because the article number will depend on whether or not the enacting State provides for hierarchical administrative review (see comment 1 on article 44).

3. Not all of the provisions of the Model Law impose obligations which, if unfulfilled by the procuring entity, give rise under the Model Law to a right to review. Paragraph (2) provides that certain types of actions and decisions by the procuring entity which involve an exercise of discretion are not subject to the right of review provided for in paragraph (1). The exemption of certain acts and decisions is based on a distinction between, on the one hand, requirements and duties imposed on the procuring entity that are directed to its relationship with suppliers and contractors and that are intended to constitute legal obligations towards suppliers and contractors, and, on the other hand, other requirements that are regarded as being only "internal" to the administration, that are aimed at the general public interest, or that for other reasons are not intended to constitute legal obligations of the procuring entity towards suppliers and contractors. The right to review is generally restricted to cases where the first type of requirement is violated by the procuring entity. (See also comment 2 on article 28.)

Article 43. Review by procuring entity (or by approving authority)

1. The purpose of providing for first-instance review by the head of the procuring entity (or of the approving authority) is essentially to enable that officer to correct defective acts, decisions or procedures. Such an approach can avoid unnecessarily burdening higher levels of review and the judiciary with cases that might have been resolved by the parties at an earlier, less disruptive stage. References to the approving authority in paragraph (1), as well as elsewhere in article 43 and the other articles on review, have been placed in parentheses since they may not be relevant to all enacting States (see paragraph 26 of section I of the Guide).

2. The policy rationale behind requiring initiation of review before the procuring entity or the approving authority only if the procurement contract has not yet entered into force is that, once the procurement contract has entered into force, there are limited corrective measures that the head of the procuring entity or of the approving authority could usefully require. The latter cases might

better fall within the purview of hierarchical administrative review or judicial review.

3. The purpose of the time limit in paragraph (2) is to ensure that grievances are promptly filed so as to avoid unnecessary delays and disruption in the procurement proceedings at a later stage. Paragraph (2) does not define the notion of "days" (i.e., whether calendar or working days) since most States have enacted interpretation acts that would provide a definition.

4. Paragraph (3) is a companion provision to paragraph (1), providing that, for the reasons referred to in comment 2 on the present article, the head of the procuring entity or of the approving authority need not entertain a complaint, or continue to entertain a complaint, once the procurement contract has entered into force.

5. Paragraph (4)(b) leaves it to the head of the procuring entity or of the approving authority to determine what corrective measures would be appropriate in each case (subject to any rules on that matter contained in the procurement regulations; see also comment 7 on the present article). Possible corrective measures might include the following: requiring the procuring entity to rectify the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rule of law; if a decision has been made to accept a particular tender and it is shown that another tender should be accepted, requiring the procuring entity not to issue the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other tender; or terminating the procurement proceedings and ordering new proceedings to be commenced.

6. An enacting State should take the following action with respect to the references within square brackets in paragraphs (5) and (6) to article "44 or 47". If the enacting State provides judicial review but not hierarchical administrative review (see comment 1 on article 44), the reference should be only to the article appearing in this Model Law as article 39. If the enacting State provides both forms of review but requires the supplier or contractor submitting the complaint to exhaust the right to hierarchical administrative review before seeking judicial review, the reference should be only to article 40. If the enacting State provides both forms of review but does not require the right to hierarchical administrative review to be exhausted before seeking judicial review, the reference should be to "article 44 or 47".

7. Certain additional rules applicable to review proceedings under this article are set forth in article 45. Additionally, the enacting State may include in the procurement regulations detailed rules concerning the procedural requirements to be met by a supplier or contractor in order to initiate the review proceedings. For example, such regulations could clarify whether a succinct statement made by telex, with evidence to be submitted later, would be regarded as sufficient. Furthermore, the procurement regulations may include detailed rules concerning the conduct of review proceedings under this article (e.g., concerning the right of suppliers or contractors participating in the procurement proceedings, other than the party submitting the complaint, to participate in the review proceedings (see article 45); the submission of evidence; the conduct of the review proceedings; and the corrective measures that the head of the procuring entity or of the approving authority may require the procuring entity to take).

8. Review proceedings under this article should be designed to provide an expeditious disposition of the complaint. If the complaint cannot be disposed of expeditiously, the proceedings should not unduly delay the institution of proceedings for hierarchical administrative review or judicial review. To that end, paragraph (4) provides a thirty-day deadline for the issuance by the procuring entity (or by the approving authority) of a decision on the

complaint; in the absence of a decision, paragraph (5) entitles the supplier or contractor submitting the complaint to initiate administrative review under article 44 or, if such review is not available in the enacting State, judicial review under article 47.

Article 44. Administrative review

1. States where hierarchical administrative review against administrative actions, decisions and procedures is not a feature of the legal system might choose to omit this article and provide only for judicial review (article 47).

2. In some legal systems that provide for both hierarchical administrative review and judicial review, proceedings for judicial review may be instituted while administrative review proceedings are still pending, or vice versa, and rules are provided as to whether or not, or the extent to which, the judicial review proceedings supplant the administrative review proceedings. If the legal system of an enacting State that provides both means of review does not have such rules, the State may wish to establish them by law or by regulation.

3. An enacting State that wishes to provide for hierarchical administrative review but that does not already have a mechanism for such review in procurement matters should vest the review function in a relevant administrative body. The function may be vested in an appropriate existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State (e.g., a central procurement board), a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters, such as a "procurement review board". It is important that the body exercising the review function be independent of the procuring entity. In addition, if the administrative body is one that, under the Model Law as enacted in the State, is to approve certain actions or decisions of, or procedures followed by, the procuring entity, care should be taken to ensure that the section of the body that is to exercise the review function is independent of the section that is to exercise the approval function.

4. While paragraph (1)(a) establishes time limits for the commencement of administrative review actions with reference to the point of time when the complainant became aware of the circumstances in question, the Model Law leaves to the applicable law the question of any absolute limitation period for the commencement of review.

5. The suppliers and contractors entitled to institute proceedings under paragraph (1)(d) are not restricted to suppliers or contractors who participated in the proceedings before the head of the procuring entity or of the approving authority (see article 44(2)), but include any other suppliers or contractors claiming to be adversely affected by a decision of the head of the procuring entity or of the approving authority.

6. The requirement in paragraph (2) is included so as to enable the procuring entity or the approving authority to carry out its obligation under article 45(1) to notify all suppliers or contractors of the filing of a petition for review.

7. With respect to paragraph (3), the means by which the supplier or contractor submitting the complaint establishes its entitlement to a remedy depends upon the substantive and procedural law applicable in the review proceedings.

8. Differences exist among national legal systems with respect to the nature of the remedies that bodies exercising hierarchical administrative review are competent to grant. In enacting the Model Law, a State may include all of the remedies listed in paragraph (3), or only those remedies that an administrative body would normally be competent to grant in the legal system of that State. If in a particular legal system an administrative body can grant certain remedies that are not already set forth in paragraph (3), those remedies may be added to the paragraph. The paragraph should list all of the remedies that the administrative body may grant. The approach of the present article, which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the approving authority may require (article 43(4)(b)). The policy underlying the approach in article 43(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority. Hierarchical administrative authorities exercising review functions are, in some legal systems, subject to more formalistic and restrictive rules with respect to the remedies that they can grant, and the approach taken in article 44(3) seeks to avoid impinging on those rules.

9. Optional language is included in the *chapeau* of paragraph (3) in order to accommodate those States where review bodies do not have the power to grant the remedies listed in paragraph (3) but can make recommendations.

10. With respect to the types of losses in respect of which compensation may be required, paragraph (3)(f) sets forth two alternatives for the consideration of the enacting State. Under option I, compensation may be required in respect of any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of the unlawful act, decision or procedure. Those costs do not include profit lost because of non-acceptance of a tender or offer of the supplier or contractor submitting the complaint. The types of losses that are compensable under option II are broader than those under option I, and might include lost profit in appropriate cases.

11. If the procurement proceedings are terminated pursuant to paragraph (2)(g), the procuring entity may institute new procurement proceedings.

12. There may be cases in which it would be appropriate for a procurement contract that has entered into force to be annulled. This might be the case, for example, where a contract was awarded to a particular supplier or contractor as a result of fraud. However, as annulment of procurement contracts may be particularly disruptive of the procurement process and might not be in the public interest, it has not been provided for in the Model Law itself. Nevertheless, the lack of provisions on annulment in the Model Law does not preclude the availability of annulment under other bodies of law. Instances in which annulment would be appropriate are likely to be adequately dealt with by the applicable contract, administrative or criminal law.

13. If detailed rules concerning proceedings for hierarchical administrative review do not already exist in the enacting State, the State may provide such rules by law or in the procurement regulations. Rules may be provided, for example, concerning: the right of suppliers and contractors, other than the one instituting the review proceedings, to participate in the review proceedings (see article 45(2)); the burden of proof; the submission of evidence; and the conduct of the review proceedings.

14. The overall period of 30 days imposed by paragraph (4) may have to be adjusted in countries in which administrative proceed-

ings take the form of quasi-judicial proceedings involving hearings or other lengthy procedures. In such countries the difficulties raised by the limitation can be treated in the light of the optional character of article 44.

Article 45. Certain rules applicable to review proceedings under article 43

1. This article applies only to review proceedings before the head of the procuring entity or of the approving authority, and before a hierarchical administrative body, but not to judicial review proceedings. There exist in many States rules concerning the matters addressed in this article.

2. References within square brackets in the heading and text of this article to article 44 and to the administrative body should be omitted by enacting States that do not provide for hierarchical administrative review.

3. The purpose of paragraphs (1) and (2) of this article is to make suppliers or contractors aware that a complaint has been submitted concerning procurement proceedings in which they have participated or are participating and to enable them to take steps to protect their interests. Those steps may include intervention in the review proceedings under paragraph (2), and other steps that may be provided for under applicable legal rules. The possibility of broader participation in the review proceedings is provided since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

4. While paragraph (2) establishes a fairly broad right of suppliers and contractors to participate in review proceedings that they have not themselves generated, the Model Law does not provide detailed guidance as to the extent of the participation to be allowed to such third parties (e.g., whether the participation of such third parties would be at a full level, including the right to submit statements). Enacting States may have to ascertain whether there is a need in their jurisdictions for establishing rules to govern such issues.

5. In paragraph (3), the words "any other supplier or contractor or governmental authority that has participated in the review proceedings" refer to suppliers and contractors participating pursuant to paragraph (2) and to governmental authorities such as approving authorities.

Article 46. Suspension of procurement proceedings

1. An automatic suspension approach (i.e., suspension of the procurement proceedings triggered by the mere filing of a complaint) is followed in the procurement laws of some countries. The purpose of suspension is to enable the rights of the supplier or contractor instituting review proceedings to be preserved pending the disposition of those proceedings. Without a suspension, a supplier or contractor submitting a complaint might not have sufficient time to seek and obtain interim relief. In particular, it will usually be important for the supplier or contractor to avoid the entry into force of the procurement contract pending disposition of the review proceedings and, if an entitlement to interim relief would have to be established, there might not be sufficient time to do so and still avoid entry into force of the contract (e.g., where the procurement proceedings are in their final stages). With a suspension approach, there is a greater possibility of settlement of complaints at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement. At the same time, the disadvantage of an automatic suspension approach

is that it would increase the extent to which the review procedures would result in disruption and delay in the procurement process, thus affecting the operations of the procuring entity.

2. The approach taken in article 46 with regard to suspension is designed to strike a balance between the right of the supplier or contractor to have a complaint reviewed and the need of the procuring entity to conclude a contract in an economic and efficient way, without undue disruption and delay of the procurement process. In the first place, in order to limit the unnecessary triggering of a suspension, the suspension provided for in article 46 is not automatic, but is subject to the fulfillment of the conditions set forth in paragraph (1). The requirements set forth in paragraph (1) as to the declaration to be made by a supplier or contractor in applying for a suspension are not intended to involve an adversarial or evidentiary process as this would run counter to the objective of a swift triggering of a suspension upon timely filing of a complaint. Rather, what is involved is an *ex parte* process based on the affirmation by the complainant of the existence of certain circumstances, circumstances of the type that must be alleged in many legal systems in order to obtain preliminary relief. The requirement that the complaint not be frivolous is included since, even in the context of *ex parte* proceedings, the reviewing body should be enabled to look on the face of the complaint to reject frivolous complaints.

3. In order to mitigate the potentially disruptive effect of a suspension, only a short initial suspension of seven days may be triggered through the fairly simple procedure envisaged in article 46. This short initial suspension is intended to permit the procuring entity or other reviewing administrative body to assess the merits of the complaint and to determine whether a prolongation of the initial suspension under paragraph (3) would be warranted. The potential for disruption is further limited by the overall thirty-day cap on the total length of the suspension in accordance with paragraph (3). Furthermore, paragraph (4) allows avoidance of the suspension in exceptional circumstances if the procuring entity certifies that urgent public interest considerations require the pro-

urement to proceed without delay, for example when the procurement involves goods needed urgently at the site of a natural disaster.

4. Paragraph (2) provides for the suspension for a period of seven days of a procurement contract that has already entered into force in the event that a complaint is submitted in accordance with article 44 and meets the requirements of paragraph (1). This suspension can also be avoided under paragraph (4) and, as noted above, is subject to extension up to a thirty-day total period under paragraph (3).

5. Since, beyond what is contained in article 47, the Model Law does not deal with judicial review, article 46 does not purport to address the question of court-ordered suspension, which may be available under the applicable law.

Article 47. Judicial review

The purpose of this article is not to limit or to displace the right to judicial review that might be available under other applicable law. Rather, its purpose is merely to confirm the right and to confer jurisdiction on the specified court or courts over petitions for review commenced pursuant to article 42. This includes appeals against decisions of review bodies pursuant to articles 43 and 44, as well as against failures by those review bodies to act. The procedural and other aspects of the judicial proceedings, including the remedies that may be granted, will be governed by the law applicable to the proceedings. The law applicable to the judicial proceedings will govern the question of whether, in the case of an appeal of a review decision made pursuant to article 43 or 44, the court is to examine *de novo* the aspect of the procurement proceedings complained of, or is only to examine the legality or propriety of the decision reached in the review proceeding. The minimal approach in article 47 has been adopted so as to avoid impinging on national laws and procedures relating to judicial proceedings.

III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE PREPARATION OF THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION AND GUIDE TO ENACTMENT

Summary record (partial)* of the 494th meeting

Monday, 5 July 1993, at 10 a.m.

[A/CN.9/SR.494]**

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 10.20 a.m.

The discussion covered in the summary record began at 10.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377, A/CN.9/378/Add.1)

Procedural matters

1. Mr. SAHAYDACHNY (Secretariat) drew attention to the report of the Working Group on the New International Economic Order on the work of its fifteenth session (A/CN.9/371), the annex to which contained the text of the draft Model Law as it had been adopted by the Group.
2. The Commission also had before it a draft Guide to Enactment of the Model Law which had been prepared by the Secretariat (A/CN.9/375) and which the Working Group had decided should accompany the Model Law after its adoption by the Commission. The purpose of the draft Guide was to assist legislators when considering the adoption of legislation based on the Model Law.
3. Comments from Governments on the draft Model Law were before the Commission in documents A/CN.9/376 and Add.1. In addition, the Secretariat had just received a communication in which the Government of the United Republic of Tanzania stated that it had no comments on the substance of the draft Model Law, but wished to commend the Working Group for its efforts in preparing the draft and to express the hope that the Model Law would assist developing countries in the conduct of their procurement transactions.
4. Concerning the possibility of work in the area of procurement of services, a subject not covered by the draft Model Law, the Commission had before it document A/CN.9/378/Add.1, which would be considered later in the session.
5. Mr. WALLACE (United States of America) said that the Commission would have to tackle three tasks: the consideration of proposals for substantive amendments to the draft Model Law, which his delegation hoped would be kept to a minimum; the work of drafting; and consideration of the draft Guide to Enactment. He would suggest that those three tasks be kept separate, with purely drafting matters left to a drafting group, so that the Commission meeting in plenary session could focus on matters of substance.
6. He would further suggest that a working party be set up to bring the draft Guide to Enactment into line with the Model Law as eventually adopted. The Guide would be crucially important for Governments when they came to consider the Model Law. However, it would be unfortunate if the Commission were to become bogged down over points of detail in the draft Guide instead of dealing with the more substantive issues arising from the draft Model Law itself.
7. Mr. HERRMANN (Secretary of the Commission) warned against departing from the Commission's normal practice by attaching particular importance to the draft Guide. The Commission had hardly ever approved a commentary on a final text adopted by it.
8. He also warned against referring too many substantive issues to a drafting group: experience had shown that that procedure did not in fact save time, because drafting groups tended to become a second battleground on contentious issues. It would be better to confine the drafting group to its traditional role, namely that of reviewing the agreed text in the Commission's six working languages. The review might well reveal differences of substance, but the drafting group would normally refer such differences back to the Commission.
9. Regarding the United States representative's suggestion that a working party be set up to adjust the draft Guide to Enactment, he said that, if a final text of the Guide was to be ready by the last day of the session, a great deal of work would be required. Since such a group would only be able to start work the following week at the earliest, however, it might be best to postpone a decision on that particular suggestion.
10. Mr. JAMES (United Kingdom) agreed that it was inadvisable to refer a large number of substantive issues to a drafting

*No summary record was prepared for the rest of the meeting.

**No summary records were prepared for the 485th to 493rd meetings.

group. Such a group should concentrate on matters of language; if it were asked also to deal with points of substance, even minor ones, there was a danger that during the final week of the current session it would have to refer back to the Commission points on which there had been disagreement. It would be better to discuss points of substance, both major and minor, in the Commission meeting in plenary session; any drafting group set up by the Commission should deal with purely drafting matters.

11. Where the draft Guide to Enactment was concerned, he agreed with the United States representative that a working party should be set up to bring it into line with what was decided in Commission on the Model Law. That would be a purely technical function, however, and points of substance relating to the draft Guide ought to be discussed by the Commission meeting in plenary session.

12. The Working Group had considered it extremely important that the draft Guide should be adopted by the Commission, so that it would be seen as having the endorsement of the Commission itself and not merely that of individual members.

13. Mr. SOLIMAN (Egypt) and Mr. TUVAYANOND (Thailand) agreed that the draft Guide should be adopted by the Commission as a whole.

14. Mr. MORAN BOVIO (Spain), agreeing with the representative of the United Kingdom that the discussion of substantive issues should take place in plenary session, suggested that the Commission should consider the draft Model Law and the draft Guide in parallel.

15. Mr. LEVY (Canada) said he could not recall a decision by the Working Group that the draft Guide should be adopted by the Commission, although he had no objection to such a course of action. In his view, it would be sufficient if the Guide were published as a Secretariat document after being brought into line with the Model Law as adopted by the Commission.

16. His concern was that the task of finalizing and adopting the Model Law might not be completed within the available time. Unlike the Working Group, the Commission had before it the comments of Governments which would have to be taken into account. He therefore believed that the draft Guide should not be considered at the same time as the draft Model Law, but left to later in the session, if time permitted.

17. Mr. WALLACE (United States of America), noting that he knew of one case of a country with an economy in transition where injudicious use of the draft Model Law had occurred, said he hoped that the Guide would receive the imprimatur of the Commission. The Guide needed prestige, and departure from precedent, with the Commission formally adopting it, was therefore desirable.

18. With regard to procedure, he believed that, provided the members of the Commission exercised discipline, the draft Model Law and the draft Guide could be considered together. The idea behind his suggestion that a working party be set up was that the working party should deal with inconsistencies between the draft Model Law and the draft Guide

19. Mr. GHAZIZADEH (Islamic Republic of Iran) said he considered that the draft Model Law and the draft Guide should be discussed together by the Commission meeting in plenary session and that the Guide should be adopted by the Commission.

20. Mr. GRIFFITH (Observer for Australia) said that the Commission's basic task was to finalize the text of the draft Model Law. If there was time thereafter, the draft Guide could be dis-

cussed. He did not think the Commission should try to finalize both together and preferred the approach indicated by the representative of Canada.

21. Mr. TUVAYANOND (Thailand) said that experience had shown that commentaries like the draft Guide were very important in interpreting conventions and model laws. He therefore believed that the draft Guide should be adopted by the Commission.

22. Mr. KOMAROV (Russian Federation) said that the legislators in some countries would need to draw on the experience of other countries, so that the Guide would be important for them. Adoption by the Commission would ensure that the Guide was more authoritative. He believed that it would be possible to deal with the draft Model Law and the draft Guide together within the available time.

23. The CHAIRMAN said that the Working Group had not decided that the draft Guide should be adopted by the Commission, although adoption would be useful. He believed that the Commission should first focus on the text of the Model Law, the comments submitted by Governments and the amendments proposed by the Secretariat. At a later stage, if there was time, a decision could be taken on whether to consider the draft Guide. In the absence of objections, he would assume that the Commission wished to proceed on that basis.

24. *It was so decided.*

25. Mr. GRIFFITH (Observer for Australia), referring to document A/CN.9/378/Add.1, said that future work on the procurement of services might call for amendments or additions to the Model Law.

26. The CHAIRMAN said that future work on the procurement of services might indeed have such an impact, but that it was not a matter for substantive consideration at present.

Consideration of draft Model Law on Procurement

Title

27. Mr. SAHAYDACHNY (Secretariat) drew the Commission's attention to the Secretariat proposal, contained in document A/CN.9/377, to amend the full title of the Model Law to read "UNCITRAL Model Law on Procurement", in line with the titles of other model laws formulated by the Commission.

28. Mr. WALLACE (United States of America) wondered whether it might not be preferable to amend the title to "United Nations Model Law on Procurement".

29. Mr. HERRMANN (Secretary of the Commission) said that all model laws hitherto adopted by the Commission were known as UNCITRAL model laws.

30. Mr. GRIFFITH (Observer for Australia) said that, as well as reflecting 25 years of precedent, a reference to UNCITRAL in the title would enable the Commission to take deserved credit for the authorship of the text.

31. Mr. TUVAYANOND (Thailand) said that a reference to UNCITRAL in the title would highlight the technical nature of the Model Law in a way that a reference to the United Nations would not.

32. Mr. LEVY (Canada) said that, in his opinion, reference to a model law as a "United Nations Model Law" would constitute a serious departure from precedent.

33. The CHAIRMAN said he took it that the Commission wished to amend the full title to read "UNCITRAL Model Law on Procurement".

34. *It was so decided.*

35. Mr. SAHAYDACHNY (Secretariat) drew attention to the Secretariat proposal, contained in document A/CN.9/377, for a footnote to be added referring to the Guide to Enactment of the Model Law.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the Secretariat proposal.

37. *It was so decided.*

38. Mr. WALLACE (United States of America) said that the addition of a footnote referring to the Guide to Enactment of the Model Law raised the question of the format to be adopted for publication of the Model Law and the Guide. Some favoured publishing such texts in separate documents; others felt it wiser to publish them in a single document—in which case the question arose of whether the various provisions and the commentaries thereon should be set out together on an article-by-article basis.

39. Mr. TUVAYANOND (Thailand) said that there were many precedents for adopting a format in which each provision was immediately followed by the commentary thereon.

40. The CHAIRMAN said that discussion of the question of the best format for publication of the Model Law and the Guide to Enactment should be deferred until consideration of their substance had been completed.

Preamble

41. *The Preamble was adopted.*

Article 1

42. Mr. WALLACE (United States of America) asked whether the Commission would be prepared to consider deleting subparagraph (2)(a) of article 1, which provided that the Law would not apply to procurement involving national security or national defence. With the end of the Cold War, there seemed no reason why military procurement should continue to be treated separately from non-military procurement. Subparagraph (2)(a) could be deleted on the understanding that some Governments might wish to specify military procurement under subparagraph (2)(b), while others might wish to exclude it through procurement regulations (subparagraph (2)(c)). To subject military procurement to the same discipline as other types of procurement would have a salutary effect.

43. Mr. LEVY (Canada), expressing surprise at the fact that the United States delegation had put forward such an idea orally and not with written comments submitted in advance to the Secretariat, said his Government believed that national security was an issue of sufficient significance to merit separate treatment, and, furthermore, to figure prominently in paragraph (2).

44. Mr. GRIFFITH (Observer for Australia) saw merit in the idea, but felt that it would be difficult to introduce an amendment as far-reaching as the deletion of subparagraph (2)(a) at such a late stage. Perhaps, with a view to securing the widest possible application of the Model Law, a note should be inserted in the final text of the Guide to Enactment indicating that the exclusions pursuant to paragraph (2) should be as few as possible.

45. Mr. TUVAYANOND (Thailand) said that for many countries military procurement remained a sensitive issue, for the cessation of the Cold War did not mean an end to threats of external aggression. He did not think that subparagraph (2)(a) should be deleted.

46. Mr. JAMES (United Kingdom), endorsing the remarks made by the representative of Canada, said that countries should be persuaded to accept the Model Law—not deterred by fear that it would apply to their defence procurement. Subparagraph (2)(a) should be retained. In the Guide to Enactment, however, it could be made clear that States were not being enjoined to exclude defence procurement.

47. Alternatively, paragraph (3) of article 1 could be amended to read: "This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procurement regulations expressly so declare or that the procuring entity expressly so declares to suppliers and contractors". In that way, an enacting State could, by means of procurement regulations, include defence procurement within the purview of national legislation based on the Model Law.

48. Mr. KOMAROV (Russian Federation) agreed that subparagraph (2)(a) should be retained. The draft Guide to Enactment made clear the general line which legislators should take with regard to exclusions.

49. Mr. PHUA (Singapore), agreeing with views expressed by the representative of Thailand, said that subparagraph (2)(a) should remain, together with an indication that it need not be included in national legislation based on the Model Law.

50. Mr. LEVY (Canada), responding to the remarks made by the representative of the United Kingdom, said he would have no objection to amending paragraph (3) provided that the amended text referred both to the procurement regulations and to the procuring entity. It would then be quite clear that, even if the procurement regulations were to provide for certain exceptions, the procuring entity would still have the authority to add to them. If there were nothing in the regulations, the procuring entity could on its own decide to increase the extent of the exceptions because, in the light of the particular procurement, it would not see any problem. In that way, the regulations could provide for a basic minimum of exceptions to which the procuring entity could still add.

51. The CHAIRMAN, summing up the discussion, said that, whether or not a reference to "procurement involving national security or national defence" was included, procurement for security and defence would in most States continue to be conducted outside the purview of the national legislation on procurement; one should therefore probably make it clear that that was allowed. At all events, the Commission appeared to take the view that subparagraph (2)(a) should be retained and that necessary clarifications should be given in the Guide to Enactment.

52. Mr. WALLACE (United States of America), accepting the Chairman's summary, said that he had probably been premature in suggesting that, with the end of the Cold War, military procurement need not be treated separately from non-military procurement; it was still a sensitive matter, but perhaps it should not remain so. The draft Model Law represented a major step forward in that it treated international and domestic procurement in essentially the same way, and the day might come when military procurement was treated like any other type of procurement. Article 1 was perfectly satisfactory as it stood, but agreement on the suggested deletion would have represented a further step forward.

53. The CHAIRMAN, thanking the United States representative for his spirit of compromise, took it that the Commission wished to retain subparagraph (2)(a).

54. *Article 1 was adopted.*

Article 2

55. Mr. SAHAYDACHNY (Secretariat) proposed that paragraph (g) be modified in order to cover functions of a "tender security" besides the one referred to in the draft Model Law. Such other functions were, in particular, providing for a situation where a tender was withdrawn or modified after the deadline for submission of tenders and providing for a situation where the supplier or contractor winning the procurement contract failed to supply any performance guarantee required under the contract—two situations envisaged in subparagraph (1)(f) of article 27. The proposal was spelled out in the Note by the Secretariat contained in document A/CN.9/377.

56. Mr. LEVY (Canada), welcoming the proposal, said that a formulation such as "to secure fulfilment of certain obligations" was nevertheless too vague. The functions of a "tender security" should be listed briefly.

57. Mr. SAHAYDACHNY (Secretariat) asked whether, in the interest of conciseness, a formulation could be used which spoke of securing obligations referred to in subparagraph (1)(f) of article 27, although no such cross-reference for purposes of definition appeared elsewhere in article 2.

58. Mr. LEVY (Canada) said that he could agree to a cross-reference, but would prefer to avoid it. Perhaps the Secretariat

could reflect on the matter and then advise the Commission. His only concern was the avoidance of vagueness.

59. The CHAIRMAN, noting that the Secretariat would reflect on the matter, suggested that the Commission consider article 2 paragraph by paragraph.

60. *Paragraphs (a) and (b) were adopted.*

61. Ms. ZIMMERMAN (Canada) said it might be useful to reconsider the definition of "goods" in paragraph (c) with a view to addressing concerns reflected in documents A/CN.9/376 and A/CN.9/376/Add.1. For example, printing was regarded as a service in a number of Canadian provinces and as a good in others; similar difficulties might be encountered in other States.

62. Modification of the definition might be needed in order to provide for the inclusion by States in their national legislation of some things not mentioned in paragraph (c) and for the exclusion of some things which States felt should be expressly excluded. Transparency would be added if the inclusions and exclusions were specifically referred to, use perhaps being made of square brackets. The likelihood of disputes about whether or not something fell within the scope of the definition of "goods" might also thereby be reduced.

The meeting rose at 12.35 p.m.

Summary record of the 495th meeting

Monday, 5 July 1993, at 2 p.m.

[A/CN.9/SR.495]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377)

Consideration of draft Model Law on Procurement (*continued*)

Article 2 (continued)

1. Mr. JAMES (United Kingdom), referring to the remarks made at the end of the previous meeting by the representative of Canada with regard to paragraph (c), said that he could go along with the idea of specific inclusions within the definition of "goods" but not with the idea of specific exclusions.

2. The draft Model Law already contained, in article 1, a provision enabling enacting States to exclude certain types of procurement from the Model Law's scope of application, and, if States were permitted to exclude certain items from the definition of "goods", the result might well be the exclusion of entire markets from the scope of application. The Guide to Enactment should therefore make it clear that any reference in square brackets to the exclusion of certain items was not intended to enable States to preclude the application of the Model Law to cases where no such effect was intended in article 1.

3. Mr. TUVAYANOND (Thailand) said that it might be useful if enacting States were enabled to exclude certain items. For example, a country wishing to procure electricity from another country as a means of assisting it financially would not wish to go through the procurement procedures envisaged in the Model Law, which could not take such political considerations into account. States should be free to decide which items to include in and exclude from the definition of "goods".

4. Ms. ZIMMERMAN (Canada) proposed the following additional wording, to be placed at the end of paragraph (c) after the word "electricity": "[and without limiting the generality of the foregoing, includes . . . but does not include . . .]". The purpose of her delegation's proposal was not to enable States to exclude entire markets from the Model Law's scope of application, but to enable them to make an appropriate distinction between goods and services. That should be made clear in the Guide to Enactment.

5. Mr. MORAN BOVIO (Spain), agreeing with the Canadian representative about the need to make the purpose of the proposed additional wording—if accepted—clear, said that limitations of the Model Law's scope of application could be achieved through the formulation of article 1, certain types of procurement, such as the procurement of electricity supplies, being excluded.

6. Mr. WALLACE (United States of America), noting what the Canadian representative had said about the purpose of her delegation's proposal, reminded the Commission that, if it took up the question of the procurement of services at some later date, it would have to consider the distinction between goods and services in that context.
7. The CHAIRMAN thought there would be little difficulty in adding to paragraph (c) the wording proposed by the delegation of Canada. On the other hand, article 1 could be amended in order to enable enacting States to specify in their own legislation which items were embraced or excluded by the concept "goods".
8. Mr. LEVY (Canada) said that subparagraph (1)(c) of article 1 could be used in order to exclude entire categories of goods. That was not the purpose of his delegation's proposal.
9. Mr. JAMES (United Kingdom), welcoming the Chairman's suggestion regarding article 1, said that the definition in paragraph (c) of article 2 should not be tampered with. If States wished to exclude certain markets, they should be obliged to do so under the provisions of article 1. The scope of the Model Law must be clear, leaving no room for enacting States to add or subtract certain categories.
10. Mr. TUVAYANOND (Thailand) also welcomed the Chairman's suggestion.
11. Ms. ZIMMERMAN (Canada) asked how the Chairman proposed to amend article 1.
12. Mr. SAHAYDACHNY (Secretariat) said that one way of resolving the issue currently before the Commission might be to add the following wording after the word "electricity" in paragraph (c) of article 2: "[the enacting State may specify in this law additional items that it considers to be goods, or items that it does not consider to be goods]".
13. Mr. JAMES (United Kingdom) said that in his view the wording just read out would be better placed in article 1, which was where the question of inclusions and exclusions should be dealt with.
14. The CHAIRMAN, agreeing with the representative of the United Kingdom, said that a definition providing for inclusions and exclusion would not, strictly speaking, be a definition at all. That was why he had suggested amending article 1.
15. Mr. TUVAYANOND (Thailand), also agreeing with the representative of the United Kingdom, said it would be logical to place the wording just read out at the end of subparagraph (2)(c) of article 1.
16. Mr. LEVY (Canada), pointing out that paragraph (2) of article 1 was concerned only with exclusions, and not with inclusions, said that his delegation's proposal was not aimed at limiting or adding to the Model Law's scope of application. It merely sought to help enacting States which might need to distinguish between goods and services in certain doubtful situations.
17. Amending article 1 in the way suggested would result in an article dealing not only with the exclusion of types of procurement but also with the exclusion—and inclusion—of different items. It would be easier if individual States could specify in their legislation what was or was not considered a "good".
18. He thought that the additional wording which his delegation had proposed made for greater clarity, but if the Commission thought otherwise his delegation would accept the fact.
19. Mr. GRUSSMANN (Austria) said that a model law should contain definitions that were as universal as possible. He therefore also agreed with the representative of the United Kingdom.
20. Mr. HERRMANN (Secretary of the Commission) said that provision was already made for exclusions in paragraph (c) of article 1 and that to provide for inclusions in that article might change the Model Law's scope of application. On the other hand, certain delegations were hesitant about the definitional approach advocated by the Canadian delegation.
21. Everyone would no doubt agree that the objective behind the Canadian proposal was a good one: a State should be able to make it clear whether, for example, printing was regarded as a good or a service. That being so, it might be better to mention printing and one or two other borderline cases after "electricity" in paragraph (c) of article 2 so as to trigger the thinking of enacting States.
22. There was, in his view, no need to say much in the Guide to Enactment about the reasons for the additions. In his experience, States were not very interested in the reasons for such changes.
23. Mr. ANDERSEN (Denmark) suggested that computer software might be one of the borderline cases mentioned after "electricity".
24. Mr. TUVAYANOND (Thailand) agreed about the mentioning of computer software but was doubtful about printing, which he felt could be regarded only as a service.
25. The CHAIRMAN asked the representative of Canada whether her delegation, in a spirit of compromise, could accept the inclusion in article 1 of the wording proposed shortly before by the Secretariat. In that connection, he understood that the idea of placing the definitions before the article concerning the Model Law's scope of application had been mooted.
26. Ms. ZIMMERMAN (Canada) said that the wording was acceptable since in substance it served the same purpose as the wording proposed by her delegation. Placing it in article 1, however, might lead to misinterpretation on the part of States; also, it would be necessary to include a cross-reference to the definition of "goods".
27. The CHAIRMAN suggested that the matter be set aside for the time being. Turning to paragraph (d) of article 2 and observing that no delegation had asked for the floor, he took it that the Commission wished to adopt that paragraph as it stood.
28. *It was so decided.*
29. The CHAIRMAN invited comments on paragraph (e) of article 2.
30. Ms. ZIMMERMAN (Canada) said that use of the expression "supplier or contractor" throughout the draft Model Law appeared to be unnecessary since the "supplier" and the "contractor" were the same entity. She felt it would be sufficient to refer simply to the "supplier".
31. Mr. WALLACE (United States of America) said that the question just raised had been discussed repeatedly during recent years. In the United States of America at least, there was a distinction: a supplier provided goods, whereas a contractor carried out civil engineering and similar work. He felt it would be preferable to retain the expression "supplier or contractor".
32. Mr. LEVY (Canada) said that his delegation did not wish to press the point, which was one of drafting, but that it would be happy if a more suitable expression could be found.
33. Mr. KLEIN (Observer for the Inter-American Development Bank) suggested that "tenderer" or "bidder" might be a suitable alternative.

34. The CHAIRMAN said he understood that the Canadian delegation was willing to accept retention of the expression "supplier or contractor", and he therefore took it that the Commission wished to adopt paragraph (e) of article 2 as it stood.

35. *It was so decided.*

36. The CHAIRMAN, observing that there were no comments on paragraph (f) of article 2, took it that the Commission wished to adopt that paragraph as it stood.

37. *It was so decided.*

38. The CHAIRMAN, recalling the discussion regarding paragraph (g) of article 2 at the previous meeting (see A/CN.9/SR.494, paras. 55-59), said that the Secretariat wished to propose an amendment to that paragraph.

39. Mr. SAHAYDACHNY (Secretariat) said that the proposed amendment concerned functions of a tender security which were envisaged in subparagraph (1)(f) of article 27 but not in paragraph (g) of article 2. It was proposed that after the words "if the contract is awarded to the supplier or contractor" the following wording be added: "not to withdraw or modify a tender after the deadline for submission of tenders, and, if required to do so, to provide a security for the performance of the procurement contract or to comply with any other condition precedent to the signing of the procurement contract specified in the solicitation documents; it includes such arrangements as bank guarantees . . ."

40. Mr. JAMES (United Kingdom) suggested that a more structured definition of "tender security" might be devised in the drafting group, if the Commission set one up.

41. The CHAIRMAN proposed that the formulation of paragraph (g) of article 2 be referred to the drafting group which the Commission would no doubt be setting up.

42. *It was so agreed.*

43. The CHAIRMAN, observing that there were no comments on paragraph (h) of article 2, took it that the Commission wished to adopt that paragraph as it stood.

44. *It was so decided.*

45. The CHAIRMAN said that in the light of informal consultations it was proposed that the following addition be made at the end of paragraph (c) of article 2: "[enacting States may include additional categories of goods]".

46. Mr. MORAN BOVIO (Spain) welcomed the proposed additional wording.

47. Mr. GRIFFITH (Observer for Australia) said that he could go along with the proposed additional wording, although he was not sure whether it was necessary. At all events, the purpose of the wording would have to be made clear in the Guide to Enactment. In particular, it would have to be made clear whether the word "includes" at the beginning of paragraph (c) was all-embracing or simply introduced an incomplete list.

48. Mr. KLEIN (Observer for the Inter-American Development Bank) suggested that "such items as" be inserted after "includes".

49. Mr. PEREZNIETO CASTRO (Mexico) supported that suggestion.

50. Mr. JAMES (United Kingdom), expressing support for the proposal read out by the Chairman, said that, while he had no objection to the suggestion made by the Observer for the Inter-American Development Bank, which might be appropriate in a

civil law setting, the word "includes" already implied—in a common law setting—that what followed was an incomplete list. On the other hand, the list of items in paragraph (c) was so comprehensive that one might consider replacing "includes" by "means"—the word used in all but one of the other definitions.

51. Mr. HERRMANN (Secretary of the Commission) said that the use of "includes" in two definitions and of "means" in the remainder implied that "includes" introduced an incomplete list; that was particularly so in the case of paragraph (h), where "includes" could not possibly be replaced by "means".

52. It would not be a good idea to add the words "such items as" after "includes" in paragraph (c), as users of the Model Law might jump to the conclusion that, where "includes" appeared without "such items as", the Commission intended that the word should be all-embracing.

53. Mr. GRIFFITH (Observer for Australia) said that, in the light of the point made by the Secretary, he felt that—unless difficulties arose in a civil law setting—the word "includes" should remain, without the addition of "such items as".

54. The CHAIRMAN took it that the Commission wished to adopt the text of paragraph (c) as it appeared in the annex to document A/CN.9/371 together with the additional wording which he had read out shortly before.

55. *It was so agreed.*

Articles 3 and 4

56. *Articles 3 and 4 were approved.*

57. Mr. WALLACE (United States of America) said that his delegation believed that it might be appropriate to add, between articles 4 and 5, an article concerning the use of electronic data interchange (EDI) in procurement. He therefore wished to alert the Commission to the fact that his delegation intended to raise the matter when the Commission came to consider article 9.

58. The CHAIRMAN said he trusted that the United States delegation would make a draft text available when it raised the matter of the use of EDI in procurement.

59. Mr. LEVY (Canada), welcoming the statement made by the United States representative, said that his own delegation intended to make proposals regarding that matter when the Commission came to consider articles 9 and 25, but it would have no objection to the addition of an article earlier in the Model Law.

60. The CHAIRMAN suggested that all proposals concerning the use of EDI be considered during the discussions on articles 9 and 25.

61. *It was so agreed.*

Article 5

62. *Article 5 was approved.*

Article 6

63. The CHAIRMAN, observing that there were no comments on paragraph (1), took it that the Commission wished to adopt it as it stood.

64. *It was so decided.*

65. Ms. ZIMMERMAN (Canada) proposed that in subparagraph (2)(d) the words "in this State" be replaced by "in any State", as the procuring entity might also be interested in knowing whether the supplier or contractor had failed to pay taxes and/or social security contributions in States other than that of the procuring entity. It might not be easy to obtain such information, but at least the possibility of trying to obtain it should not be ruled out.
66. Turning to subparagraph (2)(e), she said that the text as it stood could give rise to an anomalous situation: a supplier or contractor might qualify under the terms of that subparagraph even though one or more directors or officers were currently serving prison sentences for criminal offences related to their professional conduct. She therefore proposed the insertion of the following text after "period of . . . years": "or while a sentence is being served for the offence, whichever is the greater".
67. Mr. BONELL (Italy), expressing support for both proposals made by the delegation of Canada, said that the Italian Parliament was about to enact rules along similar lines.
68. Mr. WALLACE (United States of America) said that, while his delegation supported the proposal relating to subparagraph (2)(e), it feared that the other proposal would in effect result in the procuring entity being authorized to police compliance with tax laws and similar legislation in all countries.
69. Mr. JAMES (United Kingdom), supporting the proposal relating to subparagraph (2)(e), said it might nevertheless be advisable to introduce a change making it clear that only current directors or officers were meant.
70. He agreed with the delegation of the United States regarding the other proposal; it would be wrong, for example, to allow procuring entities to use a dispute between a company and the tax authorities as a reason for excluding that company.
71. Mr. BONELL (Italy), reiterating his support for the Canadian proposals, pointed out that in the early part of paragraph (2) it was stated only that "the procuring entity may require . . .". Information regarding the tax payment situation of a potential supplier or contractor could be important, and the procuring entity would do well to take into account any such information it might receive.
72. With regard to subparagraph (e), he felt that it might not be necessary to introduce the change envisaged by the United Kingdom representative; the text as it stood appeared to meet his concern.
73. Mr. LEVY (Canada), referring to the proposed amendment to subparagraph (2)(d), said his delegation, which recognized that a supplier or contractor might be involved in a legitimate dispute regarding tax payments, wished to avoid situations where the procuring entity was dealing with tax evaders. Perhaps the insertion of the word "lawful" before "obligations" would meet the concerns of the United States and United Kingdom representatives.
74. With regard to subparagraph (2)(e), he agreed with what the representative of Italy had just said. It was also his delegation's understanding that the text as it stood referred only to current directors or officers.
75. Mr. MORAN BOVIO (Spain) said that, in his opinion, the proposed amendment of "in this State" to "in any State" in subparagraph (2)(d) was not a good idea; it would simply make it easier for the procuring entity to reject tenders from certain suppliers or contractors.
76. Mr. GRIFFITH (Observer for Australia) said he did not think the addition of the word "lawful" in subparagraph (2)(d) would be very helpful, and he favoured retention of the present text.
77. With regard to subparagraph (2)(e), he imagined that any director or officer serving a prison sentence for a criminal offence related to his professional conduct would have been dismissed by the supplier or contractor. He wondered whether the use of a formulation such as "and the directors and officers are of good character" might not suffice.
78. Mr. WALLACE (United States of America) said he also felt that subparagraph (2)(d) should remain unchanged. Alternatively, the subparagraph could be deleted and something on the lines of "including a failure to pay taxes or social security contributions" be inserted in subparagraph (2)(e) after the words "criminal offence".
79. With regard to subparagraph (2)(e), following the comments by the observer for Australia he now thought that the text should be left as it stood.
80. Mr. LEVY (Canada) said that the problem with words such as "of good character" lay in their subjectivity and that the purpose of the Canadian proposal relating to subparagraph (2)(e) was to deal with cases where the length of the sentence being served by a current director or officer exceeded the number of years inserted by the enacting State in that subparagraph.
81. Mr. JAMES (United Kingdom) said he could not go along with the idea of using the words "of good character"; a director or officer convicted of—say—a sex offence could not be regarded as being of good character, but such a conviction would be irrelevant for the purposes of subparagraph (2)(e).
82. The crux of the matter was whether the individual concerned was a current director or officer, and he agreed with the observer for Australia that, in practice, a convicted director or officer would probably have been dismissed by the supplier or contractor.
83. On reflection, he felt it would be better to keep the text of subparagraph (2)(e) as it stood.
84. The CHAIRMAN wondered whether the insertion of "current" before "directors or officers" might help.
85. Mr. WALLACE (United States of America) suggested that the text of subparagraph (2)(e) be left as it stood.
86. Mr. LEVY (Canada) said that, in a spirit of compromise, his delegation would withdraw its proposed amendments to subparagraphs (2)(d) and (e).
87. The CHAIRMAN said he assumed that the Commission wished to adopt subparagraphs (2)(d) and (e) as they stood.
88. *It was so decided.*

The meeting rose at 5.05 p.m.

Summary record of the 496th meeting

Tuesday, 6 July 1993, at 9.30 a.m.

[A/CN.9/SR.496]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377)

Consideration of draft Model Law on Procurement (*continued*)

Article 6 (*continued*)

1. The CHAIRMAN said that, in the absence of any comments, he took it that the Commission wished to adopt paragraphs (3), (4) and (5) as they appeared in the annex to document A/CN.9/371.
2. *It was so decided.*
3. Mr. KLEIN (Observer for the Inter-American Development Bank), noting that he wished to comment on paragraphs (6) and (7) together, said that paragraph (6) as it stood permitted disqualification for minor errors and precluded the possibility of correcting such errors. With regard to paragraph (7), he believed that the phrase "Except where prequalification proceedings have taken place" should be deleted.
4. He suggested that in paragraph (6) the words "or inaccurate" be deleted and that a sentence reading as follows be added: "Solicitation documents shall permit suppliers or contractors to promptly correct reparable errors or omissions, usually relating to information of a factual or historical nature, required under paragraph (2)." The first part of paragraph (6) would then deal with instances of bad faith, while the second part would permit the correction of mistakes.
5. Mr. TUVAYANOND (Thailand), expressing support for what the Secretariat had proposed in document A/CN.9/377 regarding paragraph (6), suggested that the word "substantially" be inserted before "inaccurate" in that paragraph.
6. Ms. ZIMMERMAN (Canada) proposed that the end of paragraph (6) be amended to read "false, inaccurate or incomplete". Alternatively, if the intention of paragraph (7) was to address situations where the supplier or contractor had not submitted any information at all, she would propose that the end of paragraph (6) be amended to read "was false, inaccurate or, subject to paragraph (7), incomplete".
7. With regard to the suggested insertion of the word "substantially" in paragraph (6), she felt it might cause more problems than it solved.
8. Mr. GRIFFITH (Observer for Australia) felt that the proposed addition of the words "or incomplete" in paragraph (6) was probably unnecessary as incomplete compliance with the requirements of paragraph (2) would automatically mean failure to qualify. However, he would have no objection to the addition if the word "inaccurate" was qualified on the lines suggested by the representative of Thailand, but using the word "materially" rather than "substantially". If "materially" was understood in the same way in both the civil law and the common law setting, the addition of that word would help to ensure that disqualification on unreasonable grounds did not take place.
9. With regard to the point raised by the observer for the Inter-American Development Bank about the impossibility of correcting minor errors under the terms of paragraph (6), he warned against making it possible to correct intentional errors and thereby encouraging fraud. The possibility of correcting intentionally false, inaccurate or incomplete information should be excluded.
10. Mr. JAMES (United Kingdom) agreed with the observer for Australia that the word "materially" would be better than "substantially".
11. Mr. WALLACE (United States of America), agreeing to the inclusion of the words "or incomplete" and "materially" for the reasons already given, pointed out that the word "materially" was used in subparagraph (2)(b) of article 29.
12. With regard to the warning of the observer for Australia about making it possible to correct intentional errors, he wondered how the procuring entity was to judge the motivation of a supplier or contractor committing an error.
13. Mr. TUVAYANOND (Thailand) suggested inserting the word "materially" in front of "false" and adding "incomplete", so that the phrase read "was materially false, incomplete or inaccurate".
14. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the supplier or contractor should be given the opportunity to submit the information which had inadvertently not already been submitted.
15. Ms. ZIMMERMAN (Canada) said she supported the inclusion of the word "materially" in paragraph (6).
16. With regard to paragraph (7), it was her recollection that the previous draft had referred to "the submission of tenders, proposals or offers". Had the words "proposals or offers" been deleted inadvertently?
17. The CHAIRMAN confirmed that they had and said that the typographical error would be corrected by the Secretariat.
18. Mr. KOMAROV (Russian Federation) supported the inclusion of either "substantially" or "materially" in paragraph (6), there being no significant difference in the Russian language between the two. The inclusion of "incomplete", as proposed by the Canadian delegation, would also be useful.
19. He agreed that the possibility of correcting wrong information should not mean that intentionally false, inaccurate or incomplete information could be corrected. In the case of an intentional error, procuring entities could not but disqualify; they should not have the discretion to do otherwise.

20. Mr. LEVY (Canada), referring to the suggestion made by the representative of Thailand, said he had difficulty in understanding how "materially" could qualify "false", which was an absolute concept. In his view, the concept "false" implied intention, whereas "inaccuracy" implied a mistake. He would prefer the formulation "false or materially inaccurate or incomplete".
21. Mr. PEREZNIETO CASTRO (Mexico) agreed with the representative of Canada that "false" could not be qualified.
22. Mr. GRIFFITH (Observer for Australia) said that, in his understanding, "false" submissions were incorrect submissions made unintentionally. Since he and the representative of Canada—both from common law countries—apparently differed as to the meaning of "false", a reference to intention should perhaps be included.
23. Mr. GRUSSMANN (Austria), drawing attention to the words "at any time" in paragraph (6), said he favoured amending the end of paragraph (6) to read "was false, inaccurate or, subject to paragraph (7), incomplete". False or inaccurate information should at any time be grounds for disqualification, but not incomplete information.
24. Mr. TUVAYANOND (Thailand) said that, if intentionality was implicit in the word "false", perhaps the end of paragraph (6) should read "was false or materially inaccurate or incomplete".
25. Mr. JAMES (United Kingdom) said that a consensus seemed to exist in the Commission and that the matter should now be left to the drafting group which the Commission would no doubt be setting up. The essential point was to distinguish between information which was wrong (whether intentionally or otherwise) and information which was incomplete.
26. He endorsed the remarks just made by the representative of Austria.
27. Mr. SOLIMAN (Egypt) proposed that reference be made in paragraph (7) to previous misconduct, enabling the procuring entity to disqualify a supplier or contractor because of a major breach of contractual obligations in the past.
28. Ms. ZIMMERMAN (Canada) said that, in the light of the discussion, she felt that the end of paragraph (6) should read "was false, materially inaccurate or, subject to paragraph (7), materially incomplete".
29. With regard to the proposal made by the representative of Egypt, perhaps his concern was met by the references in subparagraph (2)(a) to "reliability" and "reputation".
30. Mr. BONELL (Italy) endorsed the remarks just made by the representative of Canada and the remarks made earlier by the representative of Austria.
31. Mr. TUVAYANOND (Thailand) said that, if paragraph (6) was to be amended so that it contained a reference to paragraph (7), the words "for the reason that it has not provided proof that it is qualified pursuant to paragraph (2) of this article" would need to be deleted from paragraph (7), while the words "undertakes to provide such proof" would have to be amended to read "undertakes to rectify the inaccuracy or incompleteness referred to in paragraph (6)".
32. The CHAIRMAN proposed that the final wording of paragraph (7) be left to the drafting group.
33. Mr. TUVAYANOND (Thailand) pointed out that paragraph (7) currently referred to "proof" of the supplier's or contractor's qualifications, which was a separate issue from the inaccuracy or incompleteness of information provided by the supplier or contractor. A supplier or contractor undertaking to rectify the inaccuracy or incompleteness referred to in paragraph (6) should not be excluded from the procurement process.
34. Mr. BONELL (Italy) said he favoured a wording of paragraph (7) along the lines suggested by the representative of Thailand.
35. Mr. AL-NASSER (Saudi Arabia) considered that paragraphs (2) and (6) covered all contingencies and that paragraph (7) should therefore be deleted.
36. Mr. JAMES (United Kingdom) reiterated his view that the matter of wording should now be left to the drafting group.
37. With regard to the remark just made by the representative of Saudi Arabia, he believed that paragraph (7) was important and should be retained.
38. Mr. PHUA (Singapore), agreeing on the need to retain paragraph (7), said that the paragraph dealt with the provision of proof that the requirements of paragraph (2) had been satisfied, whereas the current discussion on the paragraph dealt with a quite different issue—the rectification of the inaccuracy or incompleteness of information. If paragraph (7) was to be amended—a task that, in his view, could be dealt with by the envisaged drafting group—the two issues should be clearly distinguished.
39. Mr. GRIFFITH (Observer for Australia), agreeing that two separate issues were involved, said it might be desirable to break paragraph (7) into two parts. Meanwhile, the drafting group should perhaps be given some guidance on whether, in cases of inadvertence, rectification of the inaccuracy or incompleteness of information was or was not to be permitted.
40. Mr. KOMAROV (Russian Federation) said it was important to provide for such rectification if the inaccuracy or incompleteness was unintentional.
41. Mr. WALLACE (United States of America) said that the point now under discussion had arisen as a result of the addition of the word "incomplete" to paragraph (6). Originally, paragraph (6) had dealt only with questions of falsehood or inaccuracy, and paragraph (7) only with questions of incompleteness. The two sets of questions would have to be disentangled before paragraph (7) could be dealt with by the drafting group.
42. Mr. KLEIN (Observer for the Inter-American Development Bank) said that his aim in initiating the present discussion had been to ensure that, in situations where prequalification existed, there would be a short period during which the supplier or contractor could correct involuntary errors or omissions, thereby avoiding automatic disqualification. He was not sure whether he had succeeded in achieving that aim.
43. The CHAIRMAN said that in his view the issue was a drafting matter.
44. Mr. TUVAYANOND (Thailand) said that, if it was clear that both questions of falsehood and questions of inaccuracy and incompleteness were now to be dealt with in paragraph (7), he could agree that the matter be referred to the drafting group.
45. Mr. WALLACE (United States of America) said it was important to be clear about the aim of paragraph (7), which appeared to have been inadvertently changed. Originally, the aim had been to allow a supplier or contractor submitting incomplete information to "complete the record"; the aim had not been to allow a supplier or contractor submitting false or inaccurate information

to "put the record straight". Acceptance of such a change in the aim of paragraph (7) would amount to a policy decision on the part of the Commission.

46. Mr. PARRA PEREZ (Observer for Venezuela) said that in considering paragraphs (6) and (7) one was dealing with two elements of the responsibility of a potential supplier or contractor—a subjective one and an objective one. The subject element was that of possible guilt on the part of the supplier or contractor submitting false, inaccurate or incomplete information; the objective element was the relevance or importance of the error, inaccuracy or omission. In many administrations, when the authorities noted an error, inaccuracy or omission, they notified the party involved in order that it might put the matter right. Paragraph (7) served that purpose, and it was not concerned with questions of possible guilt.

47. Mr. BONELL (Italy) said he assumed that, with the replacement of "was false or inaccurate" by "was false or materially inaccurate or incomplete", paragraph (6) was acceptable to the Commission. If that assumption was correct, he agreed that the possible reworking of paragraph (7) was simply a drafting matter. If that assumption was wrong, however, the possible reworking of paragraph (7) might involve points of substance.

48. While not wishing to reopen the discussion on paragraph (6), if it was indeed closed, he would like to say that, in his view, while false statements could obviously not be "corrected", there was no difference between correcting incomplete statements and correcting inaccurate statements.

49. Mr. AZZIMAN (Morocco) said that, in his view, the purpose of paragraph (6) was to "penalize" suppliers or contractors submitting false or materially inaccurate or incomplete information, while the original purpose of paragraph (7) was to enable suppliers or contractors to demonstrate that they were qualified to submit tenders. Some speakers, however, apparently wanted paragraph (7) also to serve the purpose of enabling suppliers or contractors to correct inaccuracies in the information submitted by them. As that might lead to contradiction between paragraphs (6) and (7), the Commission should ensure that paragraph (7) served only its original purpose.

50. Mr. AL-NASSER (Saudi Arabia), recalling his earlier remark to the effect that paragraph (7) could be deleted, suggested that in paragraph (6) the words "was false or inaccurate" be replaced by "does not meet all necessary conditions". If that change were made, paragraph (2), which spoke of the right of the procuring entity to require the provision of "such appropriate documentary evidence or other information as it may deem useful", and paragraph (6) would together suffice.

51. Mr. TUVAYANOND (Thailand), stressing the need to provide the drafting group with guidance, said he had no intention of reopening the discussion on paragraph (6).

52. As he saw it, there were at present two issues before the Commission: first, that of precluding abuse of power on the part of the procuring entity, which should not be able to allege that information was false without giving the supplier or contractor an opportunity to rebut the allegation; and secondly, that of enabling the supplier or contractor to rectify the unintentional incompleteness and inaccuracy of information. The issue of precluding abuse of power on the part of the procuring entity would appear to have been resolved by the replacement of "was false or inaccurate" by "was false or materially inaccurate or incomplete" in paragraph (6).

53. Mr. GRUSSMANN (Austria), agreeing with the United States representative's most recent comment, said that the problem now before the Commission might have been caused by the

insertion of the word "materially" before both "inaccurate" and "incomplete" in paragraph (6). There should be no possibility of rectifying a material inaccuracy, only of rectifying a formal inaccuracy such as incompleteness. If that point were clear, the rest could perhaps be left to the drafting group.

54. Mr. WALLACE (United States of America) associated himself with the Austrian representative's remarks. With regard to the remarks made by the representative of Saudi Arabia, he felt that paragraph (7) could be a part of paragraph (2).

55. With regard to the issue of precluding abuse of power on the part of the procuring entity, to which the representative of Thailand had referred, he recalled that suppliers or contractors convinced that they had been wrongly excluded had the possibility of recourse under chapter V—Review.

56. If the procurement entity was irresponsible and the procurement process therefore conducted in a poor manner, potential suppliers or contractors would simply stop responding to invitations to tender in the country in question.

57. Mr. KLEIN (Observer for the Inter-American Development Bank) said that all appeared to agree that there could be no correction of errors or omissions when there was bad faith. What he had wished to propose, however, was that, when small errors or omissions had been made without bad faith, suppliers or contractors should be able to correct them even when prequalification proceedings had taken place.

58. Mr. TUVAYANOND (Thailand), responding to the representative of the United States, said that recourse under chapter V against exclusion was a *post facto* process, whereas paragraph (7) was concerned with the possibility of avoiding exclusion in the first place.

59. He did not think that paragraph (7) could be a part of paragraph (2). In his opinion, paragraph (7) was in its right place—after paragraph (6). The Commission should not try to redraft paragraph (7), but guidelines should be given to the drafting group on how to enable suppliers or contractors to rebut allegations of falsehood and how to enable them to rectify minor errors and shortcomings.

60. Mr. BONELL (Italy), supported by Mr. PEREZNIETO CASTRO (Mexico), said he had the impression that the discussion on paragraph (6), which he had assumed to be closed, was being reopened.

61. The CHAIRMAN said that that was his impression also.

62. Mr. WALLACE (United States of America) said that, if—as he believed was the case—the Commission wished paragraph (6) to end with the words "was false or materially inaccurate or incomplete", it should be clearly understood that "materially" qualified both "inaccurate" and "incomplete".

63. He proposed that paragraph (7) be incorporated into paragraph (2).

64. Mr. GRIFFITH (Observer for Australia) said he believed it to be the Commission's view that, if information was intentionally false or materially inaccurate or incomplete, no opportunity ought to be given to the supplier or contractor to correct it, but that, if information was neither materially false nor materially inaccurate, such an opportunity ought to be provided. If that was the case, he would suggest that the drafting group be asked to draw up an appropriate text on that basis.

65. Mr. TUVAYANOND (Thailand) proposed the following text for inclusion in paragraph (7):

- “The supplier or contractor shall be allowed to provide proof in rebuttal of an allegation of falsehood and to rectify the inaccuracy or incompleteness referred to in paragraph (6) no later than the deadline for the submission of tenders, unless there are reasonable grounds for believing that the supplier or contractor will not be able to do so.”
66. Mr. BONELL (Italy) said that, in his opinion, issues like the one addressed in the proposal made by the representative of Thailand should be dealt with elsewhere in the Model Law or through the courts.
67. With regard to the intervention by the observer for Australia, he did not think there was agreement that rectification should not be allowed if information was materially incomplete or inaccurate.
68. Mr. JAMES (United Kingdom), noting that his recollection was the same as that of the Italian representative, said that paragraph (7) in the form adopted by the Working Group contained a generous concession to suppliers and contractors, in that it allowed them to provide information at any time up to the deadline for the submission of tenders.
69. His understanding was that the Commission had agreed to add “incomplete” in paragraph (6) and to make that paragraph subject to paragraph (7), and that it had then agreed that the correction of unintentionally inaccurate information should also be provided for under paragraph (7). That would be consistent with the view taken by the Working Group in the matter of incomplete applications, and he was in favour of such a provision as it would potentially benefit suppliers and contractors without doing any harm to the procuring entity. Paragraph (7) should thus apply to inaccuracies and incompleteness of any kind, whether material or not.
70. With regard to the proposal made by the representative of Thailand, he suggested that the Commission take it up when it came to chapter V.

71. Mr. TUVAYANOND (Thailand) said he could accept that suggestion.

72. With regard to paragraph (6), he felt that it should be possible for suppliers or contractors to challenge disqualification only if they had been disqualified on the grounds of minor inaccuracies or incompleteness; they should be sufficiently competent not to make substantial errors in the information which they provided, and the present text was generous enough in allowing minor errors to be rectified.

73. Mr. KLEIN (Observer for the Inter-American Development Bank) said that, while there appeared to be agreement that suppliers or contractors should be able to correct minor errors up to the deadline for the submission of tenders, he had the impression that the Commission still believed that they should not be able to do so if prequalification proceedings had already taken place. He believed that the fact that such proceedings had already taken place should not debar suppliers or contractors from correcting minor errors up to the tender submission deadline.

74. Mr. PEREZNIETO CASTRO (Mexico) said that he was inclined to favour the position taken by the representatives of Italy and the United Kingdom regarding the proposal made by the representative of Thailand: chapter V already made provision for suppliers or contractors to challenge the allegation that information which they had submitted was false.

75. Mr. WALLACE (United States of America), noting that he also was inclined to favour that position, went on to say that two drafting problems remained: they related to the phrase “at any time” in paragraph (6) and to the fact that the words “false or inaccurate” occurred also in paragraph (8) of article 7.

76. The CHAIRMAN invited members to reflect during the lunch break on the issues raised in the course of the meeting so that a decision could be taken in the afternoon meeting.

The meeting rose at 12.35 p.m.

Summary record of the 497th meeting

Tuesday, 6 July 1993, at 2 p.m.

[A/CN.9/SR.497]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (*continued*)

Article 6 (*continued*)

1. The CHAIRMAN recalled that two issues in relation to article 6 had remained unresolved at the end of the previous meeting. He was happy to report that the proposal by the observer for the Inter-American Development Bank to delete the words “except

where prequalification proceedings have taken place” in article 6(7) had been withdrawn on the understanding that the idea behind it—namely, that a supplier or contractor should be able to correct information during prequalification proceedings but not later—would be inserted into article 7. Secondly, regarding materially incomplete or inaccurate information, the Australian delegation had agreed to go along with the view that incomplete information could be amended by the supplier or contractor since no tendering had taken place. On that understanding he took it that the Commission wished to adopt paragraphs (6) and (7) of article 6 subject to finalization of the drafting.

2. *It was so decided.*

Article 7

3. Mr. SAHAYDACHNY (Secretariat) said that the basic purpose of article 7 was to enable procuring entities to engage in prequalification proceedings. The Working Group had considered it important to include that aspect in the Guide to Enactment and in the Model Law mainly because certain procurement proceedings were costly and complex; the procuring entity might wish to examine the tenders only of suppliers or contractors it had established or qualified at the outset. The various paragraphs of article 7 established the principle that the prequalification procedures were essentially subject to the rules set forth in article 6 regarding in particular the criteria a procuring entity was permitted to employ in order to qualify a supplier or contractor. Another important principle was that the criteria used by the procuring entity must be disclosed to applicants for prequalification in the prequalification documents. Article 7 outlined the minimum required contents of prequalification documents, provided for a procedure for requests by applicants for clarification of those documents and contained a rule concerning the circulation of responses to such requests for clarification. It also established a procedure for what was sometimes called "post-qualification", which allowed the procuring entity to recheck and reconfirm the qualification of a supplier or contractor established at an earlier stage of the procurement proceedings, particularly if the initial qualification took place long before the time of the procurement contract and the procuring entity wished to make sure that the information originally submitted remained valid. Finally, he drew attention to the fact that article 7(8) also referred to "false or inaccurate" information.

4. The CHAIRMAN invited discussion of paragraph (1) of article 7. Observing that there were no comments, he took it that the Commission wished to adopt that paragraph as it stood.

5. *It was so decided.*

6. The CHAIRMAN, observing that there were no comments on paragraph (2), took it that the Commission wished to adopt that paragraph as it stood.

7. *It was so decided.*

8. The CHAIRMAN invited discussion of paragraph (3).

9. Ms. ZIMMERMAN (Canada) said that paragraph (3) required the prequalification documents to include the information specified in the invitation to tender under article 19(1), except subparagraphs (f), (g) and (i). In other words, subparagraph (j) of that article, which required the procuring entity to specify the place and deadline for the submission of tenders, would be incorporated into the paragraph under discussion. The procuring entity, however, might not always be in a position to state the place and deadline for the submission of tenders at the prequalification stage. She therefore suggested that article 19(1), subparagraph (j), should also be excluded in article 7(3) or, alternatively, that it should be made clear that the procuring entity's obligation in that regard existed only if the place and deadline for submission of tenders was known at the time. A similar proposal had been made by the Secretariat with respect to article 19(2). Her delegation had adopted that concept and applied it to the paragraph under discussion.

10. The CHAIRMAN suggested that the matter should be considered during the discussion of article 19.

11. Mr. TUVAYANOND (Thailand) said he was not convinced that subparagraph (j) should also be excepted, since the place and deadline might be very important considerations.

12. Mr. SAHAYDACHNY (Secretariat) said that the issue had been discussed in the Working Group. The idea behind not requiring

that information to be included in the invitation to prequalification or in the prequalification documents was that procurement proceedings involving prequalification might well stretch over a long period of time. The procuring entity might not be in a position, at the prequalification stage, to specify a place and deadline for the submission of tenders. As it might be unworkable to require such information in all cases, an alternative solution would be to emphasize the utility of that information and require it only if available or known. In the understanding of the Secretariat, the adoption of its proposal in regard to article 19(2) would obviate the necessity for the proposed Canadian amendment to article 7(3).

13. Mr. LEVY (Canada) said that it would be necessary to modify article 19(1)(j) to refer to the invitation to prequalify as well as to the submission of tenders.

14. Mr. JAMES (United Kingdom) said that it would appear odd to repeat the exceptions both in article 7 and in article 19, and even more odd if the list of exceptions in each case differed, as that would imply an intended distinction. It was a matter that could be examined by the drafting group.

15. The CHAIRMAN said that the drafting group would add that point to its agenda. He took it that the Commission wished to adopt article 7(3).

16. *It was so decided.*

17. The CHAIRMAN invited comments on paragraph (4) of article 7.

18. Ms. ZIMMERMAN (Canada) said that paragraph (4) dealt with a procuring entity's obligation to respond to requests for clarification in prequalification documents and that such clarifications provided by the procuring entity must be communicated to all suppliers and contractors provided with prequalification documents. It was, at least in Canada, not common practice to provide details of all clarifications to all parties in the prequalification process, though it was the practice to do so in the tendering process. In Canada a distinction was made since, at the prequalification stage, communicating such information to all contractors might be unnecessary and even costly. Canada therefore proposed that the word "shall" in the eighth line of the paragraph be amended to "may", so that the procuring entity would not be required to communicate such information in every instance.

19. Mr. WALLACE (United States of America) expressed his appreciation for the views put forward by the representative of Canada, but considered that the word "shall" should be retained. One purpose of the Model Law was to lay down the best possible practice. All potential bidders should be treated equally. The point was particularly relevant in regard to chapter V dealing with review: a party considering that it was unjustly refused qualification might challenge the procedure if that procedure was not public and the same for all bidders. To maintain high standards and to facilitate the challenge process, the word "shall" should be retained.

20. Mr. TUVAYANOND (Thailand) shared the concerns of Canada, but suggested a slightly different approach. The word "shall" should be retained, but the text should refer to "any reasonable request" or "for necessary clarification".

21. Mr. MORAN BOVIO (Spain) thought that the text was satisfactory as it stood. Though the Canadian proposal might, at first glance, seem useful, it did not appear to him a good idea to reduce the responsibilities of procuring entities. The Model Law was seeking to establish a minimum standard and it was not appropriate to lower that standard. The word "shall" should be retained.

Nor was he in favour of the suggestions made by the representative of Thailand, since introducing a distinction between necessary and unnecessary clarifications might give discretionary powers to the procuring entity that could create problems within the procuring entity and between the procuring entity and contractors or suppliers. It would also be difficult to distinguish satisfactorily between necessary and unnecessary information. He supported the text as it stood since it provided an acceptable standard of requirements for procuring entities, which could bill for the costs involved in providing the information concerned.

22. Mr. TUVAYANOND (Thailand) said that the words "reasonable" or "necessary" were used in many conventions and model laws. It would be easy to establish whether a qualification was necessary or not. However, it was important to retain the word "shall", since suppliers or contractors should be entitled to clarification to facilitate their comprehension of the invitation to tender or prequalification documents.

23. Mr. JAMES (United Kingdom) expressed agreement with the representative of Spain. The words "reasonable" and "necessary" were well-known legal concepts often used in legislation; ultimately, however, they were matters of judgement and, in the United Kingdom, frequently gave rise to litigation when used in legislation. The Working Group had indeed considered whether some qualification of the obligation of the procuring entity to answer requests for information was needed, but had deemed it preferable to require answers to all requests for information since suppliers or contractors not given answers might exercise their rights under the review chapter, and thus delay the procurement process. Canada had accepted the principle elsewhere in the Model Law that, when the tendering process started, clarifications and additional information should be given to all parties. The same principle applied to the prequalification process and would not necessarily involve more expense. He would have to be convinced that there did indeed exist a difference in principle. He considered that the word "shall" should be retained for both the prequalification and the tendering processes.

24. Mr. LEVY (Canada) said that his delegation had raised the point at the behest of Canada's leading government procurement entity. Information and clarifications were far more crucial during tendering than during prequalification. Canada's proposal relied on the good faith of the procuring entities to make the clarifications available to those people to whom it would be of interest. However, acknowledging that there might be many requests for clarification which would only be relevant to those making the request, he suggested as a compromise that the words "if relevant" be inserted before the word "shall", which would make the document more practical and more widely acceptable and help to eliminate unnecessary procedures and costs.

25. Mr. PHUA (Singapore) supported the view expressed by several speakers that paragraph (4) should be retained as it stood. The crux of the matter was not whether the procuring entities could be trusted; the aim was to ensure that no one supplier was given any advantage over any other. To that end the procuring entity could not be allowed to choose whether or not to respond to certain requests for clarification or whether such clarifications should be communicated to all or any suppliers.

26. Mr. TUVAYANOND (Thailand) expressed concern about the cost of responding to "any request" if the provision remained mandatory. If a supplier or contractor requested lengthy information, such as a legal text, which then had to be passed on to every potential supplier, a great deal of expense would be involved.

27. The CHAIRMAN pointed out that the prequalification procedure was tied to article 6 and the information to be supplied under that article was not infinite.

28. Mr. PRIESTLEY (Observer for Australia) said that, if the word "reasonable" was inserted, the question would then be whether the expression "reasonable request" would be interpreted by a court of law as meaning anything other than a reasonable request. Seen from that point of view, Australia could support the clause as it stood on the basis that the difficulties envisaged by Canada would in all probability be met by a reasonable construction of "request" as meaning "reasonable request", should the question ever arise.

29. Mr. WALLACE (United States of America) said it should be remembered in that connection that the Model Law was not exclusive. The Model Law dealt only with what had been defined as public procurement, and it was understood that the normal laws of the land continued. However, for the sake of countries that might have problems, his delegation would have no objection to the addition of the word "reasonable", which was the least harmful of the suggestions.

30. The proposal to insert the word "relevant" was unacceptable, because as indicated by several delegations a different issue was involved: the first sentence concerned the burden on the procuring entity, while the second sentence concerned the fairness and impartiality of the process from the point of view of the bidder. If information was given to one bidder, it should be given to all. In the real world many "simple" inquiries would be made of procuring entities, the replies to which need not be passed on to all bidders. However, as a matter of written principle, the word "shall" should remain.

31. Mr. BONELL (Italy) said that the United States proposal seemed to be a very sound one and urged the Canadian delegation to agree to it.

32. Mr. GRUSSMAN (Austria) supported the United States proposal. The use of the word "reasonable" would mean that the request was relevant to all other suppliers. The question might usefully be considered from the point of view of the review proceedings: if a supplier asked for further information and the procuring entity did not consider the request reasonable, it would not respond and the matter could be submitted to a review procedure; however, if the word "relevant" was inserted, that could mean that other bidders would not be informed of the entity's interpretation and could not therefore seek review.

33. Mr. LEVY (Canada) said that, in view of the comments made and arguments put forward, his delegation would accept the United States proposal.

34. *The United States proposal was adopted.*

35. *Paragraph (4), as amended, was approved.*

36. Ms. ZIMMERMAN (Canada), referring to paragraph (5), said that in the second sentence it would be more appropriate to provide that in reaching the decision in question the procuring entity should use only those criteria set forth in the prequalification documents. However, that was a drafting point.

37. The CHAIRMAN said that the matter would be taken care of by the drafting group.

38. *Paragraph (5) was adopted on that understanding.*

39. *Paragraphs (6) and (7) were adopted.*

40. Ms. ZIMMERMAN (Canada), referring to paragraph (8), said that the reference to prequalification in the context of the second sentence appeared unnecessary, as the point was already covered by article 6(6).

41. With regard to the reference to false or inaccurate information, her delegation's comment was similar to that made in connection with article 6—namely, that reference should also be made to incomplete information.
42. The CHAIRMAN said that the Secretariat had noted the point about "incomplete information"; the text should be brought in line with the amendment already adopted to article 6.
43. Mr. TUVAYANOND (Thailand) wondered why the first part of the second sentence used the word "shall". Why could not disqualification be left to the discretion of the procuring entity?
44. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had felt that the provision had to be mandatory. If a supplier or contractor who had previously qualified suddenly failed to qualify because of a change in his circumstances and the information earlier provided was no longer valid, the procuring entity had no choice but to disqualify him because article 6 stated that qualification had to be based on the criteria referred to in that article and disclosed in the solicitation documents.
45. The word "may" had been used in the second part of the sentence to be consistent with article 6(6), which left it to the discretion of the procuring entity whether or not the submission of false or inaccurate information should result in disqualification.
46. Mr. TUVAYANOND (Thailand) said that he had difficulty in understanding the reference to "reconfirmation".
47. Mr. SAHAYDACHNY (Secretariat) said that, if at an early stage of the procurement proceeding, a given supplier was deemed to have met the qualification criteria disclosed in the solicitation documents, and later on he became the successful supplier, the procuring entity, before entering into a procurement contract with him, might wish to verify that the qualification evaluation made earlier remained valid and might therefore ask him to confirm, but update, the information supplied earlier. The text provided that, if on that second scrutiny, based on the same criteria, the supplier no longer qualified, then disqualification was mandatory.
48. Mr. GRUSSMAN (Austria) said that the first sentence of paragraph (8) seemed to make the basic point clear; perhaps the second sentence could be deleted.
49. Mr. WALLACE (United States of America), referring to the Canadian delegation's comments, said that the reference to pre-qualification should be retained if the sentence itself were retained; however, the words "at any time" in article 6(6) should perhaps be deleted.
50. With regard to "reconfirmation", the text was perhaps ambiguous, because failure to reconfirm did not necessarily mean that the supplier was not qualified. He suggested that the sentence should be reworded on the following lines: "The procuring entity shall disqualify any supplier or contractor which the reconfirmation process shows to be unqualified".
51. The CHAIRMAN suggested that, as the problem was not a substantive one, the text should be referred to the drafting group.
52. *Paragraph (8) was adopted on that understanding.*

Article 8

53. Mr. LEVY (Canada), referring to his Government's comments in document A/CN.9/376/Add.1, said his delegation recognized that, in some situations, a reciprocity requirement was un-

necessary and uncalled for. For example, there was no reference to reciprocity in connection with the recognition of foreign arbitral awards in the UNCITRAL Model Law on International Commercial Arbitration, which had been enacted on the premise that it was good for foreign arbitral awards to be recognized in order to facilitate dispute settlement. However, in the present case, it might be asked why a State would enter into an agreement such as the General Agreement on Tariffs and Trade (GATT) or the proposed North American Free Trade Agreement while at the same time giving generally free and open access to procurements to all foreign nationals. Although a reciprocity provision could be contained in regulations, it would be more transparent if article 8 were to be amended and based on reciprocity. His delegation suggested the following wording for the beginning of paragraph (1): "Suppliers and contractors from States that have adopted legislation consistent with the Model Law and, in particular, this article are permitted to participate in procurement proceedings without regard to nationality . . .". The aim was to align the Model Law in some respects with the concepts embodied in trade agreements that had been entered into by States.

54. Mr. JAMES (United Kingdom) said that article 8 was an extremely important article and that it had been considered in some depth in the Working Group. The Working Group had concluded that the principles contained in it were the correct ones. The principle of no discrimination based on nationality should be the basic principle for a model law drafted by the United Nations. There were exceptions because it was recognized that there would be circumstances in which enacting States might have in their existing law, or might wish to enact at the same time as the procurement law, provisions to enable the procuring entity to limit participation in certain cases, which should be clearly defined and based on the law of the enacting State.

55. The suggestion made by the representative of Canada would have the effect of destroying the underlying purpose of article 8, namely that suppliers and contractors from any State should normally have the right to participate in procurement. What the Canadian delegation was proposing was very dangerous; it would represent a step towards protectionism, which would be quite unacceptable to his delegation. He was sure that most delegations wanted to see more free trade and competition, with equality of opportunity for suppliers from developing and developed States. The idea that competition in procurement should be restricted to those who had subscribed to the procurement code was unacceptable and contrary to the purpose of the Model Law which was to encourage free trade. The words of the preamble were very important, particularly paragraph (b). If the Canadian proposal was accepted, one might as well abandon the Model Law.

56. Mr. WALLACE (United States of America) said that his delegation supported the views expressed by the delegation of the United Kingdom. His delegation found it inexplicable that the Canadian delegation could raise such a point at that juncture. The matter had already been raised on many occasions and his delegation had been pleasantly surprised that agreement had been reached on such an open wording in the draft law. The preamble had already been passed, without objection from the Canadian delegation. What was being discussed was not trade policy, but a model law, embodying provision for treaty exception. The commentary on article 8 specifically mentioned treaty arrangements. As a matter of trade policy, the Canadian proposal was profoundly unwise and quite inconsistent with the current policy of Canada and other Governments participating in GATT. If the proposed change were adopted, he would recommend to his Government that it should not agree to the Model Law.

57. Mr. TUVAYANOND (Thailand) wondered why the term "suppliers and contractors" had been used in paragraph (1), rather than "suppliers or contractors", as had been used elsewhere.

58. Secondly, his delegation wondered what Governments were supposed to do in cases of economic sanctions. Would such a case constitute an exception to the rule of non-discrimination or would the suppliers from the target country be eligible to participate in the procurement process?
59. The CHAIRMAN drew attention to the commentary (see document A/CN.9/375) and said that, in the case of a Security Council resolution, the ruling would be binding on all States and contractors from embargoed States should not participate.
60. Mr. TUVAYANOND (Thailand) asked whether it was possible for a country to exclude any applicant for security reasons or for strong political policy reasons.
61. The CHAIRMAN noted that the text allowed an enacting State to insert an exclusion in its own regulations.
62. Mr. GRIFFITH (Observer for Australia) said that it was very much the view of the Australian delegation that the principle set out in paragraph (b) of the preamble should be vindicated as far as possible in finalizing the text. It was, however, necessary to admit the possibility of exceptions, as provided for in paragraph (1) of article 8. The reality was that the Model Law would be adopted only if it admitted the possibility of exceptions to the nationality provision. His delegation thus accepted the Working Group's text, but hoped that the Commission would do what it could to support the principle stated in paragraph (b) of the preamble. The commentary, in its final form, could make the general point, with reference to the Preamble in general, paragraph (b) thereof or article 8, that the strong view of the Commission was that, in so far as possible, there should be no discrimination based on nationality. There should also be a statement that the basic view of the Commission was that there should be no discrimination between non-nationals. An enacting State might have a preference for nationals over non-nationals, but there should be no discrimination between non-nationals.
63. As the draft Guide to Enactment (A/CN.9/375) made clear, obligations such as those imposed by the Security Council were allowed for by the text.
64. The CHAIRMAN, with reference to non-discrimination between non-nationals, drew attention to the provisions of paragraph (5) of article 6.
65. Mr. RAO (India) said the provision in article 8 would be undesirable in certain situations, for political reasons. It should be for the procuring entity to determine who should participate, in the light of the principle of reciprocity. Developing countries like India exercised marginal preferences for certain categories of supplier, such as small producers and development corporations. In India, price advantages were given to small producers, and procuring entities gave preference to the public sector, and to home-produced goods bearing an Indian standard. He therefore agreed with the representative of Canada that participation in procurement proceedings under article 8 should be based on reciprocity, giving preference to suppliers, contractors or bidders which had adopted the Model Law.
66. Mr. HAINZL (Austria) said the intention of the Model Law was to avoid discrimination based on nationality. Article 8 was counter-productive, opening the door to all kinds of discrimination. His delegation supported the view that there should be no discrimination on grounds of nationality. If there were any, it should be based on reciprocity, so that all States and legislatures which accepted the Model Law would have to accept bidders from any other country that did the same.
67. Mr. BONELL (Italy) said that the Canadian proposal should be considered on its merits. He did not support it, because the Model Law was not intended to serve the purpose of a law on competition, or an anti-trust law. The ultimate goals stated in the preamble were a form of wishful thinking, and must not be confused with the operative rules, which must be carefully and unambiguously drafted. Article 8 raised controversial economic and political issues. If the Commission's intention was to open the door as far as possible to international competition, article 8 must say so clearly. As presently drafted it was unclear. Its wording would enable States to discriminate on a case-by-case basis, on grounds which would be lawful but need not be stated in advance. Article 17 dealt with the preference, mentioned by the representative of India, for domestic procurement in the case of small entities or contracts. The case contemplated in article 17(b) should be the main reason for applying the exemption provided for in paragraph (1) of article 8. Both articles must be framed in unambiguous language.
68. Mr. SOLIMAN (Egypt) supported the proposal of the representative of Canada that participation in procurement proceedings should be confined to suppliers from States which had adopted the Model Law. Indeed, a provision along those lines would help to encourage adherence to the Model Law.
69. Mr. MORAN BOVIO (Spain) preferred to retain the existing wording of article 8. Doubts had been expressed about paragraph (1), but they could be dispelled by the commentary on article 8 in the draft Guide to Enactment (A/CN.9/375). Paragraph 1 of the commentary on article 8 explained the reason for the exceptions provided; he drew particular attention in that connection to the last three sentences. There was broad agreement within the Commission on the general principle laid down in article 8(1), but it could not be implemented immediately because of the international obligations mentioned in the commentary. Those were public commitments, and could not be described as unfair to other States.
70. Mr. WALLACE (United States of America) said the representative of Spain had offered a useful reminder of the historical background to the drafting of article 8. That article represented a compromise achieved over a period of years during which the legal presumption had shifted in favour of international competition. Article 17 likewise represented a compromise, and it was already clear, in article 8, that a State was entirely free under its own law to confine procurement to domestic suppliers. In recent years, the law had moved towards openness and non-discrimination; yet it remained clear, in article 17, that Governments had the right to exclude foreign competition. Where the Model Law was found to be too compact or opaque, guidance should be sought in the commentary, which he felt could be much more explicit. In his own earlier remark referred to by the representative of Italy, what he had meant was that he would recommend that his Government should not agree to the Model Law if the proposal was adopted.
71. The CHAIRMAN said that the discussion turned upon a proposal by the representative of Canada to insert a reciprocity clause into paragraph (1) of article 8. In its present wording, paragraph (1) was felt to be unclear, but as had been pointed out the reason for the exception provided for was stated in the draft Guide to Enactment. If necessary, the Commission could perhaps amend the commentary in the draft Guide.
72. Mr. BONELL (Italy) pointed out that the draft Guide to Enactment emphasized that the exceptions were not to be made "informally or secretly". Article 8 did not attempt to say which suppliers and contractors would be awarded a contract, but rather to state the grounds on which they would be "permitted to participate". Such participation could hardly be secret, nor could a foreign supplier be debarred in secret. Article 8 should emphasize the exceptional character of any exclusions granted on grounds of nationality. In most cases, exclusion would be due to the low

value of the procurement, or to international regulations, and such exceptions should be clearly defined. The reference in the draft Guide to secrecy and informality should be deleted, since article 8 was dealing only with admission to procurement procedures. The commentary could perhaps be expanded to reflect the majority view of the Commission, in which case he would support retention of article 8 in its present wording.

73. Mr. HUNJA (Secretariat) said that the Commission appeared to be of the same mind as the Working Group, preferring to leave the text of article 8 as it now was. He noted the misgivings expressed by the representative of India about non-discrimination towards foreign suppliers. In the Working Group, it had been emphasized that States had the right to make any exemptions they wished under the procurement regulations. It was also ex-

plained in paragraph 1 of the commentary on article 8 that obligations of enacting States such as those based on regional economic groupings were allowed for. That might also extend to reciprocal arrangements. The commentary should perhaps highlight the point that possible exemptions were not confined to those specifically mentioned in article 8.

74. The CHAIRMAN said he thought that most delegations could live with that approach. He suggested that the Commission should agree that the difficulties mentioned should be taken care of in the commentary.

75. *It was so decided.*

The meeting rose at 5 p.m.

Summary record of the 498th meeting

Wednesday, 7 July 1993, at 9.30 a.m.

[A/CN.9/SR.498]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (*continued*)

Article 9

1. Mr. SAHAYDACHNY (Secretariat) said that article 9 constituted a generic provision on the required form of communication between the procuring entity and the supplier or contractor. During the preparatory work of the Working Group, a consensus had emerged that the Model Law should facilitate the use of electronic data interchange (EDI), and the Secretariat had initially hoped that article 9 might also serve as an enabling provision in that regard. However, that hope had not been fulfilled.

2. Documents (conference room papers) A/CN.9/XXVI/CRP.2 and CRP.3, which would be available in all languages in due course, contained specific proposals for additional provisions to facilitate the use of EDI.

3. As it stood, paragraph (1) set forth a requirement that communications must be in a form that provided a record—not necessarily written—of their content; it also stipulated that that form was subject to other provisions of the law. The only provision in the existing text of the Model Law that conflicted with article 9 was the one in article 25(5), which required that tenders be submitted in writing and in a sealed envelope. The implications of the decision of the Working Group with regard to article 25(5) could be considered in greater detail during discussion of the proposals contained in documents A/CN.9/XXVI/CRP.2 and CRP.3.

4. He drew attention to a typographical error in the text of paragraph (2): the reference to article 11(3) should be replaced by a reference to article 18(3). In addition, the Commission might wish to consider the wisdom of retaining the reference, in the same

paragraph, to article 32(1), since the Model Law would then permit acceptance of a tender to be communicated initially by telephone.

5. Mr. HERRMANN (Secretary of the Commission) said that the key phrase in the wording of article 9(1) was "a form that provides a record of the content of the communication". There was general agreement that the substantively identical wordings used in other model laws, such as the Model Law on International Commercial Arbitration, should be interpreted as applying to EDI and that only purely oral communications, whether direct or by telephone, were excluded. He urged the Commission, in the interests of consistency, to consider the proposed wording of article 9(1) in the light of that interpretation.

6. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he had difficulty in understanding the first paragraph of article 9 and would therefore submit his own proposed version of that paragraph to the drafting group.

7. Mr. LEVY (Canada) said that his delegation's proposals (contained in document A/CN.9/XXVI/CRP.3) for amending articles 9(1) and 25(5) so as to provide for the use of EDI were based on an interpretation that fully coincided with the interpretation just referred to by the Secretary of the Commission.

8. Noting that the United States delegation was also submitting a proposal relating to EDI, he said that the Canadian delegation was not wedded to any particular form of words in its endeavour to secure the end that both delegations desired. The overriding concern was to ensure that, where EDI was available, its use should be permitted and that, where it was not available, its absence should not constitute an impediment to submitting or receiving tenders.

9. Mr. WALLACE (United States of America), noting that, like the delegation of Canada, his delegation was not wedded to any particular form of words, said that many countries currently

lacked EDI facilities and that, given the difficulties associated with issues such as confidentiality and authenticity, caution would have to be exercised if conversion of the procurement process from a paper-based to an electronics-based system was envisaged.

10. Perhaps the Commission should request the Secretariat to prepare a paper on EDI as applied to procurement, for consideration by the Commission at its next session along with the question of the procurement of services. In the paper, the Secretariat might address such questions as how to ensure confidentiality, how to solve problems of authentication, how to educate people in the workings of EDI in the procurement field and how to convince legislatures that the risks involved in the use of EDI were not too great.

11. Mr. ANDERSEN (Denmark), expressing strong support for the principle underlying article 9, said that the Commission, which should stick to the conclusion that it had reached some years before about the legal value of computer records, should ensure that the principle was not undermined.

12. Many problems associated with matters such as confidentiality and authentication would undoubtedly be resolved by technical means or by legislation other than laws based on the Model Law. He accordingly wished to endorse article 9 as it stood and to caution against raising problems that could be resolved in the practical world.

13. The CHAIRMAN proposed that the discussion on article 9 be suspended until documents A/CN.9/XXVI/CRP.2 and CRP.3 were available in all of the Commission's working languages.

Article 10

14. Mr. SAHAYDACHNY (Secretariat) said that earlier versions of the article had spelled out detailed requirements, the aim being to harmonize the relevant legalization laws of different States. Ultimately, however, the Working Group had decided that it should not attempt to harmonize such laws, but rather to ensure that they were not used for stifling competition, in particular through discrimination against foreign suppliers and contractors, and it had agreed on the principle that no legalization requirements should be imposed in procurement proceedings that were not imposed for the same types of documents in a general context.

15. Mr. WALLACE (United States of America) said he found article 10 entirely satisfactory.

16. Mr. KOMAROV (Russian Federation) said that there were international treaties which established simpler requirements for the legalization of documentary evidence than those established by the national legislation of many States. Perhaps one should provide in article 10 for legalization requirements to be determined not only by the legislation of a given State but also by relevant international treaties.

17. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 10 was an excellent means for precluding the imposition of excessive legalization requirements, but should also contain a provision enabling suppliers or contractors (especially those awarded contracts) to correct defects of form which were relevant from the point of view of legalization. Some might think that the point was implicitly covered by article 6(7), but he believed it should be covered explicitly in article 10.

18. Mr. JAMES (United Kingdom) considered that the best place to cover the point raised by the observer for the Inter-American Development Bank was in the Guide to Enactment.

19. Regarding the important point raised by the representative of the Russian Federation, if the laws of a State reflected that

State's obligations pursuant to an international treaty, the legalization requirements in that State would differ from those in a State not party to that treaty. The point was probably one of interpretation and could also be dealt with in the Guide to Enactment.

20. Mr. MORAN BOVIO (Spain) agreed with the representative of the United Kingdom that the points raised by the representative of the Russian Federation and the observer for the Inter-American Development Bank could be covered in the Guide to Enactment.

21. Mr. TUVAYANOND (Thailand), noting that article 10 referred to "the laws of this State", said that there were sometimes regulations and practices not specified in the laws of a State and that it might be necessary to add the word "regulations" to the word "laws".

22. The point raised by the representative of the Russian Federation was not, in his opinion, simply one of interpretation. Perhaps the wording of article 10 should take that point into account.

23. Mr. PEREZNIETO CASTRO (Mexico) suggested that the Guide to Enactment mention the international (including inter-American) treaties concerning the legalization of documentary evidence.

24. Mr. WALLACE (United States of America), noting that the question of international treaty obligations was covered in article 3, said that the drafting group should perhaps consider the point raised by the representative of the Russian Federation—and also the point raised by the representative of Thailand.

25. Mr. LEVY (Canada) said, with regard to the point raised by the representative of Thailand, that article 10 referred to requirements "provided for in the laws of this State" and that, as far as he was concerned, laws included regulations. He did not think that article 10 as it stood would give rise to any problems in common law jurisdiction, and probably not in civil law jurisdiction either. Besides, references to regulations in conjunction with laws in some cases and not in others might lead to problems of interpretation.

26. The representative of Thailand had also referred to "practices". As practices sometimes arose independently of the law, he would prefer it if there were no reference to practices in article 10.

27. With regard to the point raised by the representative of the Russian Federation, if a State became party to an international treaty, its laws should be brought into conformity with it. If they were not, that State was in breach of its international treaty obligations. The Model Law should be based on the assumption that the laws of the State were in conformity with such obligations.

28. Mr. TUVAYANOND (Thailand), noting that he hoped the drafting group would consider the point raised by him, said that the Model Law should reflect the fact that some countries, especially developing countries, implemented international treaty obligations without any implementing legislation—on the basis of practices. Unless the Model Law reflected that fact, such countries might find it difficult to enact it.

29. Mr. KOMAROV (Russian Federation) said that, after listening to the discussion, he was more convinced than ever that the point which he had raised should be covered—either in the Guide to Enactment or in the Model Law itself. A situation could arise where suppliers or contractors based in countries parties to international treaties providing for more lenient legalization requirements had an advantage over suppliers or contractors based in other countries and hence subject to more stringent requirements.

30. Mr. HERRMANN (Secretary of the Commission) said that, as he understood it, the representative of the Russian Federation had raised an important question—namely, should the Model Law ensure that there was no discrimination between tenders from suppliers or contractors based in countries which had acceded to treaties providing for less stringent legalization requirements and tenders from suppliers or contractors based in countries not bound by such treaties? That question was a complex one which could not be dealt with simply by inserting a remark in the Guide to Enactment.

31. Mr. KOMAROV (Russian Federation) said that the understanding of the Secretary of the Commission was correct.

32. Mr. RAO (India), recalling the Canadian representative's remark that, as far as he was concerned, laws included regulations, said that was not necessarily the case in his own country, where administrative regulations did not have the character of law. He therefore felt that explicit reference should be made to regulations in article 10.

33. Mr. PEREZNIETO CASTRO (Mexico) said that the discussion gave the impression that the Commission was developing an international treaty rather than a model law. He failed to see where the difficulties—if any—lay.

34. THE CHAIRMAN said the Commission had to decide whether to make provision in article 10 for equal treatment as between suppliers or contractors based in States with lenient legalization procedures and suppliers or contractors based in other States. Speaking in his personal capacity, he would suggest that article 10 not be amended for that purpose.

35. With regard to the question of regulations, he felt it should be dealt with in the Guide to Enactment.

36. Mr. LEVY (Canada), agreeing with the Chairman's remarks concerning the question of regulations, said that, in his opinion, the Commission should not try to eliminate differences arising from international treaties; it might otherwise be seen as acting presumptuously, and the endeavour might give rise to difficulties. He believed that article 10 should be left unchanged.

37. Mr. WALLACE (United States of America) supported that view, but agreed with the Secretary that the representative of the Russian Federation had raised an important question; the existence of international treaty obligations might well lead to discrimination in favour of certain suppliers or contractors, which would conflict with one of the main objectives of the Model Law. The attention of legislators should be drawn to the question in the Guide to Enactment.

38. The CHAIRMAN said he took it to be the wish of the Commission to include in the Guide to Enactment a statement to the effect that, where laws were mentioned, regulations were also implied and also a statement drawing attention to the question just referred to; article 10 could then be adopted unchanged.

39. *It was so decided.*

Article 11

40. Mr. HERRMANN (Secretary of the Commission), drawing attention to amendments proposed by the Secretariat in document A/CN.9/377, said the purpose of the article was to establish the requirement that the procuring entity prepare and maintain a record of all major actions and decisions taken in the course of the procurement proceedings. The Working Group had regarded that requirement as one of the main pillars of the type of procurement system envisaged under the Model Law and as an essential ele-

ment in trying to ensure transparency and the accountability of the procurement entity to taxpayers, administrative oversight bodies and legislatures.

41. The Working Group had thought it useful, for purposes of clarity, to list under a single heading all the kinds of information that should be contained in the record—even those which were already referred to in other parts of the text.

42. Paragraphs (2) and (3) of the article dealt with the question of the extent to which the record should be made available for examination, to whom and when. The Working Group's view had been that it would not be appropriate for the Model Law to provide for complete disclosure of the record to anyone on request, as provided for in some States by freedom of information acts, but rather that the Model Law should provide for disclosure to the extent necessary if the record was to fulfil its function of ensuring transparency and the right of aggrieved suppliers and contractors to seek review.

43. The Working Group had thought it important that a portion of the record should be available for examination by suppliers and contractors so that they could find out whether they had been treated fairly or whether they had grounds for seeking review, and provision for such examination was made in paragraph (3). Of course, the provisions regarding disclosure could be overridden by the orders of a competent court.

44. Lastly, the article provided that failure by the procuring entity to prepare a record would not give rise to liability for monetary damages.

45. Ms. ZIMMERMAN (Canada), referring to her Government's comments in document A/CN.9/376/Add.1, said that in some countries the procuring entity acted on behalf of client departments which prepared the record, which was then maintained by the procuring entity. In order to accommodate that situation, she suggested that the word "maintain" be substituted for "prepare" in the first line of paragraph (1).

46. With regard to subparagraph (1)(k), she suggested that the drafting group consider replacing the word "grounds" by the phrase "grounds and circumstances", which had been used in other contexts.

47. Mr. KLEIN (Observer for the Inter-American Development Bank) pointed out that countries might wish to add other kinds of information to those listed in paragraph (1). He therefore suggested that the words "at least" be inserted after the word "containing" in the second line.

48. Mr. WALLACE (United States of America) endorsed the last two suggestions.

49. Mr. JAMES (United Kingdom) supported the replacement of "grounds" by "grounds and circumstances" in subparagraph (1)(k).

50. The CHAIRMAN said he took it that the Commission wished to replace the word "grounds" by the phrase "grounds and circumstances" in subparagraph (1)(k).

51. *It was so decided.*

52. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. KLEIN (Observer for the Inter-American Development Bank), suggested that, rather than substituting "maintain" for "prepare" at the beginning of paragraph (1), the Commission use both words, so that the paragraph would read "prepare and maintain".

53. Ms. ZIMMERMAN (Canada) said that the suggestion made by the representative of Mexico would not meet her delegation's concerns.
54. Mr. TUVAYANOND (Thailand) suggested that "prepare" be replaced by "keep" rather than "maintain".
55. Mr. JAMES (United Kingdom), supporting that suggestion, said that the matter should perhaps be referred to the drafting group.
56. Mr. RAO (India) said that the essential question was not who prepared and maintained the record, but accessibility of the record for suppliers and contractors. Their interests required simply that the record be maintained.
57. The CHAIRMAN said he took it that the Commission wished to delete the word "prepare" in the first line of paragraph (1) and replace it by "maintain" or "keep", the choice being left to the drafting group.
58. *It was so decided.*
59. Mr. MORAN BOVIO (Spain) supported the idea—put forward by the Observer for the Inter-American Development Bank—that the words "at least" should be inserted after the word "containing" and said that their insertion would underline the fact that one was thinking in terms of minimum requirements.
60. Mr. PEREZNIETO CASTRO (Mexico), also supporting the idea, said that one should not view the Model Law in general as setting minimum requirements. The important thing was uniformity and harmonization, with potential suppliers or contractors participating in procurement proceedings on the basis of certainty that there were no requirements over and above those laid down in the Model Law.
61. The CHAIRMAN said he took it that the Commission wished to adopt the amendment suggested by the observer for the Inter-American Development Bank.
62. *It was so decided.*
63. The CHAIRMAN invited the Commission to consider the proposal by the Secretariat, made in document A/CN.9/377, that the required content of the record also include a summary of requests for clarifications and of the corresponding clarifications. If the proposal was acceptable, a subparagraph (1) could be added to article 11(1).
64. Mr. SAHAYDACHNY (Secretariat) explained that such a summary was needed so that suppliers or contractors could discover whether or not they had received responses to requests for clarification made by other suppliers or contractors—in other words, whether or not the procuring entity had complied with the requirement to circulate such responses.
65. Mr. TUVAYANOND (Thailand) said that, in his opinion, the matter was already dealt with in paragraph (4) of article 7.
66. Mr. SAHAYDACHNY (Secretariat) said that the purpose of the Secretariat's proposal was to provide a backstop to paragraph (4) of article 7.
67. Mr. WALLACE (United States of America) commended the proposal in principle, but said that, since the procurement process was often very long and could involve very many requests for clarifications, there was a need to specify exactly what kinds of information should be covered in the summary.
68. Mr. LEVY (Canada) suggested that the scope of the summary could be made clear by referring in additional subparagraph (1) to subparagraph (4) of article 7 and to article 23.
69. Mr. TUVAYANOND (Thailand) pointed out that in two places in article 11(1) the phrase "suppliers and contractors" was used, but elsewhere the reference was generally to "suppliers or contractors". Was that intentional, and if so what was the rationale?
70. The CHAIRMAN suggested that the question be referred to the drafting group and said he took it that the Commission wished to adopt the Secretariat's proposal for an additional subparagraph (subparagraph (1)), with the references suggested by the representative of Canada.
71. *It was so decided.*
72. The CHAIRMAN took it that the Commission wished to adopt article 11(1) as amended.
73. *It was so decided.*
74. The CHAIRMAN said he took it that the Commission wished to adopt article 11(2) as submitted by the Working Group in the annex to document A/CN.9/371.
75. *It was so decided.*
76. The CHAIRMAN invited the Commission to consider article 11(3).
77. Mr. SAHAYDACHNY (Secretariat) drew the attention of the Commission to the two amendments to article 11(3) proposed by the Secretariat in document A/CN.9/377, where the reference to article 11(3)(f) and (g) should read article 11(1)(f) and (g).
78. Ms. ZIMMERMAN (Canada) had no difficulties with the proposed amendments, but suggested that "other than" would be preferable to "beyond"; perhaps the drafting group could consider the matter.
79. Also, referring to the comments of her Government in document A/CN.9/376/Add.1, she proposed that paragraph (3) provide that relevant portions of records be made available "to" rather than "for inspection by" suppliers and subcontractors.
80. Mr. TUVAYANOND (Thailand), referring to the words "the procuring entity shall not disclose", asked why there should be an obligation—rather than a right—not to disclose information of the kind referred to in subparagraphs (3)(a) and (b). Also, he wondered whether the paragraph should not include provisions regarding non-disclosure on national security grounds. In addition, he wondered whether there might not be contradiction between subparagraph (3)(b), concerning information that should not be disclosed, and subparagraph (1)(e), concerning information that should be included in the record of the procurement proceedings.

The meeting rose at 12.35 p.m.

Summary record of the 499th meeting

Wednesday, 7 July 1993, at 2 p.m.

[A/CN.9/SR.499]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (*continued*)

Article 11 (*continued*)

1. Ms. ZIMMERMAN (Canada) said that, after informal consultations during the lunch break, her delegation wished to withdraw its proposal that the words "for inspection by" be replaced by the word "to" in paragraph (3).
2. Mr. WALLACE (United States of America) said his delegation had considered the Canadian proposal to have merit and would have liked the same change to be made in paragraph (2) of article 11 as well. As they stood, paragraphs (2) and (3) were unnecessarily limiting.
3. Mr. JAMES (United Kingdom), having expressed support for the remarks just made by the representative of the United States of America, said that he had misgivings about the written comments of the Canadian Government, where there was reference to the "debriefing" of bidders. The Model Law should provide for at least the inspection of the relevant portions of records.
4. Recalling that during the previous meeting it had been agreed that a subparagraph (l) should be added to paragraph (1), he said that a reference to that subparagraph would presumably also have to be included in paragraph (3).
5. Regarding the question of the representative of Thailand about non-disclosure on national security grounds, the point was probably covered by the phrase "would not be in the public interest" in subparagraph (3)(a). With regard to the phrase "shall not disclose", he felt that non-disclosure on the grounds that disclosure would be contrary to law, would impede law enforcement or would not be in the public interest might be dealt with in general legislation regarding confidentiality, but that non-disclosure on the grounds that disclosure would prejudice legitimate commercial interests of the parties or would inhibit fair competition and non-disclosure of information of the kind to which subparagraph (3)(b) related should be covered by legislation on procurement. At all events, as far as those two questions were concerned, he felt that paragraph (3) should remain unchanged.
6. Mr. WALLACE (United States of America), endorsing the remarks of the representative of the United Kingdom regarding the phrase "shall not disclose", said it was important that the provision remain in a mandatory form, in order to maintain both confidentiality and the integrity of the procurement process. Perhaps a comment could be included in the Guide to Enactment.
7. Mr. BONELL (Italy) expressed agreement with the representatives of the United Kingdom and the United States of America.
8. The CHAIRMAN said he took it that the Commission wished to retain the word "shall" in paragraph (3).
9. *It was so decided.*
10. The CHAIRMAN invited the Commission to consider the two proposals made by the Secretariat. The first one was to end the first sentence of paragraph (3) after "procurement contract" and to have a second sentence reading "Disclosure of the portion of the record referred to in subparagraphs (c) to (e) may be ordered by a competent court." The second one was to add the phrase "beyond the summary referred to in subparagraph (1)(e)" at the end of subparagraph (3)(b).
11. He took it that the Commission wished to approve those proposals.
12. *It was so decided.*
13. Mr. RAO (India) suggested that the words "for inspection by" be replaced by the words "on request to".
14. Mr. BONELL (Italy) said he had no objection to that suggestion, although he had assumed that portions of records would be made available only on request.
15. Mr. WALLACE (United States of America) said that he would prefer the text to read "made available for inspection or otherwise", but could go along with the suggestion made by the representative of India.
16. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. TUVAYANOND (Thailand), pointed out that paragraph (2) talked of making portions of records available "for inspection by any person", whereas paragraph (3) talked of making them available "for inspection by suppliers or contractors" only. Recalling what the representative of the United States of America had said a little earlier about paragraph (2), he said that, in his opinion, it was in order to hand over portions of records to suppliers or contractors, in order that they might compare and check figures, but not to persons other than suppliers or contractors.
17. The CHAIRMAN said that, as he saw it, the purpose of article 11 was to promote accountability and transparency. The procuring entity was under an obligation to keep records so that suppliers and contractors could seek meaningful review if the need arose. At the same time, the Model Law established two types of disclosure, one for the public at large and the other for contractors and suppliers if they so demanded. In a situation where the procuring entity was requested by a contractor or supplier to make a disclosure, the level of disclosure need not go beyond the summary. On the other hand, a situation was foreseen in the Model Law in which, even if a contractor or supplier made a request, no disclosure need be made save on the orders of a court. The balance achieved by the Model Law was a good one, taking care of the interests of the procuring entity and of contractors and suppliers.
18. He took it that the Commission wished to approve the replacement of the words "for inspection by" by the words "on request to" in paragraph (3).

19. *It was so agreed.*
20. *It was further agreed that the same amendment should be made in paragraph (2).*
21. Mr. BONELL (Italy) suggested that the phrase "for monetary damages solely as a result of failure" in paragraph (4) be replaced by "for damages due to failure", which was the more usual wording in such cases.
22. Mr. TUVAYANOND (Thailand) said that the word "prepare" should be replaced by the word "keep" in order to be consistent with what had been decided regarding paragraph (1).
23. Mr. GRIFFITH (Observer for Australia) wondered whether it was necessary to mention "damages"; the paragraph could perhaps read "The procuring entity shall not be liable to contractors and suppliers because of failure . . .".
24. Mr. SAHAYDACHNY (Secretariat) said that, as he recalled it, the Working Group had felt that mere omissions from the record, which would be unintentional in most cases, should not give rise to monetary damages, but it had not wished to preclude the possibility of injunctive or other forms of relief.
25. Mr. BONELL (Italy) said that, in spite of that explanation, he would still like to see the deletion of the word "monetary".
26. Mr. WALLACE (United States of America) said he supported the suggestion made by the representative of Italy.
27. Mr. LEVY (Canada), supporting the suggestion made by the Italian representative, said that paragraph (4) would then presumably read "The procuring entity shall not be liable to contractors and suppliers for damages due to failure to keep a record . . .".
28. It was his recollection that, when that paragraph had been discussed in the Working Group, the need had been felt to balance the necessity for record-keeping against ensuring that there was no penalty for a procuring entity that failed to carry out what was basically an administrative task. It had therefore been decided that there would be a requirement for the procuring entity to keep a record but, in the event of failure to do so, suppliers and contractors would not be able to sue it for damages. The assumption was that the procuring entity would also be subject to the general laws of the country and that such matters could be dealt with in other ways.
29. The observer for Australia had talked about deletion of the word "damages". However, use of the words "shall not be liable to contractors and suppliers" would remove the requirement for injunctive relief, which some delegations considered to be necessary.
30. Mr. PEREZNIETO CASTRO (Mexico), having expressed support for the suggestion made by the representative of Italy, said that use of the word "liable" in the English version of paragraph (4) suggested that the common law view had predominated during the drafting of that paragraph; in civil law systems, the focus was on "responsibility", which was not quite the same thing as "liability". In the Spanish version, the word "*deberá*" was used, with no reference to either responsibility or liability.
31. In response to the comment of the Canadian representative regarding injunctive relief, he said that most civil law systems did not have injunctions.
32. Mr. JAMES (United Kingdom) said that it had been agreed in the Working Group that there would be no liability for damages, but there would be liability either for injunctive relief or for

administrative law action. It was crucial to retain the idea of liability for damages, although it was not necessary to specify "monetary" damages.

33. Mr. GRIFFITH (Observer for Australia) withdrew his suggestion that the reference to "damages" be deleted.
34. Mr. KLEIN (Observer for the Inter-American Development Bank) said he did not see why a procuring entity that was incapable of keeping records should not pay damages to a supplier or contractor for its failure to comply with such an essential requirement. He would prefer it if paragraph (4) were deleted.
35. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had been concerned that a simple reference to exclusion of liability might be taken to exclude all forms of relief. That was why the word "monetary" had been inserted.
36. The CHAIRMAN called on the Commission to adopt paragraph (4) amended to read "The procuring entity shall not be liable to contractors and suppliers for damages due to failure to keep a record . . .".
37. *It was so decided.*

Article 12

38. Ms. ZIMMERMAN (Canada), referring to document A/CN.9/376/Add.1, said that, as it was currently worded, article 12 did not catch inducements offered through an agent of a supplier or contractor. To correct that, her delegation suggested the insertion of the words "directly or indirectly" in the third line after "submitted it". The present wording referred only to any "current or former officer or employee of the procuring entity". In order to broaden the scope of the provision, her delegation suggested the addition, in the fourth line, of the words "State or the" before "procuring entity". If the Commission were prepared to accept that proposal, it would also be necessary to refer to "the State or the procuring entity" in the seventh line.
39. Mr. SOLIMAN (Egypt) asked whether it was necessary to provide for cases where officers or employees of the procuring entity refrained from performing certain acts.
40. Ms. ZIMMERMAN (Canada) said she thought that cases of omission—as well as of commission—should be covered. Perhaps the reference to "decision" in the seventh line of article 12 covered both.
41. Mr. TUVAYANOND (Thailand), supporting the inclusion of the words "directly or indirectly", said he had doubts about the wisdom of inserting a reference to the State; it would be necessary, for the sake of consistency, to insert such references throughout the Model Law as the procuring entity acted on behalf of the State. In international forums, the bona fides of States was normally presumed.
42. He agreed with the Canadian view that the reference to "decision" covered cases of commission and omission.
43. In place of "a gratuity, whether or not in the form of money", he suggested the words "a gratuity or benefit in any form".
44. Mr. LEVY (Canada) said that, in suggesting the inclusion of a reference to the State, his delegation did not wish to cast doubt on the bona fides of any State. It was concerned about inducements offered to high officials of the State who were not employed by the procuring entity but were in a position to exercise influence.

45. Mr. WALLACE (United States of America) suggested that the final sentence begin with the words "Such rejection" rather than "The rejection".

46. Mr. RAO (India) expressed support for the amendments proposed by Canada, including the proposed insertion of a reference to the State.

47. Mr. MORAN BOVIO (Spain) also expressed support for the insertion of such a reference.

48. Mr. TUVAYANOND (Thailand) suggested that a reference to "relevant authorities" might be preferable.

49. Mr. WALLACE (United States of America) suggested the phrase "of the procuring entity or other governmental authority"; there were several references to "governmental authority" in the Model Law.

50. Mr. TUVAYANOND (Thailand) agreed.

51. Mr. LEVY (Canada) said that, if the words "the State or" were inserted, it should be made clear that the "officer or employee" was an officer or employee of the Government of the State or of the procuring entity—certainly not the constitutional head of State.

52. Mr. BONELL (Italy) suggested the phrase "of the procuring entity or any other relevant authority".

53. Mr. NICOLAE-VASILE (Observer for Romania) proposed the insertion, after the word "if", of the phrase "evidence is furnished that".

54. The CHAIRMAN suggested that the proposal made by the observer for Romania be reflected in the Guide to Enactment. On the basis of the discussion so far, article 12 might read as follows:

"(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it directly or indirectly offers, gives or agrees to give to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity or other governmental authority in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor."

55. *The wording read out by the Chairman was adopted.*

56. Mr. HERRMANN (Secretary of the Commission) said that insertion of the phrase "directly or indirectly" had often been proposed in the past in order to cover situations where an agent might be involved, but the Commission had always decided against inserting it so as to avoid its frequent repetition. Use of the phrase in article 12 should be regarded as exceptional, and it must not prompt the conclusion that references elsewhere in the text to acts of the procurement entity excluded acts of an agent.

57. The CHAIRMAN proposed that the Commission defer consideration of article 9 until documents A/CN.9/XXVI/CRP.2 and 3 had been available for some time in all of the Commission's working languages and that the Commission now take up chapter II of the Model Law.

Article 13

58. Ms. PIAGGI-VANOSI (Argentina) suggested that the title of article 13 be changed from "Methods of procurement" to "Selection procedures".

59. The CHAIRMAN said that the matter appeared to be purely one of drafting.

60. Mr. TUVAYANOND (Thailand) said that paragraph (13)(1) appeared to limit the freedom of Governments in certain fields, such as national security, and suggested that consideration of that paragraph be postponed until various articles later in chapter II had been discussed.

61. Mr. HUNJA (Secretariat) said that paragraph (13)(1) contained one of the most important provisions of the draft Model Law. Before discussing other methods of procurement, the Commission should agree on the principle enshrined in it—namely, that a procuring entity should normally employ tendering proceedings. Any difficulties which delegations had in that respect should be resolved at the outset.

62. Mr. WALLACE (United States of America) suggested that the Commission first discuss chapter II in its entirety, paragraph by paragraph. It could then approve articles 13, 14, 15 and 16 in the light of proposed drafting changes.

63. Mr. TUVAYANOND (Thailand) welcomed that suggestion.

64. Mr. LEVY (Canada) said that the entire Model Law rested on the principle that tendering was the preferred method of procurement. That principle should be endorsed before consideration was given to exceptions and to problems. He therefore felt it would be undesirable to leave paragraph (13)(1) in abeyance.

65. Mr. PEREZNIETO CASTRO (Mexico), referring to the remarks of the representative of Thailand, recalled that subparagraph (2)(a) of article 1 provided for the exemption of procurement involving national security or national defence from the scope of application of laws based on the Model Law. Moreover, subparagraph (2)(b) enabled enacting States to specify other types of procurement to be excluded. Hence there was no limitation of the freedom of Governments.

66. Mr. TUVAYANOND (Thailand) said he had no intention of undermining the principle that tendering proceedings were the best method of procurement. He merely wished to reserve his position in respect of paragraph (13)(1) until he could be sure that its wording would be compatible with national interests.

67. The CHAIRMAN proposed that the Commission approve article 13 in principle. In the course of its examination of articles 13 to 42, it might wish to return to previous articles in chapter II and consider proposed amendments to them.

68. *It was so decided.*

Article 14

69. Mr. SAHAYDACHNY (Secretariat), introducing the amendment to the *chapeau* of subparagraph (1)(a) proposed in document A/CN.9/377, said that, even if the procuring entity was able to formulate detailed specifications, the nature of the goods and uncertainty about the specifications might prompt it to use one of the methods of procurement referred to in article 14 other than tendering proceedings.

70. Mr. WALLACE (United States of America) said the Secretariat's proposal touched on an issue that had been hotly contested in the Working Group, which had given precedence to formal competitive bidding in article 13(1) and where there had been

opposition even to the mention of competitive negotiation in the Model Law.

71. In his view, the expression "unable to formulate" was objective, whereas "prefer not to formulate" was not. Moreover, the latter phrase would make it easier for Governments to delay giving specifications and then to opt for competitive negotiation or two-stage tendering. The words "unable to" should be retained, or at least language more careful than "prefer not to" chosen.

72. Mr. JAMES (United Kingdom) said that, for the reasons stated by the representative of the United States of America, he was not in favour of the amendment proposed by the Secretariat. He endorsed the principle, expressed in article 13(1), that tendering proceedings were the best method of procurement. There were exceptions, but they should be rigorously circumscribed.

73. Mr. LEVY (Canada) expressed surprise at the fact that the Secretariat had proposed such an amendment.

74. The CHAIRMAN said that the Secretariat had decided to withdraw its proposal.

75. Mr. TUVAYANOND (Thailand) said that, although the Secretariat had withdrawn its proposal regarding subparagraph (1)(a), he would suggest that the *chapeau* be amended to read "for the procuring entity the formulation of detailed specifications is not feasible"; in some cases, what was possible might not be feasible.

76. Mr. JAMES (United Kingdom), welcoming the suggestion made by the representative of Thailand, said the concept of "feasibility" lay between "inability" and "free choice". The matter could be brought to the attention of the drafting group.

77. Mr. PEREZNIETO CASTRO (Mexico), expressing preference for the phrase "is unable to", said that the procuring entity was not being given *carte blanche*; paragraph (2) of article 13 required a statement of the grounds and circumstances—for example, its inability to formulate the necessary detailed specifications—justifying the use of a method of procurement other than tendering procedures.

78. Mr. SAHAYDACHNY (Secretariat) introduced the amendment to subparagraph (1)(a)(ii) proposed in document A/CN.9/377.

79. Mr. JAMES (United Kingdom) said that, in his opinion, the proposed amendment did not merely represent a drafting improvement; it actually changed the meaning of the present text. The present wording provided for the situation where the procuring entity did not know how to solve a problem and felt it necessary to approach a supplier for advice; such a situation called for a two-way relationship from the very beginning because of the technical nature of the goods—such as computer software—or construction, not because the specifications could not be established with sufficient precision.

80. Mr. ANDERSEN (Denmark), recalling that the United Kingdom representative had mentioned computer software, said that in the case of standard software the specifications would be available and there would accordingly be nothing to negotiate about. Specialized software was a different matter; it lay outside the scope of application of the Model Law.

81. Mr. WALLACE (United States of America) said that, given the changes that were likely to be made to the *chapeau* of subparagraph (1)(a), the proposal made by the Secretariat regarding subparagraph (1)(a)(ii) was largely redundant. At the same time, he was not convinced that subparagraph (1)(a)(ii) should be retained in its present formulation.

82. Ms. PIAGGI-VANOSI (Argentina) said that in article 14 there should be provision for pointing out and correcting technical and legal errors in the solicitation documents and in the contract. For example, a procuring entity might be seeking equipment that was obsolete or technically inappropriate. The tenderer drawing attention to such an error should not be allowed to enjoy a special advantage; the other tenderers should be informed of it so as to ensure equal treatment for all.

83. The CHAIRMAN, noting that the concerns raised by the representative of Argentina appeared to be dealt with in article 23, said that the Secretariat had decided to withdraw its proposal relating to subparagraph (1)(a)(ii) and that he took it that the Commission wished to adopt that subparagraph as it stood.

84. *It was so decided.*

The meeting rose at 5 p.m.

Summary record of the 500th meeting

Thursday, 8 July 1993, at 9.30 a.m.

[A/CN.9/SR.500]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (*continued*)

Articles 13 and 14 (*continued*)

1. Ms. PIAGGI-VANOSI (Argentina), recalling the statement made by her at the previous meeting and the Chairman's comment on it, said she had been referring to two-stage tendering,

which was used in cases where the procuring entity was not in a position to formulate detailed specifications with sufficient precision to be able to open tendering proceedings. Article 23 provided for clarifications and modifications of the solicitation documents, and she had wished to suggest that the possibility of requesting clarifications and modifications of the contract itself also be provided for.

2. Mr. JAMES (United Kingdom) asked whether the representative of Argentina would agree to a postponement of consideration of the point raised by her until the Commission came to chapter III.

3. The CHAIRMAN said the representative of Argentina had indicated that she would agree to a postponement.

4. Mr. TUVAYANOND (Thailand) said he still had misgivings about the wording of article 13. Military procurement was, of course, excluded from the Model Law's scope of application, but national authorities might wish procurement details not to be made public for reasons other than national security or national defence—such as the desire to protect industrial secrets.

5. Mr. JAMES (United Kingdom) said that the point made by the representative of Thailand was probably covered by subparagraph (1)(c) of article 14. In document A/CN.9/377, the Secretariat was suggesting the deletion of that subparagraph, but he hoped that it would be retained. There was a difference between having a general rule as to whether the Law applied to defence procurement and deciding in a particular case whether tendering proceedings were appropriate. For example, one could have a general rule that the Law applied to aircraft procurement and then make exceptions on a case-by-case basis. Therein lay the importance of subparagraph (1)(c) of article 14.

6. The CHAIRMAN said that the point raised by the representative of Thailand might best be resolved during consideration of subparagraph (1)(c) of article 14; he therefore called upon the Secretariat to explain why it was suggesting in document A/CN.9/377 that the subparagraph be deleted.

7. Mr. SAHAYDACHNY (Secretariat) said that, in the light of the discussion on article 14, and in particular the comment just made by the representative of the United Kingdom, the Secretariat now felt that the subparagraph was not redundant and should therefore be retained.

8. Mr. BONELL (Italy) said that in subparagraph (1)(c) reference was made to "article 1(2)", whereas the correct reference should be to "article 1(3)".

9. The CHAIRMAN, noting that the typographical error would be corrected, said he took it that the Commission wished to retain subparagraph (1)(c).

10. *It was so decided.*

11. The CHAIRMAN invited comments on the suggestion of the Secretariat, contained in document A/CN.9/377, that "in the judgement of the procuring entity," be inserted between "when" and "engaging" in subparagraph (1)(d) of article 14.

12. Mr. WALLACE (United States of America), advising caution with regard to the Secretariat's suggestion, said that in the Working Group some representatives had felt that the procuring entity should not be able to resort automatically to informal procedures if all tenders had been rejected; consequently, the phrase "when engaging in new tendering proceedings would be unlikely to result in a procurement contract" had been introduced as a kind of objective standard. Insertion of "in the judgement of the procuring entity," would rob that phrase of its objective character, particularly as there would be no possibility of contesting the procuring entity's judgement. One should not make it too easy to opt for informal rather than formal procedures.

13. Mr. LEVY (Canada) said that, while there was admittedly a need for caution, someone had to judge whether "engaging in new tendering proceedings would be unlikely to result in a procurement contract". The amendment suggested by the Secretariat made it clear that it was the procuring entity that would do so.

14. Mr. KOMAROV (Russian Federation) said he also supported the Secretariat's suggestion, especially since there was no risk that overly great powers would thereby be accorded to the procur-

ing entity: the *chapeau* of paragraph (1) provided that the actions of the procuring entity should be subject to approval by an appropriate State organ.

15. Mr. RAO (India) also supported the Secretariat's suggestion.

16. The CHAIRMAN took it that the Commission accepted the Secretariat's suggestion.

17. *It was so decided.*

18. Mr. KLEIN (Observer for the Inter-American Development Bank) suggested that the words "therefore be impossible or imprudent" in subparagraph (2)(a) be replaced by something on the lines of "not deliver the goods or produce the work when required".

19. Subparagraph (2)(b) seemed unnecessary, since a catastrophic event was simply one example of an occurrence that could give rise to an urgent need. The question of catastrophic events could perhaps be dealt with in the Guide to Enactment.

20. Mr. JAMES (United Kingdom) said he had no objection to the suggestion made by the observer for the Inter-American Development Bank regarding the words "therefore be impossible or imprudent". However, a change of the kind suggested would have to be made also in article 16.

21. In his opinion, subparagraph (2)(b) should be retained. There was a substantive difference between it and subparagraph (2)(a), which contained an important proviso. Paragraph (2)(b) had been included because it had been recognized that, after a catastrophic event, there might well not be enough time to consider questions of foreseeability or dilatory conduct. For example, in the current major flooding disaster in the mid-western United States, it would be unreasonable to expect governmental bodies to go through tendering procedures just because there had been no flood wall in one area and serious flooding should therefore have been foreseen.

22. Mr. TUVAYANOND (Thailand) suggested that the word "impossible" in subparagraph (2)(a) be replaced by "impractical".

23. Mr. LEVY (Canada) said he had no objection to the suggestion made by the representative of Thailand.

24. With regard to subparagraph (2)(b), which had been included at the request of the Canadian delegation, a situation could exist where a catastrophic event was foreseeable but nothing had been done about it. In the case of the flooding in the mid-western United States, people should not suffer because a flood wall had not been built in one area. Thus, subparagraph (2)(b) should be retained.

25. If "impossible" was changed to "impractical" in subparagraph (2)(a), that change should also be made in subparagraph (2)(b).

26. Mr. KLEIN (Observer for the Inter-American Development Bank) said he would not press his suggestion regarding subparagraph (2)(a). With regard to subparagraph (2)(b), he said that disasters were regarded as unforeseeable in insurance law.

27. Mr. GRIFFITH (Observer for Australia) supported the substitution of "impractical" for "impossible" and suggested that the words "or imprudent" be deleted in subparagraphs (2)(a) and (2)(b). He also suggested that in subparagraph (2)(b) the words "amount of" be deleted.

28. With regard to subparagraph (2)(a), it seemed unrealistic to make an exception for cases of urgent need if the need was to be

subject to a "foreseeability test", particularly as the concept of "foreseeability" was a highly subjective one. Weeks of litigation might be necessary in order to establish whether the circumstances giving rise to an urgency were or were not foreseeable. He therefore felt that "foreseeable by, or" should be deleted.

29. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. PARRA-PEREZ (Observer for Venezuela), said, with regard to the word "impossible" in subparagraph (2)(a), that the procuring entity might manoeuvre in such a way that engaging in tendering proceedings actually became impossible. Although he could accept the replacement of "impossible" by "impractical", he feared that the procuring entity would still have that possibility.

30. Where subparagraph (2)(b) was concerned, he did not think that use of the word "impractical" was appropriate.

31. Mr. TUVAYANOND (Thailand) considered the phrase "because of the amount of time involved in using those methods" in subparagraph (2)(b) to be rather a negative comment on tendering proceedings and suggested instead the phrase "because of time constraints".

32. One reason why he believed that "impractical" was preferable to "impossible" in subparagraph (2)(b) was that, although it might be possible to engage in tendering proceedings, they might take so long that the needs of the catastrophe victims would go unmet.

33. Mr. LEVY (Canada), explaining the reason for the proviso in subparagraph (2)(a), said that a procuring entity about to—say—engage contractors to build a highway in the north-eastern United States, where road-building in winter was impossible owing to the harsh climate, might avoid tendering proceedings by waiting until autumn and then claiming that there was not enough time to call for tenders because of the need to start work immediately.

34. Mr. AL-NASSER (Saudi Arabia) proposed that the word "direct" be added before "competitive negotiation" in the *chapeau* of paragraph (2).

35. Mr. WALLACE (United States of America), commending the explanation given by the Canadian representative, said it should not be made easy for the procuring entity to move into competitive negotiation or sole-source procurement.

36. Regarding the proposal made by the observer for Saudi Arabia, he said that, in his opinion, "competitive negotiation" was a technical term and could not be qualified in the manner proposed.

37. Mr. PHUA (Singapore) noted that in paragraph (1) of article 14 procurement by two-stage tendering and competitive negotiation was subject to approval by a State-designated organ, whereas procurement by competitive negotiation was not subject to such approval in paragraph (2). What was the reason for the difference?

38. Mr. LEVY (Canada) said that, if his memory served him well, the Working Group had not included the approval provision in paragraph (2) as that would have been inconsistent with the need to take urgent decisions.

39. Mr. PHUA (Singapore) asked whether the State-designated organ could, for its own reasons, order competitive negotiation in a situation where there was no urgent need for the goods or construction.

40. Mr. JAMES (United Kingdom), noting that in article 16 single-source procurement when there was an urgent need for the goods or construction was subject to approval by a State-designated organ, said that in his opinion the fact that in paragraph (2) of

article 14 there was no approval provision was probably due to an oversight on the part of the Working Group.

41. Regarding the second question asked by the representative of Singapore, he said that a major point of the draft Model Law was that competitive negotiation should not be engaged in merely because the procuring entity or some other organ thought it fit to opt for that procurement method.

42. Mr. LEVY (Canada), agreeing with the United Kingdom representative, said that on reflection he thought that the approval provision should be included in paragraph (2) also.

43. Mr. TUVAYANOND (Thailand) said he was by no means sure that the absence of an approval provision in paragraph (2) was the result of an oversight.

44. Mr. KOMAROV (Russian Federation) said he did not think it was the result of an oversight. Admittedly article 16 contained the approval provision, but that was because single-source procurement precluded competition whereas a major purpose of the draft Model Law was to promote it. Competitive negotiation, on the other hand, did not preclude competition, so that there was no need for the approval provision in paragraph (2) of article 14.

45. The CHAIRMAN said that, in paragraph (2), as elsewhere, the approval provision would be in parentheses, indicating that it was an optional provision.

46. Mr. AL-NASSER (Saudi Arabia) said that, when the procuring entity engaged in competitive negotiation pursuant to paragraph (2), it should do so with a number of suppliers or contractors in order to ensure a fair price and effective implementation of the contract.

47. The CHAIRMAN said there would be an opportunity to discuss that point under article 33.

48. He took it that the Commission wished to adopt article 14 with "impossible or imprudent" replaced by "impractical" in subparagraphs (2)(a) and (b), with the words "amount of" deleted in subparagraph (2)(b) and with the approval provision added at the beginning of paragraph (2).

49. *It was so decided.*

Article 15

50. Mr. GRIFFITH (Observer for Australia) suggested that a definition of "quotation" be provided in article 2.

51. Mr. HUNJA (Secretariat) said that, after considerable debate, the Working Group had decided not to provide procedural definitions.

52. Mr. AZZIMAN (Morocco) suggested that in the title of the article "recourse to" be substituted for "use of" and that the same change be made in the titles of articles 14 and 16.

53. Mr. KLEIN (Observer for the Inter-American Development Bank) said that, where there was a monetary threshold above which public tendering was required, procurement requests were often artificially subdivided in order to avoid the need for public tendering. He therefore suggested that the rule contained in paragraph (2) be made a general rule.

54. Mr. NICOLAE-VASILE (Observer for Romania) suggested that the proviso in paragraph (1) that the estimated value of the procurement contract should be less than the amount set forth in the procurement regulations be supplemented by a reference to international anti-dumping rules.

55. Mr. JAMES (United Kingdom), responding to the suggestion made by the observer for the Inter-American Development Bank, said that article 15 was the only article in which permission to adopt a procurement method other than public tendering—namely, a request for quotations—was based on the estimated value of the procurement contract. In other articles there was no reliance on estimated value, so there was no need for a general rule. After lengthy discussions regarding other procurement methods, the Working Group had agreed that a monetary threshold was inappropriate except in the case of a request for quotations.

56. The matter raised by the observer for Romania was one for decision by individual States or for consideration within the framework of an organization like GATT rather than of a body like the Commission.

57. Ms. ZIMMERMAN (Canada) supported the remarks of the representative of the United Kingdom.

58. Mr. WALLACE (United States of America), supporting the remarks made by the representative of the United Kingdom in response to the suggestion of the observer for the Inter-American Development Bank, said that States basing legislation on the Model Law might be requested in the Guide to Enactment not to set monetary thresholds below which public tendering was not required—or, if they did set such thresholds, to make them subject to the provision that there be no arbitrary division of contracts.

59. Mr. TUVAYANOND (Thailand), agreeing with the suggestion made by the representative of the United States of America, asked whether it would be permissible under the Model Law to divide work on, say, large-scale construction projects among a number of contractors. He also asked how it would be possible to establish that the procuring entity had divided such work up in that way for the purpose of invoking paragraph (1) of article 15 rather than for other purposes.

60. The CHAIRMAN, in response to the latter question, said that there were provisions in the draft Model Law requiring procurement procedures and approvals to be recorded.

61. Mr. KLEIN (Observer for the Inter-American Development Bank) agreed with the suggestion made by the representative of the United States of America in response to his own suggestion.

62. Mr. PEREZNIETO CASTRO (Mexico) said that in principle public tendering should always be required and that the exceptions should be as few as possible. The Model Law should make that clear.

63. The CHAIRMAN, noting that there did not appear to be general support for the suggestion that a definition of “quotation” be provided, took it that the Commission would like the Guide to Enactment to include a request concerning monetary thresholds along the lines suggested by the representative of the United States of America.

64. He also took it that the Commission wished to adopt article 15 with “use of” replaced by “recourse to” in the title.

65. *It was so decided.*

Article 16

66. The CHAIRMAN said that, in the absence of objections, he took it that the Commission wished to adopt the *chapeau* and paragraph (a) as submitted by the Working Group in the annex to document A/CN.9/371.

67. *It was so decided.*

68. The CHAIRMAN took it that the Commission wished the word “impractical” to be substituted for the words “impossible or imprudent” in paragraph (b), for consistency with paragraph (2) of

article 14, and that it wished to adopt paragraph (b) with that change.

69. *It was so decided.*

70. The CHAIRMAN took it that, in paragraph (c), the Commission wished the word “impractical” to be substituted for the words “impossible and imprudent” and the words “amount of” to be deleted and that it wished to adopt paragraph (c) with those changes.

71. *It was so decided.*

72. The CHAIRMAN said that, in the absence of any objections, he took it that the Commission wished to adopt paragraphs (d), (e) and (f) as submitted by the Working Group in the annex to document A/CN.9/371.

73. *It was so decided.*

74. Mr. SAHAYDACHNY (Secretariat), drawing attention to the Secretariat’s observation in document A/CN.9/377 regarding paragraph (g), noted that the paragraph did not specify what body was to issue the approval referred to in it.

75. Mr. WALLACE (United States of America) said it was possible to infer that the approval might be issued by the State-designated organ referred to in the *chapeau* of article 16. However, as the nature of the approval in question was different from that of the other—optional—approvals, perhaps a different body should be designated.

76. Mr. TUVAYANOND (Thailand) proposed that the word “by”, followed by a blank, be added after “approval”.

77. Mr. JAMES (United Kingdom) supported the proposal.

78. Mr. PRIESTLEY (Observer for Australia) said that the question of the organ designated to issue the approval should be dealt with either in paragraph (g) or in the Guide to Enactment.

79. Mr. GRUSSMANN (Austria) suggested that “approval” be replaced by some form of words like “governmental authorization” in order to make it clear that the approval was intended to cover a special situation.

80. The Guide to Enactment should explain that the mandatory approval required by paragraph (g) did not necessarily involve duplication, the approval provided for in the *chapeau* of article 16 being optional.

81. Mr. LEVY (Canada) said that the problem of duplication could be resolved by adopting the proposal made by the representative of Thailand and by explaining in the Guide to Enactment that the organ issuing the approval provided for in the *chapeau* of article 16 would not be expected also to issue the approval required by paragraph (g).

82. Ms. CRISTEA (Observer for Romania) asked whether paragraph (g) applied to both international and domestic suppliers and contractors and how, when engaging in sole-source procurement under paragraph (g), Governments could be persuaded to take account of comments made in response to the envisaged public notice.

83. The CHAIRMAN said that such questions could best be addressed when the Commission came to consider the Guide to Enactment.

84. Mr. BONELL (Italy) said he was not clear about the relationship between the approval required by paragraph (g) and the approval provided for in the *chapeau* of article 16. Also, the meaning of “public notice” and of “adequate opportunity to comment” was not obvious.

The meeting rose at 12.35 p.m.

Summary record of the 501st meeting

Thursday, 8 July 1993, at 2 p.m.

[A/CN.9/SR.501]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/373, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.2 and 3)

Consideration of draft Model Law on Procurement (*continued*)

Article 16 (continued)

1. Mr. HUNJA (Secretariat), referring to one of the comments regarding paragraph (g) made by the representative of Italy at the end of the previous meeting, said that the draft Model Law was designed to provide only a framework for legislation; it had not been the Working Group's intention to establish detailed rules on how procurement should be carried out. It was expected that the procurement regulations of enacting States would make clear the practical implications of phrases such as "following public notice and adequate opportunity to comment".

2. Mr. JAMES (United Kingdom) said he would have no objection if the enacting State felt it appropriate that the authority issuing the approval provided for in the *chapeau* of article 16 should be the same as the authority issuing the approval required by paragraph (g). However, some enacting States might require approval pursuant to paragraph (g) to be given by a higher authority. The importance of that approval should be made clear in the Guide to Enactment, for without it the procuring entity would have a very convenient loophole.

3. In that connection, he wondered whether it might not be a good idea to include an obligation on the procuring entity to take account of any comments received in response to the public notice.

4. When considering article 29(4)(c)(iii), the Commission would have to bear paragraph (g) of article 16 in mind.

5. Mr. BONELL (Italy) said that in the Italian legal system an expression like "adequate opportunity to comment" meant nothing and wondered whether the envisaged "public notice" would be sufficient to make potential foreign suppliers or contractors aware of the imminent procurement proceedings.

6. Mr. GRIFFITH (Observer for Australia) proposed that article 16 be split into two sections, the first dealing with the matters covered in paragraphs (a) to (f) and the second dealing with what the Commission was seeking to cover in paragraph (g). The wording of the second section might be on the following lines: "Provided that procurement from no other supplier or contractor is capable of promoting a policy specified in article 29(4)(c)(iii), the procuring entity may engage in single-source procurement in accordance with article 27 so long as approval is obtained (from a high government authority) following public notice and adequate opportunity to comment." The importance attached to the "high government authority" could be stressed in a footnote or commentary.

7. Mr. LEVY (Canada) expressed support for the suggestion made by the observer for Australia.

8. The CHAIRMAN suggested that the Commission adopt the proposal made by the observer for Australia.

9. *It was so decided.*

Article 9 (continued)

10. The CHAIRMAN invited the Commission to return to its consideration of article 9 and drew attention to the proposals contained in documents A/CN.9/XXVI/CRP.2 and CRP.3.

11. Mr. WALLACE (United States of America), introducing the proposals contained in document A/CN.9/XXVI/CRP.2, said that his delegation could accept article 9 as it stood, subject to drafting changes by the Secretariat. It was important to enable procuring entities to embrace electronic data interchange (EDI) as it developed. However, he was well aware that some procuring entities would have difficulty in achieving with electronically conveyed communications the ends achieved with sealed written bids. The situation was simpler when the parties knew one another, but public procurement should, as envisaged in the Model Law, be open, so that all parties would usually not know one another.

12. He reiterated his view—expressed during the Commission's 498th meeting—that the Commission should request the Secretariat to prepare a paper on EDI as applied to procurement.

13. Mr. BONELL (Italy) said that, in his opinion, the time was not yet ripe for the Commission to take a stand for or against the use of EDI in procurement.

14. Ms. ZIMMERMAN (Canada), introducing the proposals contained in document A/CN.9/XXVI/CRP.3, said that the proposal relating to article 9(1) was based on the assumption that the present wording of article 9(1) permitted the use of EDI. The proposed amendment did not imply that EDI might be used by States in the near future; the intention was merely to provide for the availability of EDI as a means of communication in the procurement field.

15. With regard to the idea that the Commission should request the Secretariat to prepare a paper on EDI as applied to procurement, she felt that the issues which would be dealt with in such a paper were already being dealt with by the Working Group on Electronic Data Interchange, which had recently issued a report on its twenty-fifth session (document A/CN.9/373).

16. The view had been expressed that the Model Law was paper-based and therefore precluded the use of EDI. However, the Working Group was considering what requirements should be imposed in order to ensure that procurement by means of EDI met the same standards as a paper-based system. The purpose of her delegation's proposed amendment of article 25(5) was to enable

States and procuring entities to use EDI as soon as it satisfied those requirements.

17. Mr. JAMES (United Kingdom) said that, ideally, the Commission should await the recommendations of the Working Group on Electronic Data Interchange and adapt the Model Law to them. However, as the Commission wished to conclude its work on the Model Law during the current session, it should give serious consideration to the United States and Canadian proposals, which had considerable merit.

18. He suggested amending the Canadian proposal regarding article 25(5) so that it read as follows: "A tender shall be submitted either in writing in a single sealed envelope or by any other means which provides at least a similar degree of authenticity, security and confidentiality."

19. He also suggested that in article 9(1) the word "permanent" be inserted before "record of the content of the communication".

20. Mr. ANDERSEN (Denmark), expressing support for the Canadian proposal concerning article 9(1), said he had misgivings about the proposal concerning article 25(5) as many countries did not have the technical facilities for receiving and handling communications in electronic form.

21. Mr. FRIES (United States of America), noting that the use of EDI raised legal problems associated with the fact that the technical facilities in different States differed widely, said that the overriding goal should be to ensure that procurement proceedings remained open to all. The language of the Model Law should be neutral, but should encourage the development of EDI and of similar technologies. A Secretariat study on EDI as applied to procurement, in conjunction with the findings of the Working Group on Electronic Data Interchange, might point the way to a solution of the problems to which he had just referred.

22. Mr. BONELL (Italy) said that the Working Group had not yet even arrived at a satisfactory definition of "electronic data interchange" and that there were many difficulties associated with the use of EDI in procurement.

23. One major difficulty was that of ensuring that a tender submitted in electronic form was not "unsealed" by the procuring entity before it should be. Until that could be ensured, and various other difficulties resolved, EDI could not be regarded as a functional equivalent of writing.

24. Mr. PHUA (Singapore) said that the proposals now before the Commission would allow for the use of EDI in procurement. However, he urged caution in respect of the United Kingdom representative's suggestion for amending the Canadian proposal regarding article 25(5) through the inclusion of a reference to "authenticity": according to the report on the work of its twenty-fifth session, the Working Group on Electronic Data Interchange had not yet reached agreement on the meaning of the term "authentication".

25. Mr. LEVY (Canada) said he was inclined to agree with the representative of the United Kingdom regarding the inclusion in article 25(5) of a reference to "authenticity", but, as had just been pointed out, the Working Group had not yet defined the concept of "authentication". He therefore favoured provisional acceptance of the amendments suggested by the representative of the United Kingdom subject to any advice the Secretariat might give on the question of authentication.

26. As to the suggested insertion of the word "permanent" in article 9(1), thought needed to be given to the meaning of "permanence" in the context of procurement.

27. With regard to the difficulty of ensuring that a tender submitted in electronic form was not "unsealed" before it should be, he understood that computer programs could be time-controlled to prevent the premature "unsealing" of such tenders. However, further information and advice were needed on that point.

28. Mr. SORIEUL (Secretariat) said that the Working Group on Electronic Data Interchange, which had been endeavouring to define functional equivalents of written documents, signatures and so on in the EDI field, had considered the question of authentication (for example, certification of a document by a notary or authentication of the source of a message) but had not yet discussed the question of functional equivalents of the sealed envelope. For the purposes of the Model Law, he thought it would be enough simply to require the same degree of authenticity as that achieved with the sealed envelope in the case of written documents.

29. As for the question of "permanent" records, the Working Group was now tending to speak of "durable" records, in line with the legislation in certain countries.

30. Regarding the last point just mentioned by the representative of Canada, the computerized equivalent of the sealed envelope did indeed exist, but it was not yet being used widely.

31. With regard to the idea that the Secretariat be requested to prepare a paper on EDI as applied to procurement, the legal issues involved were not fundamentally different from those encountered in other fields. The technical issues were quite different, however, and it would probably be beyond the competence of the Secretariat and the Commission to demonstrate the technical viability of EDI for the purposes of the Model Law.

32. Mr. WALLACE (United States of America) said that he would for the time being go along with the proposals made by the representatives of Canada and the United Kingdom regarding article 25(e), although he failed to understand why—in contrast to the proposals by the United States of America in document A/CN.9/XXVI/CRP.2—they contained no explicit reference to EDI. One purpose of the United States proposals was to make it clear to Governments that they must address the EDI question before issuing procurement regulations. Moreover, the amended wording proposed by the United Kingdom representative appeared to impose the submission of tenders in electronic form even when they were not wanted.

33. With regard to the envisaged Secretariat paper on EDI as applied to procurement, it need not be very long and could be based on the deliberations of the Working Group on Electronic Data Interchange.

34. Mr. SOLIMAN (Egypt) said he preferred article 9(1) as originally drafted.

35. Mr. MORAN BOVIO (Spain) said that, as just indicated by the representative of the United States of America, an advantage of the United States proposal was that it made clear what needed to be done by national legislators; it highlighted potential problems without proposing remedies, and its placement early in the Model Law meant that it would attract attention. He was therefore in favour of that proposal, but if it was withdrawn he would go along with the Canadian proposal.

36. Mr. JAMES (United Kingdom) said that, for him, the issue of authenticity was as important as that of confidentiality, and he would therefore not like the word "authenticity" to be dropped.

37. As to the question of permanence, he took the point made by the representative of Canada. He would be happy to accept the adjective "durable".

38. He hoped that some thought had been given by the Working Group on Electronic Data Interchange to the problems associated with the opening of tenders (the subject of article 28) when some tenders were on paper and some in electronic form.
39. Mr. GRIFFITH (Observer for Australia) said that one point which had arisen during the discussion but which had not yet been clarified was whether a procuring entity should be obliged to accept a tender in electronic form; he did not think that it should, and therefore suggested that, in the Canadian proposal as amended by the United Kingdom representative, the words "stipulated by the procuring entity" be added after the word "means".
40. Regarding the question of "permanent" records, he considered that article 9(1) already provided for the requisite degree of permanence.
41. Mr. ANDERSEN (Denmark) and Mr. RAO (India) expressed support for the wording proposed by the observer for Australia.
42. Mr. JAMES (United Kingdom) expressed concern that the proposal by the observer for Australia might result in a situation where a procuring entity could exclude potential suppliers or contractors without access to EDI facilities. The procuring entity should be able to rule out tenders in electronic form but not tenders submitted on paper.
43. Mr. GRIFFITH (Observer for Australia) said that the matter could be clarified by the drafting group through a reference to article 9.
44. Mr. LEVY (Canada) said he believed that the additional words proposed by the observer for Australia would not affect the right of suppliers or contractors to submit tenders in writing.
45. Mr. WALLACE (United States of America) said that the Canadian proposal as amended by the United Kingdom representative and the observer for Australia was a good one but left certain matters open.
46. There was as yet no general enabling provision with regard to EDI, which was mentioned in the Guide to Enactment but not in the draft Model Law itself, where there was only a veiled reference to it in article 9. He thought it would be useful to draw the attention of legislators more explicitly to the EDI issue, in article 9 if necessary.
47. Within the context of the Commission's future work, possibly on the procurement of services, the Commission might perhaps request the Secretariat to prepare a 10-12 page paper on the broad subject of enabling legislation in the EDI field for the benefit of developed countries, developing countries and countries with economies in transition.
48. The CHAIRMAN took it that, for the time being, the Commission wished the first sentence of article 25(5) to read as follows: "A tender shall be submitted either in writing in a single sealed envelope or by any other means stipulated by the procuring entity which provides at least a similar degree of authenticity, security and confidentiality." When the Commission reverted to article 25(5), it would take up the Secretariat proposal contained in document A/CN.9/377.
49. *It was so decided.*
50. The CHAIRMAN suggested that, in the light of that decision, the Commission might wish to make a consequential amendment to article 9(1).
51. Mr. SAHAYDACHNY (Secretariat) said that deletion of the words "other provisions of this Law or" in article 9(1) might create the impression that the procuring entity could choose to accept only one form of communication. That would run counter to the spirit of article 25(5) as just adopted and might raise doubts about the overriding nature of article 9(3). Also, deletion of those words would raise the question of consistency within the Model Law.
52. Mr. LEVY (Canada) said that his delegation considered the words "other provisions of this Law or" to be superfluous. Also, the present wording of article 9(1) suggested that a requirement of form specified by the procuring entity could override the Law. In his opinion, the question of consistency was less important.
53. Mr. PHUA (Singapore), referring to the title of article 9 ("Form of communications"), asked whether it was presupposed that the form contemplated in the Model Law would be consistent with the form which might be required in the domestic legislation of an enacting State.
54. Mr. JAMES (United Kingdom) said that the intention behind article 9(1) was to permit communications in any form which provided a record of the content of the communication, subject to other provisions of the Law or any requirement of form specified by the procuring entity. Communications could always be in writing, the procuring entity being allowed to impose requirements as regards other forms of communication but not to refuse communications in writing. He had come to the conclusion that article 25(5) as adopted was consistent with that.
55. Mr. LEVY (Canada) said that, if that was the general understanding, the text could be left to the drafting group.
56. *It was so decided.*
57. Mr. TUVAYANOND (Thailand) suggested that the United Kingdom representative's remarks might usefully be reflected in the Guide to Enactment.
58. Mr. WALLACE (United States of America), drawing attention to the Secretariat comment in document A/CN.9/377 regarding article 25(5) that "Consideration may be given to adding a requirement that tenders must be signed or authenticated in some other manner", asked whether the Commission would be taking up that matter.
59. The CHAIRMAN replied that it would.
- Article 17*
60. Mr. SAHAYDACHNY (Secretariat) drew the Commission's attention to a typographical error in the list of articles, where "article 11(2)" should read "article 18(2)".
61. Ms. ZIMMERMAN (Canada) drew attention to the Canadian proposal in document A/CN.9/376/Add.1 to change "low amount or value" to "small quantity or low monetary value".
62. Mr. MORAN BOVIO (Spain) said that the layout of article 17 in the Spanish version of document A/CN.9/371 should be brought into line with that in the English version.
63. The CHAIRMAN said that he took it that the Commission wished to approve article 17 with the amendment proposed by Canada, which could still be examined by the drafting group.
64. *It was so decided.*

Article 18

65. Mr. PHUA (Singapore) said that the draft Guide to Enactment (document A/CN.9/375) seemed to presuppose the publication of invitations to tender or prequalify in paper-based media only. What about the use of EDI in that connection?

66. The CHAIRMAN said that the Secretary had taken note of the question.

67. *Paragraph (1) was approved.*

68. Mr. WALLACE (United States of America), referring to the Canadian Government's comment on article 18(2) contained in document A/CN.9/376/Add.1, said that article 18(2) illustrated the need for a study of the full implications of using EDI in procurement.

69. Mr. PARRA-PEREZ (Observer for Venezuela) said that the requirement in article 18(1) that invitations to tender or prequalify "be published in a language customarily used in international trade" and "in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation" could entail disproportionately high costs for many countries, particularly when small contracts were involved.

In such a case, might it not be sufficient to publish the invitation in—say—a national newspaper that was known internationally?

70. The CHAIRMAN said that article 17(b) would seem to cover the point raised by the observer for Venezuela.

71. Mr. TUVAYANOND (Thailand) said he could foresee difficulties in his country if invitations to tender or prequalify had, under national law, to be published in newspapers, trade publications or technical journals of wide international circulation. In Thailand, nationals of other countries had access to public notices through their embassies there, and foreign enterprises interested in supplying goods or services to the Thai administration simply needed to remain vigilant. That being the current practice, any attempt to require of the Thai administration that it spend considerable sums of money in order to facilitate access by foreigners to procurement proceedings in Thailand would not be well received by parliamentarians.

72. Mr. PEREZNIETO CASTRO (Mexico), noting that the phrase "or in a relevant trade publication or technical journal of wide international circulation" was missing from the Spanish version of article 18(2), commended the remarks made by the representative of Thailand.

The meeting rose at 5 p.m.

Summary record of the 502nd meeting

Friday, 9 July 1993, at 9.30 a.m.

[A/CN.9/SR.502]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377, A/CN.9/378/Add.1)

Consideration of draft Model Law on Procurement (*continued*)

Article 18 (continued)

1. The CHAIRMAN, recalling the question raised at the end of the previous meeting by the observer for Venezuela and his own reply, said that the purpose of article 18(2) was to promote transparency and foster competition, and in his view article 18(2) should be retained as it stood.

2. In that connection, he recalled that in the draft Guide to Enactment (document A/CN.9/375) the Secretariat drew attention to the business edition of *Development Business* (published by the United Nations Department of Public Information and the United Nations University) as a possible publication medium.

3. Mr. ANDERSEN (Denmark) said that, if the principle of non-discrimination on the basis of nationality was to be upheld, article 18(2) had to be retained as it stood, so that suppliers and contractors might have access to the necessary information.

4. Mr. JAMES (United Kingdom), agreeing with the Chairman and the representative of Denmark, said that, in his view, the concern of the observer for Venezuela that tendering for small contracts should not be unduly expensive was met in article 17.

5. Mr. WALLACE (United States of America), supporting that view, said it was important for procuring entities to avoid a narrow, nationalistic approach and to think in terms of their obligation to the taxpayer to ensure the most effective competition possible.

6. Mr. TUVAYANOND (Thailand) said that the point at issue—which had originally been raised by him—was not discrimination on the basis of nationality.

7. In his view, the nationwide dissemination of an invitation to tender in a language customarily used in international trade should suffice. Most countries were represented abroad by embassies or consulates, which had access to the national newspapers and journals of the countries where they were located and should be on the alert for any business opportunities—for example, in the field of road or railway construction—that might arise.

8. He himself would find it difficult to persuade his Government that it should go to the trouble of publishing invitations to tender

or prequalify in international newspapers or journals. It was not a matter of whether such a procedure was expensive, but of whether it was necessary.

9. Mr. AZZIMAN (Morocco) shared that view. The procuring entity should be given the option of using the national press, resorting to international publications only when appropriate.

10. He wondered whether the envisaged system might not have the indirect effect of disadvantaging national firms which did not have access to international publications and might thus not receive the required information in time.

11. Mr. ANDERSEN (Denmark) said, besides large companies tendering for major projects, one had to think of small companies engaged in what was known as "niche production"—i.e. making various highly technical items for which there was demand all over the world. Such companies could not reasonably be expected to follow the demand for their products if procuring entities did not use newspapers and journals of wide international circulation, and neither could their Governments.

12. There had to be a proper balance between the burden on the procuring entity and the burden on the tenderer, and he felt that the draft Model Law struck it.

13. Mr. KLEIN (Observer for the Inter-American Development Bank) endorsed the views expressed by the representative of Denmark.

14. Mr. PEREZNIETO CASTRO (Mexico) said that, in his opinion, the responsibility for disseminating information should lie with the potential supplier or contractor and not with the procuring entity.

15. Mr. TUVAYANOND (Thailand) shared that opinion; his Government had had to spend money it could ill afford sending representatives to other countries in order to find suppliers and contractors capable of meeting its needs. Businessmen should make the effort to find out what demand for their products existed, using their embassies and consulates, which had ready access to the necessary information.

16. He proposed that the words "of wide international circulation" be deleted where they occurred in article 18(2).

17. Mr. MORAN BOVIO (Spain) said that businessmen, on learning about an invitation to tender, should also make use of the embassies and consulates representing the country of the procuring entity that issued the invitation.

18. Mr. WALLACE (United States of America), noting that a Government could always opt for domestic procurement, said that, if a particular legislature, such as that of Thailand, wished not to enact article 18(2), it was free to do so. The Commission's report should reflect the fact that there were Governments which did not wish to enact it.

19. Mr. PARRA-PEREZ (Observer for Venezuela) said that in many developing countries, in an effort to prevent corruption, great efforts were being made to change the way public works contracts were handled; there was now sometimes a legal requirement for international tendering even in the case of very small projects. The cost of complying with article 18(2), however, might jeopardize such efforts.

20. Mr. JAMES (United Kingdom), responding to one of the points made by the representative of Thailand, said that no countries had embassies or consulates in all other countries. In any case, the main function of trade representatives at diplomatic and

consular missions was not to disseminate information about public procurement, but to advise and assist companies engaged in negotiations. Moreover, the publication of invitations to tender or prequalify in international newspapers or journals produced a better response.

21. Mr. HAINZL (Austria) said that, given the importance of international procurement in promoting international trade, an objective referred to in preambular paragraph (b), he believed that article 18(2) should be retained as it stood.

22. Mr. KOMAROV (Russian Federation) said that, although preambular paragraph (b) spoke of "promoting international trade", preambular paragraph (a) spoke of "maximizing economy and efficiency in procurement". In his view, it should be left to the procuring entity to decide on the most economic and efficient method of procurement—and therefore on whether to apply article 18(2).

23. Mr. PRIESTLEY (Observer for Australia) suggested that reference be made in the Model Law to the business edition of *Development Business*. If that publication became established as the recognized medium for invitations to tender or prequalify, publication costs would be minimized. If such a reference was considered excessive, one might make a more positive statement in the Guide to Enactment about using that publication.

24. The CHAIRMAN said he sensed that there was a consensus in the Commission for retaining article 18(2) unchanged. It had been sufficiently explained that States, including developing countries, would elicit more competitive tenders by widely publicizing their invitations to tender or prequalify in international publications. Also, the Guide to Enactment might stress the value of using the business edition of *Development Business*.

25. In the absence of any objections, he took it that the Commission wished to adopt article 18(2) as submitted by the Working Group in the annex to document A/CN.9/371.

26. *It was so decided.*

27. The CHAIRMAN, inviting the Commission to consider article 18(3), which dealt with procedures for soliciting tenders or applications to prequalify on a restricted basis (so-called "restricted tendering"), said that it provided for three safeguards: the requirement that the number of suppliers or contractors selected should be sufficient; the requirement that the grounds and circumstances for soliciting on a restricted basis should be recorded in the record of the procurement proceeding; and the need to seek approval.

28. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 18(3) provided for a procurement method which, although an exception to the general rule, was commonly employed in Latin America. In his view, it should therefore be moved to chapter II.

29. Also, he felt that the reasons justifying use of the method ("reasons of economy and efficiency") were open to abuse; something less broad and vague was necessary.

30. Mr. UEMURA (Japan), noting that article 18(3) spoke of the procuring entity "sending invitations to tender or invitations to prequalify . . . only to particular suppliers or contractors selected by it", suggested that, in the interests of transparency, the procuring entity should be required to issue a prior public announcement that it was sending invitations to selected suppliers or contractors. That would be in accordance with paragraph (4) of article 5 of the GATT agreement on government procurement.

31. Mr. PEREZNIETO CASTRO (Mexico) agreed with the observer for the Inter-American Development Bank that article 18(3) should be moved to chapter II.

32. With regard to the question of transparency, he was not convinced that prior public announcement as envisaged by the representative of Japan would be appropriate to restricted tendering, but he did believe that, in order to minimize the possibility of abuse, the subsequent publication of information on the proceedings was very desirable.

33. Mr. GRIFFITH (Observer for Australia) agreed with the observer for the Inter-American Development Bank that the formulation "reasons of economy and efficiency" was very weak and proposed the insertion of a reference to "exceptional and particular circumstances" and—as agreed at the previous meeting in connection with article 16—a reference to the need for approval by high government authority.

34. Mr. AZZIMAN (Morocco), supporting the placing of article 18(3) in chapter II, proposed that the procuring entity be required to state in advance its criteria for the selection of suppliers or contractors to be invited to submit tenders or applications to prequalify and that, following the award of the contract, it be required to record the reasons for its choice of supplier or contractor.

35. Mr. TUVAYANOND (Thailand) said that chapter II would be a more appropriate place for article 18(3) and that the proposal made by the observer for Australia was a useful one. Also, it would be helpful if the record of the exceptional proceedings provided for in article 18(3) was accessible to the public.

36. Mr. PARRA-PEREZ (Observer for Venezuela) said that in some countries where restricted tendering was practised there was no possibility of challenging the procuring entity's selection of suppliers or contractors to be invited to submit tenders or applications to prequalify as there was no provision for cancelling the selection. It was therefore necessary to be very precise about the conditions under which restricted tendering would be permitted.

37. Mr. HUNJA (Secretariat) said that, before deciding that article 18(3) should be moved to chapter II, the Commission should bear in mind that moving it there would in effect add a further method of procurement to those already referred to in that chapter.

38. Regarding the view that the formulation "for reasons of economy and efficiency" was very weak, in an earlier draft of the Model Law the Secretariat had proposed (on page 17 of the English version of document A/CN.9/WG.V/WP.28) a wording that set out in detail the circumstances under which restricted tendering might be resorted to. The Working Group had decided, however, that the proposed wording was too detailed and had agreed to adopt the formulation now under discussion. Clarification of the circumstances under which the procurement entity would be permitted to resort to restricted tendering might be worthwhile if the Commission felt that the present formulation was open to abuse, but members should perhaps first refer to documents A/CN.9/WG.V/WP.28 and A/CN.9/343 so as to ascertain the position of the Working Group on that question.

39. Mr. JAMES (United Kingdom) said that the words "economy and efficiency" referred back to "economy and efficiency in procurement" in paragraph (a) of the preamble. If those words were retained, perhaps "in procurement" should be added.

40. Regarding the proposal made by the observer for Australia, he suggested that the reference to "exceptional and particular circumstances" also be added, so that the phrase in question read:

"... when in exceptional and particular circumstances it is necessary for reasons of economy and efficiency in procurement". As to the reference to the need for approval by a high government authority, he questioned whether restricted tendering was such an undesirable procurement method that such approval was necessary.

41. He did not think that article 18(3) should be moved to chapter II. Perhaps the point raised by the observer for the Inter-American Development Bank could be addressed by stressing in the Guide to Enactment that article 18(3) provided for a procedure which was less desirable than open tendering but which might in some circumstances be appropriate.

42. Mr. MORAN BOVIO (Spain) suggested that the various proposals made during the discussion be set forth clearly in a conference room paper, as a basis for further discussion.

43. Mr. WALLACE (United States of America) agreed with the observer for Australia on the desirability of including an approval requirement and making the criteria for recourse to restricted tendering more rigorous.

44. As to the question of moving article 18(3) to chapter II, on the grounds that restricted tendering was a procedure of which the Commission basically disapproved, relocation might simply result in the procedure's enjoying greater prominence. If article 18(3) was going to be moved to chapter II, perhaps the best place for it would be at the end of the chapter—as a new article 17. Alternatively, it could be kept in chapter III, as a new article 18 immediately before the present article 18. The essential point was that restricted tendering was abused in some parts of the world, and camouflaging the procedure would not help to curb the abuse.

45. Mr. AL-NASSER (Saudi Arabia) said he failed to see how greater economy and efficiency could be achieved by restricting the number of suppliers or contractors invited to submit tenders or applications to prequalify.

46. Mr. KLEIN (Observer for the Inter-American Development Bank), reiterating his view that article 18(3) should be moved to chapter II, said that that chapter provided for procurement methods of which some (such as competitive negotiation and two-stage tendering) were unknown in Latin America, whereas the provision for restricted tendering—a procurement method widely employed in Latin America—was hidden away in a chapter on tendering procedures.

47. With regard to the words "reasons of economy and efficiency", something even more explicit than what had been proposed during the discussion was necessary. The Guide to Enactment contained a very full enumeration of the circumstances that could trigger recourse to restricted tendering, and the Model Law itself should be equally explicit.

48. Mr. LEVY (Canada) said that he could see no point in moving article 18(3) to chapter II and that he was in favour of the United Kingdom representative's suggestion regarding the combining of a reference to "exceptional and particular circumstances" with the reference to "reasons of economy and efficiency in procurement". The reference to the need for approval by a high government authority should perhaps be placed in parentheses.

49. Ms. PIAGGI-VANOSSI (Argentina), supporting the idea of moving article 18(3) to chapter II, emphasized the importance of a rigorous approach to restricted tendering. With regard to the last sentence of article 18(3), in the interests of transparency the record of the procurement proceedings should state what benefits in terms of economy and efficiency had been achieved by resorting to that procedure.

50. Mr. RAO (India), noting that restricted tendering was sometimes resorted to in India, suggested that article 18(3) be moved to chapter II and that the wording suggested by the representative of the United Kingdom be adopted.

51. The CHAIRMAN asked whether the Commission could agree that the paragraph under discussion become a new article, 18 *bis*, with the wording suggested by the representative of the United Kingdom and—in parentheses—the reference to approval by a high government authority.

52. Mr. GRIFFITH (Observer for Australia) felt that the phrase “when necessary for reasons of economy and efficiency” and the words “in exceptional and particular circumstances” should not be combined as suggested by the representative of the United Kingdom.

53. Mr. WALLACE (United States of America) suggested that the new article be numbered 17 *bis*.

54. Mr. MORAN BOVIO (Spain) said that most speakers had seemed to be in favour of moving article 18(3) to chapter II.

55. Mr. PEREZNIETO CASTRO (Mexico), expressing support for the first point just made by the observer for the Inter-American Development Bank, said he continued to believe that article 18(3) should be moved to chapter II. At the same time, he felt that additional safeguards were necessary in order to ensure that restricted tendering was not abused.

56. Mr. AZZIMAN (Morocco) said that the paragraph dealing with restricted tendering should logically appear with the paragraphs dealing with other procurement methods that constituted exceptions to the rule of 100 per cent open tendering. It was true that some reservations had been expressed about moving article 18(3) to chapter II, but they had not struck him as being very strong.

57. Moving article 18(3) to chapter II would no doubt somewhat disturb the present structure of the Model Law, which would have to be adjusted, but that was not an insurmountable task; an informal group set up by the Chairman could tackle it.

58. Mr. PARRA-PEREZ (Observer for Venezuela), supporting the statements just made by the representatives of Morocco and Mexico, said that the important point was not where the provisions contained in article 18(3) finally appeared in the Model Law but how to ensure that the Model Law provided for restricted

tendering, which was a useful intermediate between 100 per cent open tendering and direct purchasing, and to ensure that the procedure was not abused.

59. Ms. CRISTEA (Observer for Romania) said that, if article 18(3) meant that foreign suppliers and contractors were excluded from restricted tendering, it might as well be incorporated into article 17. If foreign suppliers and contractors were not excluded, it ought perhaps to be incorporated into article 16, for only a very few suppliers or contractors were likely to be able to penetrate the market in question when restricted tendering was being practised. At all events, restricted tendering should not appear as a separate procurement method as it might thereby become the norm in the case of some countries.

60. Mr. KOMAROV (Russian Federation) said that the risk of restricted tendering becoming the norm could to some extent be reduced by placing the procuring entity under more rigid controls. That might be achieved by deleting from article 38 the subparagraph—subparagraph 2(c)—which exempted from review the limitation of solicitation of tenders on the ground of economy and efficiency pursuant to article 18(3).

61. The CHAIRMAN proposed that the discussion be suspended and requested concerned delegations to meet with him later in order to see how the problems associated with article 18(3) might be resolved.

Article 19

62. Mr. SAHAYDACHNY (Secretariat), referring to document A/CN.9/377, said that the reference to article 8(1)(a) in article 19(1)(d) was a typographical error; the reference should be to article 6(2).

63. With regard to the change in article 19(2) which the Secretariat was proposing, he said that the procuring entity might sometimes already have decided on “the place and deadline for the submission of tenders” (mentioned in subparagraph (j) of article 19(1)) at the time when it was issuing the invitation to prequalify. If the change proposed in document A/CN.9/377 was adopted, a corresponding change would have to be made in the provisions concerning prequalification documents.

The meeting rose at 12.30 p.m.

Summary record of the 503rd meeting

Friday, 9 July 1993, at 2 p.m.

[A/CN.9/SR.503]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.1-4)

Consideration of draft Model Law on Procurement (*continued*)

Article 19 (*continued*)

1. Mr. PEREZNIETO CASTRO (Mexico) suggested that in subparagraph (1)(c) the word “supply” be replaced by “delivery”.

2. Ms. ZIMMERMAN (Canada), noting that subparagraph (1)(c) contained no reference to the place of delivery of the goods, felt that might be a relevant consideration.

3. Mr. AZZIMAN (Morocco) suggested that the *chapeau* of paragraph (2) be reworded to read: “An invitation to prequalify shall contain the information referred to in subparagraphs (a), (b), (c), (d), (e), (g) and (h) of paragraph (1), as well as the following information”.

4. The CHAIRMAN, noting that the various drafting suggestions would be considered by the drafting group, took it that the Commission wished to adopt article 19.

5. *It was so decided.*

Article 20

6. Mr. SAHAYDACHNY (Secretariat), drawing attention to the Secretariat proposals in document A/CN.9/377 for amending article 20, said that prequalification documents were not likely to be involved when a procuring entity was using a procurement method other than tendering proceedings.

7. Mr. PRIESTLEY (Observer for Australia) said that, if the price charged by the procuring entity was intended to enable it to recover its costs, perhaps the word "producing" would be better than "printing" in the last sentence.

8. The CHAIRMAN, referring to the commentary on article 20 in document A/CN.9/375, said he took it that the Commission wished to adopt article 20.

9. *It was so decided.*

Article 21

10. Mr. GRIFFITH (Observer for Australia) noted that in the *chapeau* of article 21, the words "at a minimum" were used, whereas in the *chapeau* of article 19 the corresponding expression was "at least". For the sake of consistency, the same wording should be used in both articles.

11. The CHAIRMAN said the drafting group would ensure consistency, the words "at a minimum" being used throughout the text.

12. Mr. WALLACE (United States of America) felt that the Secretariat's proposal (in document A/CN.9/377) that the word "principal" be inserted before "terms and conditions of the procurement contract" in paragraph (f) was unwise.

13. As to paragraph (g), he suggested that the words "evaluated and compared" in the additional phrase which the Secretariat was proposing might be replaced by "handled".

14. Mr. LEVY (Canada) agreed with both the points made by the United States representative.

15. Mr. GRIFFITH (Observer for Australia) thought the proposal to add the word "principal" was a reasonable one; it would often be impossible to spell out all the terms and conditions of the contract. If "principal" was added, paragraph (f) should end at the words "the procuring entity".

16. Mr. PHUA (Singapore) wondered whether it would be enough if only the "principal" terms and conditions of the contract were provided in the solicitation documents.

17. Mr. PEREZNIETO CASTRO (Mexico) said he was not in favour of the amendments proposed by the Secretariat.

18. In the Spanish version of paragraph (f), the word *escritura* should be replaced by a word such as *forma* or *texto*.

19. The CHAIRMAN, suggesting that the point regarding the Spanish text be referred to the drafting group, took it that the Commission wished to adopt paragraph (f) without the proposed addition of "principal" and to adopt paragraph (g) with the addi-

tional phrase proposed by the Secretariat in document A/CN.9/377, subject to review by the drafting group.

20. *It was so decided.*

21. Mr. AZZIMAN (Morocco), commenting on the reference in paragraph (n) to "a statement whether the procuring entity intends to convene a meeting of suppliers and contractors", said that normally it would not be known in advance whether such a meeting would be required.

22. The provision in paragraph (s) that the omission of one of the envisaged references should not constitute grounds for review or give rise to liability on the part of the procuring entity was the only provision of its kind in the Model Law. It would therefore be better placed at the end of article 21.

23. Mr. SAHAYDACHNY (Secretariat) said, with regard to the point made by the representative of Morocco about paragraph (n), that, if the procuring entity did not know whether it intended to convene a meeting of suppliers and contractors, the envisaged statement could obviously not be included in the solicitation document. The non-inclusion of such a statement, however, would not preclude the procuring entity from deciding to convene a meeting.

24. Mr. JAMES (United Kingdom) said that, as liability was a separate issue, paragraph (s) should perhaps be separated from the rest of the article.

25. The CHAIRMAN suggested that the Commission adopt article 21 with paragraph (s) moved to the end.

26. *It was so decided.*

Article 22

27. Mr. SAHAYDACHNY (Secretariat), referring to the Secretariat proposal in document A/CN.9/377 that article 22 be moved to chapter I, said that in the Secretariat's opinion that would help to ensure the widest possible competition.

28. The CHAIRMAN suggested that the question of moving article 22 to chapter I be considered before the actual content of the article.

29. Mr. LEVY (Canada) said that, although the Secretariat proposal was an interesting one, he was not sure how article 22 would apply to requests for proposals or competitive negotiation—or to any other procurement method which the procuring entity might employ because it was unable to specify exactly what it wanted.

30. Mr. JAMES (United Kingdom) said that article 22 was unlikely to be helpful in the context of requests for proposals or competitive negotiation, but in the context of procurement methods such as requests for quotations (or even single-source procurement) it might be of some use, although the cases in question might count for only about 1 per cent of the total. If the article was to be moved, the wording would have to be made more neutral, so that it applied to—for example—requests for quotations.

31. Ms. ZIMMERMAN (Canada) agreed that the wording of article 22 would have to become more neutral if the article was moved to chapter I.

32. Mr. WALLACE (United States of America), expressing himself in favour of the Secretariat proposal, said that article 22 should be redrafted so as to make the underlying principles stand out more clearly.

33. Mr. LEVY (Canada) said that, if article 22 was to be re-drafted in such a way that it covered procurement methods such as requests for proposals and competitive negotiation, he would have to withhold his approval until he had seen the text produced by the drafting group. The envisaged relocation would be acceptable only if no damage was done to chapter I.

34. Mr. WALLACE (United States of America) felt that the issue was basically one of drafting; if moved, article 22 would have to be made more flexible.

35. Mr. MORAN BOVIO (Spain) said that, before transmitting article 22 to the drafting group, the Commission should be fully agreed on its substance.

36. Mr. GRUSSMANN (Austria) said that, if article 22 was moved to chapter I, reference to it should be in chapter IV where appropriate.

37. Mr. WALLACE (United States of America) suggested that the article start with the *chapeau* "To the extent and where applicable".

38. The CHAIRMAN took it that the Commission wished article 22 to be moved to chapter I and that it wished the drafting group to examine the wording of the article in the light of its discussion.

39. *It was so decided.*

40. The CHAIRMAN, inviting comments on the substance of article 22, drew attention to the Secretariat proposal that the words "Standardized trade terms shall be used" be replaced by the words "Due regard shall be had for the use of standardized trade terms" in subparagraph (3)(b).

41. Mr. JAMES (United Kingdom), expressing support for the proposed amendment, said that in his view a similar amendment would have been appropriate in subparagraph (3)(a). However, his concern had been met by the United States representative's proposal for a *chapeau*.

42. The CHAIRMAN took it that the Commission wished to adopt article 22 as amended.

43. *It was so decided.*

Article 23

44. Ms. PIAGGI-VANOSI (Argentina) suggested that provisions like those in article 23 also be formulated in respect of the envisaged contract, which suppliers and contractors should be able to challenge before its conclusion.

45. Mr. MORAN BOVIO (Spain) said that, in his view, the proposal made by the representative of Argentina related to matters that went beyond what the Model Law was intended to achieve.

46. Mr. WALLACE (United States of America), expressing agreement with the representative of Spain, said he understood the representative of Argentina to have been referring to a situation where the contract was defective. A procuring entity that drafted defective contracts was bad at its job, but that was a political problem that could not be solved through the Model Law. In paragraphs 9 and 10 of the Introduction to the Guide to Enactment (document A/CN.9/375), the Model Law was described as a "framework" law, in which the answers to certain legal questions might not necessarily be found; it was stated there that answers were more likely to be found in other bodies of law,

such as the applicable administrative, contract, criminal and judicial procedure law.

47. Ms. PIAGGI-VANOSI (Argentina) said that, in her view, if the contract contained a serious error or omission, it ought to be possible to rectify the matter, all tenderers being informed of what was being done. That having been said, however, she would withdraw her proposal if the Commission considered it inappropriate.

48. Mr. WALLACE (United States of America), referring to the possibility of redress under the terms of article 38(1), said that anything more would go beyond the scope of procurement law.

49. The CHAIRMAN said that the point raised by the representative of Argentina could be addressed during the discussion of chapter V—Review.

50. Ms. PIAGGI-VANOSI (Argentina) said she was not referring to possible redress, but to preventive measures before the procurement contract was concluded. In her view, article 23 should refer to the contract as well as to solicitation documents.

51. Mr. SAHAYDACHNY (Secretariat) said that, in the understanding of the Secretariat, clarification or modification of the contract at an early stage of the procurement proceedings was provided for by article 21(f) taken in conjunction with article 23; the contract was one of the solicitation documents, with the result that it was subject to the envisaged clarification or modification procedure.

52. Ms. PIAGGI-VANOSI (Argentina) said that clarification or modification of the contract in the manner envisaged would be possible only if the terms and conditions of the contract were known at an early stage.

53. The CHAIRMAN took it that the Commission wished to adopt article 23.

54. *It was so decided.*

Article 24

55. *Article 24 was adopted.*

Article 25

56. Mr. PRIESTLEY (Observer for Australia) suggested that a location for the submission of tenders should be specified in paragraph (1).

57. Mr. LEVY (Canada), supporting that suggestion, proposed that the paragraph read "The procuring entity shall fix a specific date and time as the deadline and the location for the submission of tenders."

58. *It was so decided.*

59. Mr. TUVAYANOND (Thailand), having suggested that "suppliers and contractors" in paragraph (2) should perhaps read "suppliers or contractors", said that he could not understand why a deadline extension should be required following a meeting of suppliers or contractors.

60. Mr. SAHAYDACHNY (Secretariat), having agreed that "suppliers or contractors" would probably be more correct, said that the purpose of the envisaged meeting would be to clarify the solicitation documents, the information provided at the meeting being deemed essential for the preparation of tenders. The

Working Group had therefore considered it necessary, when minutes of the meeting were issued, to allow time for them to be taken into account.

61. Mr. TUVAYANOND (Thailand) asked who would organize such meetings.

62. Mr. SAHAYDACHNY (Secretariat) drew attention to article 23(3), which suggested that the procuring entity was responsible for convening such meetings and for preparing the minutes.

63. Mr. AL-NASSER (Saudi Arabia) asked whether an indication could not be given of the period by which the deadline for the submission of tenders might be extended.

64. Mr. SAHAYDACHNY (Secretariat) replied that the Working Group had felt that it would be inappropriate for the Model Law to establish deadlines for the submission of tenders; so it would also be inappropriate for the Model Law to indicate how far such deadlines might be extended. Such matters were best left to the enacting State and its procurement regulations.

65. The CHAIRMAN said he took it that the Commission wished to adopt paragraph (2) with the words "suppliers and contractors" amended to "suppliers or contractors" [where they first occurred] [at both places where they occurred].

66. *It was so decided.*

67. Mr. TUVAYANOND (Thailand) felt that in paragraph (3) it was going too far to provide for a deadline extension "due to any circumstance" beyond the control of suppliers or contractors.

68. The CHAIRMAN said that, as indicated in the draft Guide to Enactment (document A/CN.9/375), paragraph (3) was permissive.

69. Mr. AL-NASSER (Saudi Arabia) suggested that if, following a deadline extension, the number of suppliers or contractors submitting tenders was considerably lower than the number invited to do so, it should be possible for the deadline to be extended further.

70. Mr. PHUA (Singapore) asked whether, if the procuring entity decided to exercise its discretion and not extend the deadline, its decision would be open to judicial review.

71. Mr. LEVY (Canada) said that, although the word "may" was generally regarded as permissive, it was not impossible under common law that a procuring entity relying on the wording of paragraph (3) as it stood would find itself subject to judicial review on grounds that the provision in question was mandatory. The wording should therefore be tightened up, perhaps through insertion of the words "at its sole discretion" after "may".

72. Mr. WALLACE (United States of America) suggested a form of words such as "The procuring entity may, at its discretion and if, in its judgement, it believes that its convenience is served . . .".

73. Mr. PHUA (Singapore) wondered whether the procuring entity could not be protected through a suitable addition to article 38(2).

74. Mr. TUVAYANOND (Thailand) supported the proposal made by the representative of Canada.

75. In response to the question asked by the representative of Singapore, he said that judicial review was foreseen for cases

such as breach of duty and bad faith on the part of the procuring entity. Use of the word "may" in paragraph (3) suggested that a supplier or contractor would not be able to challenge the decision of a procuring entity not to extend the deadline.

76. Mr. JAMES (United Kingdom) said that chapter V—Review—dealt with failure on the part of the procuring entity to comply with duties. As he recollected, however, the Working Group had intended "may" in paragraph (3) of article 25 to be discretionary. Nevertheless, he had no objection to the proposal made by the representative of Canada.

77. With regard to the words "in its judgement" suggested by the representative of the United States of America, he felt that they might make the kind of judicial review found in the United Kingdom and in most other common law jurisdictions more likely—on the grounds of unreasonable exercise of judgement.

78. Mr. PRIESTLEY (Observer for Australia) supported the proposal made by the Canadian representative but suggested replacement of the word "sole" by "absolute"; in most common law jurisdictions the expression "absolute discretion" went as far as was possible in trying to exclude judicial review.

79. The CHAIRMAN asked whether the Commission could accept the text of paragraph (3) with the insertion of the words "at its absolute discretion" before "may".

80. *It was so decided.*

81. The CHAIRMAN asked the Commission whether it could accept paragraph (4) as drafted.

82. *It was so decided.*

83. The CHAIRMAN recalled that, at its 501st meeting, the Commission had tentatively agreed that the first sentence of paragraph (5) should read "A tender shall be submitted either in writing in a single sealed envelope or by any other means stipulated by the procuring entity which provides at least a similar degree of authenticity, security and confidentiality". Also, he drew attention to the Secretariat proposal contained in document A/CN.9/377.

84. Mr. AL-NASSER (Saudi Arabia) suggested the addition of a phrase on the lines of "including an envelope issued directly by a computer," after "single sealed envelope".

85. Mr. JAMES (United Kingdom), supporting the Secretariat proposal, said it was necessary to ensure the highest degree of authentication of tenders. There was therefore a strong case for requiring that a tender be signed by a director or other officer of the company submitting it.

86. Ms. ZIMMERMAN (Canada) said that, although her delegation would not object to the addition of a requirement that tenders must be signed or authenticated in some other manner, it would have difficulty if the authentication procedure was spelt out in the kind of detail appropriate in corporate law.

87. Mr. ANDERSEN (Denmark) said that, in his view, the real issue was whether an offer was binding on the party submitting it; that would depend on the legal system in question. The Model Law should simply make it clear that, in order to be accepted by the procuring entity, the offer must be binding, and there should be no attempt to specify what made an offer binding.

88. Mr. HAINZL (Austria), endorsing the statement made by the representative of Denmark, said that the point at issue was one

best dealt with in the relevant civil laws of enacting States rather than in the Model Law.

89. Mr. TUVAYANOND (Thailand) wondered whether fax communication was regarded as a form of electronic data interchange (EDI). If it was, problems might arise in his country, where the courts had ruled that a fax did not constitute proof as it could easily be falsified.

90. He also wondered whether suppliers or contractors submitting tenders in electronic form might not be subject to less stringent document legalization requirements than those submitting written tenders.

91. Mr. WALLACE (United States of America) said that in most cases the procuring entity required that tenders be signed. Paragraph (5) should therefore provide for the signing of tenders.

92. Mr. ANDERSEN (Denmark) said that, in his view, it was unreasonable to insist that the person responsible for the submission of a tender should actually sign the tender when there was no doubt that that person was bound by it; in such a case, the signature requirement was a very formalistic one.

93. Mr. PEREZNIETO CASTRO (Mexico) expressed support for the views expressed by the representatives of Denmark and Austria.

94. Mr. AL-NASSER (Saudi Arabia) said that in his country there was a trend towards the acceptance of computer-generated signatures.

95. The CHAIRMAN asked the Commission whether it could accept—subject to editing by the drafting group—the following wording for the first sentence of paragraph (5): “A tender shall be submitted, signed, either in writing in a single sealed envelope or by any other means [stipulated by the procuring entity] which provides at least a similar degree of authenticity, security and confidentiality.”

96. *It was so decided.*

97. The CHAIRMAN asked the Commission whether it could accept paragraph (6) as drafted.

98. *It was so decided.*

The meeting rose at 5.05 p.m.

Summary record of the 504th meeting

Monday, 12 July 1993, at 9.30 a.m.

[A/CN.9/SR.504]

Chairman: Mr. MORAN BOVIO (Spain)
later: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.45 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377, A/CN.9/378 and Add.1)

Consideration of draft Model Law on Procurement (*continued*)

Article 26

1. Mr. LEVY (Canada) suggested that in paragraph (1) “in effect” be replaced by “open for acceptance”.

2. Mr. TUVAYANOND (Thailand) supported the suggestion.

3. Mr. WALLACE (United States of America) said that, although he had no strong feelings about the suggestion, the words “in effect” had a certain legal ring about them which “open for acceptance” lacked.

4. Mr. PHUA (Singapore) supported the suggestion and said he would support a similar amendment to article 21(o).

5. The CHAIRMAN said he took it that the Commission wished to adopt paragraph (1) with the change suggested by the representative of Canada.

6. *It was so decided.*

7. The CHAIRMAN drew the Commission’s attention to the Secretariat proposal in document A/CN.9/377 for amending subparagraph (2)(b) through deletion of the words “if it is not possible to do so”.

8. Mr. TUVAYANOND (Thailand) said that the reference to “effectiveness” of tenders raised the problem of consistency with paragraph (1). He wondered whether the change in paragraph (1) should be reconsidered.

9. Mr. LEVY (Canada) suggested that the drafting group deal with the matter. He had no particularly strong feelings about the change.

10. The CHAIRMAN, noting that the matter would be referred to the drafting group, said he took it that the Commission wished to adopt paragraph (2) without the words “if it is not possible to do so”.

11. *It was so decided.*

12. Mr. LEVY (Canada), drawing attention to document A/CN.9/376/Add.1, said that, as drafted, the first sentence of paragraph (3) was contrary to the law and contracting practices in Canada and some other countries with common law jurisdictions. In Canada, in the absence of other specific terms and conditions, a contract automatically arose upon the submission of a tender in

response to an invitation. The leading case, which had been heard in the Supreme Court of Canada in 1981, was "Her Majesty the Queen in right of Ontario and the Water Resources Commission v. Ron Engineering and Construction (Eastern) Limited". The tenderer had discovered a mistake in the tender which would cost millions of dollars and had tried to withdraw the tender, although the solicitation documents had contained no provision for withdrawal. The Supreme Court had found against the tenderer. In a subsequent case, "North-East Marine Services Limited v. Atlantic Pilotage Authority", the Federal Court had stated that the law on tendering had changed with the decision of the Supreme Court.

13. He said that paragraph (3) would change the present situation in a way which many procuring entities, suppliers and contractors would find disruptive and confusing, at least in Canada, and pointed out in that connection that the Government of Japan had indicated in document A/CN.9/376/Add.2 that the withdrawal of tenders was not permitted in Japan.

14. The problem could be resolved if paragraph (3) was modified so as to permit the solicitation documents to state when, if at all, a tender could be withdrawn without forfeiture of the tender security. He proposed that paragraph (3) start with the phrase "If so provided for in the solicitation documents,".

15. Mr. UEMURA (Japan), noting that the withdrawal of tenders was indeed not permitted under Japanese law, said that paragraph (3) should be amended so as to enable the procuring entity to restrict or prohibit the modification or withdrawal of tenders after their submission.

16. Mr. GRIFFITH (Observer for Australia) said that under the common law of his country a tenderer could withdraw a tender after submission unless specifically prohibited from doing so by the solicitation documents.

17. In order to cover all eventualities, perhaps paragraph (3) should state that, if the solicitation documents contained no specific provisions, the ordinary law of the country would prevail, but, if the solicitation documents contained provisions concerning the withdrawal or modification of tenders, those provisions would apply.

18. Ms. PIAGGI-VANOSI (Argentina), noting that in the Spanish version of paragraph (3) "*oferta*" would be a better translation of "tender" than "*licitación*", said that the suggestion made by the Australian delegation seemed a good one.

19. Mr. TUVAYANOND (Thailand) said that perhaps the procuring entity should be allowed to decide whether modification or withdrawal of a tender prior to the submission deadline was permissible. That could be achieved by a phrase such as "Unless otherwise stipulated in the solicitation documents" at the beginning of paragraph (3).

20. Mr. JAMES (United Kingdom) said that, in his view, it was normal that the withdrawal of a tender prior to the submission deadline should be permitted; the real issue was whether the tender security should be forfeited in such a case. He did not think that procuring entities should be encouraged to introduce conditions that would lead to forfeiture of the tender security if the tender was modified or withdrawn prior to the deadline, and he felt it might be wiser to leave paragraph (3) as it stood. If paragraph (3) were to be amended along the lines proposed by the representative of Canada, that would have implications for subparagraph (1)(f) of article 27.

21. Mr. SAHAYDACHNY (Secretariat) said that, when the provision under discussion had been considered at the eleventh session of the Working Group, the Secretariat had been asked to find

out what the general practice was in that regard. As he recalled it, the Secretariat's researches had indicated that the provision set forth in the first sentence of paragraph (3) was typical of what was provided for in national legislation.

22. Mr. AZZIMAN (Morocco) said that, in his view, it was illogical to prevent the supplier or contractor from modifying or withdrawing the tender prior to the submission deadline. Accordingly, he had difficulties with the Canadian representative's proposal.

23. Mr. TUVAYANOND (Thailand) said that, while he saw no harm in allowing procuring entities to stipulate that the tender security would be forfeited under specified circumstances, he also did not think that procuring entities should actually be encouraged to make such stipulations. In his opinion, the words "Unless otherwise stipulated in the solicitation documents" would leave procuring entities with the flexibility they needed.

24. Ms. ZIMMERMAN (Canada), recalling her delegation's proposal, said that she could go along with something on the lines of what had been suggested by the observer for Australia.

25. Mr. WALLACE (United States of America) said that he would prefer the phrase "Unless otherwise stipulated in the solicitation documents" suggested by the representative of Thailand.

26. He agreed that changes would be necessary in article 27—and perhaps also in article 26(1); in fact, he thought that the second sentence of article 26(1) could in any case be deleted.

27. Mr. GRIFFITH (Observer for Australia) supported the wording suggested by the representative of Thailand.

28. Mr. LEVY (Canada) said that his delegation could also accept that wording.

29. Mr. JAMES (United Kingdom) said that he could go along with the suggested wording, which would, however, entail changes in articles 21 and 27.

30. The CHAIRMAN said that the drafting group would look into the question of consequential changes and asked the Commission whether it could accept paragraph (3) with the phrase "Unless otherwise stipulated in the solicitation documents," placed at the beginning.

31. *It was so decided.*

32. The CHAIRMAN, recalling that shortly before the Commission had adopted paragraph (1) with the words "in effect" replaced by "open for acceptance", invited comments on the suggestion by the representative of the United States that the second sentence of the paragraph could well be deleted.

33. Ms. CRISTEA (Observer for Romania) said that, in her view, the second sentence of paragraph (1) served a useful purpose and should therefore be retained.

34. Mr. TUVAYANOND (Thailand), supporting deletion of the second sentence, said that the first sentence was sufficient on its own.

35. Mr. GRIFFITH (Observer for Australia), also supporting deletion of the second sentence, said that the amendment to paragraph (3) which the Commission had just accepted would make it possible for the procuring entity to require that the tender not be withdrawn prior to the submission deadline. That meant that the tender would be open for acceptance prior to the deadline, so that

it did not seem very helpful to have a sentence stating when the period of time during which the tender would be open for acceptance would commence.

36. Mr. LEVY (Canada) supported deletion of the second sentence of paragraph (1).

37. Mr. JAMES (United Kingdom) said he had no objection to deletion of the second sentence of paragraph (1). However, there would then be a strong case for retaining the words "in effect" in the first sentence of that paragraph.

38. Mr. GRIFFITH (Observer for Australia) suggested that the point raised by the representative of the United Kingdom be left to the drafting group.

39. The CHAIRMAN said there seemed to be general agreement that the second sentence of paragraph (1) should be deleted.

40. *It was so decided.*

41. Mr. Mohammed (Nigeria) took the Chair.

Article 27

42. Mr. SAHAYDACHNY (Secretariat), recalling that the Commission had shortly before accepted paragraph (3) of article 26 with the phrase "Unless otherwise stipulated in the solicitation documents," placed at the beginning, said that subparagraph (1)(f)(i) of article 27 would require the addition of a phrase on the lines of "or before the deadline if so stipulated in the solicitation documents".

43. *Subparagraph (1)(a) was adopted.*

44. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. MORAN BOVIO (Spain), suggested that in subparagraph (1)(b) the words "or entity" be deleted from the phrase "institution or entity", since in Spanish "entity" might easily be taken to mean the procuring entity.

45. Mr. JAMES (United Kingdom) felt that in English the word "institution" alone was probably not sufficient. The matter seemed to be one of translation and should be referred to the drafting group.

46. Mr. HERRMANN (Secretary of the Commission) said that it might be worth considering use of the phrase "institution or person".

47. Mr. LEVY (Canada) supported the replacement of "or entity" by "or person".

48. Mr. WALLACE (United States of America) asked whether consequential changes would not have to be made in subparagraphs (1)(c), (d), (e) and—possibly—(f).

49. Mr. AL-NASSER (Saudi Arabia) proposed that the expression "financial institution" be used.

50. Mr. MORAN BOVIO (Spain), supporting the replacement of "or entity" by "or person", said that the word "institution" should not be qualified as it covered both financial institutions and non-financial institutions such as insurance companies.

51. Mr. HERRMANN (Secretary of the Commission) said that the change of "or entity" to "or person" in subparagraph (1)(b) would obviously entail consequential changes in the subsequent subparagraphs.

52. With regard to subparagraphs (d) and (e), he suggested that "confirming institution" be replaced by "confirmer".

53. Mr. PARRA-PEREZ (Observer for Venezuela) said that the tender securities envisaged in article 27 appeared to be "personal securities" and not "real securities" such as mortgages. Should the Model Law not deal also with the provision of "real securities"?

54. Mr. LEVY (Canada) felt that the point raised by the observer for Venezuela was covered by the words "nature . . . of any tender security to be provided . . ." in paragraph (1) of article 21.

55. Mr. WALLACE (United States of America) felt that the definition of "tender security" in paragraph (g) of article (2) was broad enough to cover the types of security envisaged by the observer for Venezuela.

56. Mr. MORAN BOVIO (Spain) said that the concept of "real security" was a complicated one and that the type of security needed in the context of the Model Law was one which would easily meet the requirements of the procuring entity.

57. The CHAIRMAN took it that the Commission wished the words "or entity" to be replaced by "or person" in subparagraphs (1)(b) and (c), the words "confirming institution" to be replaced by "confirmer" in subparagraphs (d) and (e), and subparagraph (1)(f)(i) to be brought into line with paragraph (3) of article 26 as accepted by the Commission.

58. *It was so decided.*

59. Mr. MORAN BOVIO (Spain) said he would like the drafting group to consider inserting a comma after the word "acceptables" in the Spanish version of subparagraph (1)(e).

60. Mr. TUVAYANOND (Thailand) proposed that in the *chapeau* of paragraph (2) the words "without delay" be replaced by "without undue delay" or "promptly".

61. Mr. LEVY (Canada) said he would prefer "promptly".

62. Mr. MORAN BOVIO (Spain) said he saw no need for a change in the Spanish version of the *chapeau*.

63. Mr. AZZIMAN (Morocco) said he saw no need for a change in the Arabic and French versions either.

64. The CHAIRMAN took it that the Commission wished "without delay" to be replaced by "promptly".

65. *It was so decided.*

66. Mr. AZZIMAN (Morocco) suggested that the French version of subparagraph (2)(a) be amended to read "*Expiration du délai de la garantie de soumission*".

67. Mr. TUVAYANOND (Thailand) suggested that in subparagraph (2)(b) the phrase "by the solicitation documents" be added after "if such a security is required".

68. Mr. JAMES (United Kingdom) said that subparagraph (2)(d) would also need to be brought into line with paragraph (3) of article 6 as accepted by the Commission.

69. Mr. TUVAYANOND (Thailand) said that, in his opinion, the whole of subparagraph (2)(d) after the words "the withdrawal of the tender" could be deleted.

70. Mr. WALLACE (United States of America) said that such a deletion would be a substantive change. It was not something that could be left to the drafting group to decide on.

71. Mr. LEVY (Canada) suggested that the drafting group consider adding "modification or" before "withdrawal" in subparagraph (2)(d) in order to bring the wording into line with that of paragraph (3) of article 26.

72. Mr. TUVAYANOND (Thailand) said he was not sure whether it would be a good idea to add the words "modification or".

73. Mr. AZZIMAN (Morocco) said that the drafting group should not exclude the possibility of leaving subparagraph (2)(d) unchanged.

74. The CHAIRMAN, recalling that the Commission had already agreed that "without delay" should be replaced by "promptly" in the *chapeau* of paragraph (2), said that, in bringing the paragraph into line with paragraph (3) of article 26 as accepted by the Commission, the drafting group could consider the other suggestions which had been made during the Commission's discussion of paragraph (2).

The meeting rose at 12.30 p.m.

Summary record of the 505th meeting

Monday, 12 July 1993, at 2 p.m.

[A/CN.9/SR.505]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377)

Consideration of draft Model Law on Procurement (*continued*)

Article 28

1. Mr. AZZIMAN (Morocco), having suggested that in the French version of the title of article 26 "*offres*" be changed to "*plis*", said he had misgivings about the provision in paragraph (1) that the opening of tenders should be exactly simultaneous with the deadline for the submission of tenders. He felt that it would be more reasonable to allow a certain lapse of time between the deadline for the submission of tenders and the opening of the envelopes.

2. The CHAIRMAN said that it was the deliberate intention of the authors of the draft Model Law not to allow any time between the submission deadline and the opening of tenders, so as to preclude opportunities for misconduct. Clearly, however, situations could arise that necessitated a certain lapse of time between the two.

3. Mr. WALSER (Observer for the World Bank), emphasizing the importance of simultaneity, said that the World Bank did not allow any time at all between the two and that he knew of no valid reason for acting otherwise. Even a very short interval could give rise to doubts concerning the submissions.

4. Mr. PRIESTLEY (Observer for Australia), drawing attention to the comments of the Australian Government contained in document A/CN.9/376, wondered whether paragraph (3) was not inconsistent with paragraph (3) of article 11, which admitted at least some circumstances in which tender prices would not be announced to those present at the opening of the tenders.

5. Mr. SAHAYDACHNY (Secretariat) said there did indeed appear to be an inconsistency between paragraph (3) of article 28 and paragraph (3) of article 11.

6. Mr. WALLACE (United States of America) and Mr. MORAN BOVIO (Spain) said that the observer for Australia had raised a very important point.

7. Mr. WALSER (Observer for the World Bank) said that, in his view, the tender prices ought to be read out at the opening of the tenders in order to preclude the possibility of different prices being announced later (which sometimes happened) and in the interests of transparency.

8. Mr. PRIESTLEY (Observer for Australia) said that, if it was considered essential that all tender prices be announced at the opening of the tenders, article 11 would have to be amended.

9. Mr. WALLACE (United States of America) expressed agreement with the observer for Australia.

10. The CHAIRMAN suggested that the Commission accept the principle of the prime importance of tender prices being announced at the opening of tenders and refer the matter to the drafting group, which could propose amendments to article 11 while the Commission adopted article 28 as it stood.

11. *It was so decided.*

Article 29

12. The CHAIRMAN drew attention to the Secretariat proposal, made in document A/CN.9/377, that the word "prompt" be inserted before "notice" in subparagraph (1)(b).

13. Ms. ZIMMERMAN (Canada), drawing attention to the Canadian Government's comments in document A/CN.9/376/Add.1, said that the first sentence of subparagraph (1)(b) made it mandatory for the procuring entity to correct "purely arithmetical errors apparent on the face of a tender". Her delegation considered that too great an onus was thereby placed on the procuring entity, which might become involved in disputes over whether or not an error was apparent on the face of the tender.

14. Accordingly, her delegation proposed either that the word "shall" be amended to "may" or, preferably, that the paragraph read "the procuring entity shall correct purely arithmetical errors that it may discover on the face of a tender".

15. Mr. WALLACE (United States of America) said that, in his view, the second proposed amendment would only slightly reduce the onus on the procuring entity.

16. He was opposed to replacing "shall" by "may", the first proposed amendment, since it ran counter to the purpose of subparagraph (1)(b), which was to prevent the procuring entity from rejecting a tender as unresponsive when it discovered purely arithmetical errors.
17. Mr. JAMES (United Kingdom) said he too was opposed to the replacement of "shall" by "may"; in his view, the rule must be mandatory.
18. As to the second proposal, he did not consider it unreasonable to require that the procuring entity correct purely arithmetical errors. Subparagraph (1)(b) should be left as it stood.
19. Ms. ZIMMERMAN (Canada) said that, with the present wording, if the procuring entity failed to discover an arithmetical error made by a tenderer it might become responsible for that error; tenderers should be responsible for getting their figures right.
20. Mr. MORAN BOVIO (Spain) said he would prefer the wording to remain unchanged.
21. Mr. LEVY (Canada) said that the Commission had to ensure a proper balance between the obligations of the procuring entity and those of the supplier or contractor. Clearly, if the procuring entity discovered an arithmetical error, it should correct it, but there was no reason why the procuring entity should be penalized for overlooking what the bidder had overlooked.
22. Ms. PIAGGI-VANOSI (Argentina) said that, while she preferred subparagraph (1)(b) as it stood, she considered the second Canadian proposal acceptable; the procuring entity would not be required to make an exhaustive search for arithmetical errors—merely to correct those which were obvious.
23. Mr. GRUSSMANN (Austria), supporting the replacement of "shall" by "may", said that under Austria's procurement law the procuring entity could not correct arithmetical errors if they corresponded to more than 2 per cent of the estimated value of the contract. Reliability was considered important, and tenders which contained significant arithmetical errors were rejected.
24. Ms. CRISTEA (Observer for Romania) said that before correcting an arithmetical error the procuring entity would have to consult with the supplier or contractor that had made the error. That point should be reflected in the text.
25. Mr. WALLACE (United States of America) said that subparagraph (1)(b) should be read in the light of the draft Guide to Enactment (document A/CN.9/375) and in conjunction with subparagraph (3)(b), which permitted the supplier or contractor to withdraw his tender—possibly forfeiting his tender security—if he did not accept a correction of the mathematical error.
26. Mr. WALSER (Observer for the World Bank) said that obvious arithmetical errors had to be corrected and that article 29 as it stood was perfectly adequate for ensuring that they were.
27. Mr. JAMES (United Kingdom) said that, although—as stated earlier—he did not consider it unreasonable to require that the procuring entity correct purely arithmetical errors, he did not consider it the job of the procuring entity to inquire whether a supplier or contractor had meant to submit a different figure.
28. On the other hand, with regard to the words "errors that it may discover" in the second Canadian proposal, he pointed out that the procuring entity could easily claim that it had not noticed a particular error. Accordingly, he felt that subparagraph (1)(b) should be left as it stood.
29. Mr. WALLACE (United States of America) said that, while he would prefer subparagraph (1)(b) to remain unchanged, a formulation on the lines of "the procuring entity shall correct purely arithmetical errors which it discovers or reasonably might have discovered" would be an acceptable compromise in his opinion.
30. Mr. BARICAKO (Observer for the Organization of African Unity) said it was not legally sound to place on the procuring entity a duty which should lie with the supplier or contractor. Provision should therefore be made for the procuring entity to correct any errors which it might discover without any detraction from the responsibility of the supplier or contractor for ensuring the accuracy of the figures submitted.
31. Mr. LEVY (Canada), referring to the words "or reasonably might have discovered" suggested by the representative of the United States of America, said they could well result in recourse to a court or administrative tribunal for a decision on what was "reasonable". In his delegation's opinion, subparagraph (1)(b) should provide for correction by the procuring entity of any arithmetical errors which it discovered, with no penalty if the procuring entity failed to discover all such errors.
32. Mr. PEREZNIETO CASTRO (Mexico) said that the problem appeared to affect only English-speaking, common law countries; the French and Spanish versions of subparagraph (1)(b) did not give rise to difficulties. The compromise suggestion made by the United States representative would reduce the onus on the procuring entity and should meet the concerns of common law countries. If it was accepted, the Commission's thinking could be reflected in the Guide to Enactment.
33. Mr. GRIFFITH (Observer for Australia) said that, in his opinion, the words suggested by the United States representative would increase rather than reduce the onus on the procuring authority.
34. His delegation preferred "may correct" to "shall correct", but otherwise felt that the present text was broadly suitable.
35. Mr. WALSER (Observer for the World Bank) said that, if the concern was for the procuring entity's responsibility, wording along the lines of "or reasonably might have discovered" was not very helpful. He suggested the following wording: "the procuring entity shall correct purely arithmetical errors which might be discovered during tender evaluation".
36. Mr. PHUA (Singapore) said the discussion seemed to be based on the premise that the procuring entity would discover the errors and, having discovered them, would know how to correct them.
37. He proposed that subparagraph (1)(b) start with the sentence "The procuring entity shall not reject a tender on the grounds that there are purely arithmetical errors apparent on the face of the tender". The present first sentence might then be amended to read as follows: "Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors apparent on the face of the tender that it discovers".
38. Mr. KOMAROV (Russian Federation), agreeing with the Canadian delegation that subparagraph (1)(b) placed too great an onus on the procuring entity, said that subparagraph (1)(a) provided the procuring entity with an opportunity to resolve a variety of problems—including, in his opinion, the problem of arithmetical errors. He therefore felt that subparagraph (1)(b) could simply be deleted.
39. Ms. ZHANG Yuejiao (China) suggested the wording "the procuring entity shall authorize the supplier or contractor to

correct purely arithmetical errors", it being understood that the procuring entity would not be allowed to reject corrections made by the supplier or contractor.

40. The CHAIRMAN, emphasizing the need to strike a balance between the responsibilities of the procuring entity and those of the supplier or contractor, asked whether the wording suggested by the observer for the World Bank was acceptable to the Commission.

41. Mr. GRIFFITH (Observer for Australia) wondered whether the drafting group could look at the possibility of using "are" in place of "might be" in the wording suggested by the observer for the World Bank.

42. Mr. LEVY (Canada) said he could accept the wording if "might be" was replaced by "are".

43. Mr. JAMES (United Kingdom) said that he was happy with "might be". There was a substantive difference between "might be" and "are", and the matter should not be left to the drafting group.

44. Mr. WALLACE (United States of America) regretted that the suggested wording did not include the phrase "on the face of a tender".

The meeting was suspended at 2.45 p.m. and resumed at 4.20 p.m.

45. The CHAIRMAN said that the following wording was now being proposed for subparagraph (1)(b): "Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors which are discovered on the face of a tender". He asked whether the Commission could accept that wording.

46. *It was so decided.*

47. The CHAIRMAN asked whether, since there had been no discussion of the Secretariat proposal that "prompt" be inserted before "notice" in the second sentence of subparagraph (1)(b), the proposal in question was acceptable to the Commission.

48. Ms. ZIMMERMANN (Canada) pointed out that there were a number of places in the Model Law where the procuring entity was required to "give notice" and that the question had not arisen of adding "prompt" in each such case.

49. Mr. GRIFFITH (Observer for Australia), pointing out that subparagraph (3)(b) enabled a supplier or contractor to accept or reject a correction, said it was important that the process be expedited. He therefore favoured insertion of the word "prompt".

50. The CHAIRMAN took it that the Commission wished to word "prompt" to be inserted.

51. *It was so decided.*

52. The CHAIRMAN asked whether the Commission accepted the text of paragraph (2) as drafted.

53. *It was so decided.*

54. Mr. ALSHTYWI (Observer for the Libyan Arab Jamihirya), pointing out that article 28(2) referred to the representatives of suppliers or contractors, suggested that in subparagraph (3)(b) of article 29 the words "or a representative" be inserted after "supplier or contractor".

55. The CHAIRMAN said that, if that insertion were made in subparagraph (3)(b), similar insertions would have to be made elsewhere. References in the Model Law to suppliers or contractors were intended to include their representatives.

56. Mr. GRIFFITH (Observer for Australia) agreed; it was clear that a representative should be able to accept a correction under subparagraph (3)(b). Representatives could act for suppliers and contractors in all respects except the formal execution of a document, which might require sealing.

57. Mr. PEREZNIETO CASTRO (Mexico) said that in most States such questions were governed by laws not relating to procurement. The draft Model Law presupposed that suppliers and contractors would have representatives acting for them.

58. Mr. GRIFFITH (Observer for Australia) said that subparagraph (3)(b) seemed to give suppliers and contractors a choice of whether or not to accept a correction of an arithmetical error, although such errors were open to correction under subparagraph (1)(b). Noting that suppliers and contractors sometimes made deliberate arithmetical errors, he suggested that in order to prevent them from deriving an advantage from such errors, subparagraph (3)(b) be deleted.

59. Mr. WALLACE (United States of America) said that, as far as he could recall, it had been felt in the Working Group when drafting paragraph (3) that, for practical reasons, it would be better for the procuring entity simply to reject a tender containing a serious arithmetical error which the supplier or contractor would not allow to be corrected rather than to hold the supplier or contractor to that tender; if the supplier or contractor were held to the tender, the matter would almost certainly end in litigation.

60. Mr. MORAN BOVIO (Spain) said that there appeared to be a balance between subparagraph 1(b) and subparagraph 3(b) and that, if the latter subparagraph were deleted, the former one would have to be deleted also. To him it seemed obvious that, if a supplier or contractor refused to accept a correction of an arithmetical error made by the procuring entity pursuant to subparagraph (1)(b), the procuring entity should not accept the tender.

61. The CHAIRMAN took it that the Commission wished to retain subparagraph (3)(b).

62. *It was so decided.*

63. The CHAIRMAN, inviting the Commission to consider paragraph (4), drew attention to the Secretariat suggestion in document A/CN.9/377 that in subparagraph (4)(d) an express requirement that use of a margin of preference should be reflected in the record be added.

64. Mr. PRIESTLEY (Observer for Australia), having expressed support for the suggestion, said his delegation was concerned that the price factor should not be overemphasized. In document A/CN.9/376, commenting on article 28, his Government stated that the practice contemplated by paragraphs (2) and (3) of that article "places the emphasis on the price as being the main factor on which the contract is let, and thereby could be seen as giving the suppliers the wrong message. Modern practices try to achieve maximum value for money and price is only one of the factors considered." Commenting on article 29, his Government mentioned several other factors which were taken into account in evaluating tenders.

65. As pointed out in paragraph (3) of the commentary on article 29 in the draft Guide to Enactment (document A/CN.9/375), "in some tendering proceedings, the procuring entity may wish to select a tender not purely on the basis of the price factor". The

Model Law accordingly enabled the procuring entity to select the "lowest evaluated tender", i.e. to select on the basis of criteria in addition to price. Subparagraphs (4)(c)(ii) and (iii) indicated the non-price criteria envisaged in the Model Law.

66. However, subparagraphs (4)(c)(ii) and (iii) did not adequately address his Government's concerns. For instance, in considering two tenderers which met the prequalification requirements and offered identical engineering skills and financial and personnel capabilities, the procuring entity might prefer the tenderer with previous experience of the particular type of work required. It was important to ensure that the procuring entity could select that tenderer, even where there was a price margin in favour of the less experienced tenderer.

67. He was not convinced that under subparagraphs (4)(c)(ii) and (iii) the procuring entity could. Nor was it clear from articles 6 and 21 that the procuring entity would have a sufficient margin of discretion in such cases. He therefore suggested amending sub-

paragraph (4)(b)(i) to begin something like "the tender from that tenderer which has been determined to be fully capable of undertaking the contract and whose tender contains the lowest tender price . . .". That amendment, if approved, would provide the necessary latitude for the procuring entity to disregard the lowest tender price if necessary.

68. Mr. WALLACE (United States of America) said that the Model Law had been drafted in such a way as to deal with the concerns of the Australian Government. First, formal tendering was only one of the methods open to procuring entities; the other methods, such as two-stage tendering, competitive negotiation and a request for proposals, allowed for consideration of a mixture of price and non-price factors. Secondly, even formal tendering offered a degree of latitude, because tenders were judged on the basis of qualification and responsiveness as well as of price.

The meeting rose at 5 p.m.

Summary record of the 506th meeting

Tuesday, 13 July 1993, at 9.30 a.m.

[A/CN.9/SR.506]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.45 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (*continued*)

Article 29 (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of paragraph (4).
2. Mr. SHIMIZU (Japan), referring to subparagraph (4)(c)(iii), said that, as the Working Group's text was the result of long discussions, he would not propose the deletion of the subparagraph. He wished to say for the record, however, that his delegation would have preferred its deletion. First, his delegation considered, as a matter of principle, that the evaluation of tenders should be based on price factors. Secondly, to allow a procuring entity to consider factors with political implications could lead to abuse; such factors should be considered by high governmental authorities. Lastly, the factors indicated in subparagraph (4)(c)(iii) could undermine the logical structure of the tendering procedure as envisaged in the draft Model Law.
3. Mr. MORAN BOVIO (Spain), referring to the suggestion made by the observer for Australia at the previous meeting for an amendment to subparagraph (4)(b)(i), said he agreed with what had been said by the representative of the United States of America and felt that it would be preferable to leave the subparagraph as it stood.
4. Mr. WALSER (Observer for the World Bank) said that the qualifications of suppliers and contractors should not be considered in the evaluation of tenders since it would already have

been decided in the prequalification process which suppliers and contractors had the necessary qualifications. To attempt to compare the qualifications of one bidder with those of another would introduce an element of subjectivity and could encourage corruption. However, article 7 made prequalification proceedings optional, and it was not clear to him what would happen if there were no prequalification proceedings. To deal with that point, the amendment suggested by the observer for Australia might be justified. He would welcome clarification from the Secretariat.

5. Mr. SAHAYDACHNY (Secretariat) noted that, under article 29 (3)(a), a tender submitted by a supplier or contractor that was not qualified must be rejected.
6. Mr. WALSER (Observer for the World Bank) said that, in that case, he felt that the suggested amendment was unnecessary.
7. Mr. WALLACE (United States of America) said that there was a logical structure to the draft Model Law and that the question of qualifications, which was adequately covered by articles 6 and 7 and article 29 (3)(a), should be kept separate.
8. Mr. PRIESTLEY (Observer for Australia) said that his delegation had raised the point in order to hear the views of others and would not press the suggestion which he had made at the previous meeting.
9. The CHAIRMAN said he took it that the Secretariat's suggestion for an amendment to subparagraph (4)(d) (see document A/CN.9/377) was accepted.
10. *It was so decided.*
11. *Paragraph (4) of article 29, as amended, was adopted.*

12. Mr. MORAN BOVIO (Spain), referring to paragraph (5), noted the amendment to that paragraph proposed by the Secretariat in document A/CN.9/377. The proposal seemed a good one; however, he wondered whether the rest of the paragraph could not be simplified by saying merely that the tender prices of all tenders were to be converted to the currency specified in the solicitation documents, without referring to the expression of prices in "two or more currencies".

13. Mr. PEREZNIETO CASTRO (Mexico), supporting that suggestion, asked what would happen if no currency were specified in the solicitation documents.

14. Mr. MORAN BOVIO (Spain) noted that article 21(r) required the solicitation documents to state the currency that was to be used for the purpose of evaluating and comparing tenders. Without that information, the solicitation documents would be incomplete.

15. Mr. JAMES (United Kingdom) supported the Secretariat's proposal and the suggestion made by the representative of Spain. The wording could be finalized by the drafting group.

16. Mr. WALLACE (United States of America), welcoming the reference to article 21(r) contained in the Secretariat's proposal, agreed with what had been said by the representative of the United Kingdom.

17. Ms. CRISTEA (Observer for Romania) wondered whether the reference was necessary, since there was a reference to article 29(5) in article 21(r).

18. The CHAIRMAN said that the Secretariat's proposal and the suggestion made by the representative of Spain seemed to be acceptable in principle, but that it would be for the drafting group to finalize the wording. He suggested that paragraph (5) be adopted on that understanding.

19. *It was so decided.*

20. *Paragraphs (6), (7) and (8) were adopted.*

Article 30

21. *Article 30 was adopted.*

Article 31

22. Mr. RAO (India), drawing attention to the commentary on article 31 in the draft Guide to Enactment (document A/CN.9/375), said that the article seemed to address only the interests of suppliers and contractors. There was a need, however, to address also the interests of the procuring entity when suppliers or contractors were engaging in price-fixing.

23. In India, the Government did not resort to negotiation as a general rule. However, when there was evidence that a cartel of suppliers or contractors had caused unreasonable prices to be quoted, the Government did enter into negotiations with all tenderers.

24. Accordingly, he felt that the article should be amended through the addition of a phrase on the following lines: "except when the procuring entity has reason to believe that the supplier or contractor has entered into a price-fixing arrangement".

25. Mr. WALLACE (United States of America), noting that the representative of India had raised an interesting point, said that the purpose of article 31 was to preserve the integrity of competitive tendering. The article, which was based on the assumption

that honest suppliers and contractors would not participate in competitive tendering if they thought that the procuring entity might try to force them to lower their prices, removed the temptation for the procuring entity to attempt to obtain a lower price—thereby perhaps ending up with a poorer product or a poorer job.

26. Article 33, which was extremely strict, complemented article 21, which stated what solicitation documents should contain. If the procuring entity could not provide solicitation documents containing all the requisite information, it should not proceed with competitive tendering but choose another procurement method.

27. Cartels could be dealt with under article 30, which provided for the rejection of all tenders—for example, if the procuring entity believed it was faced with a price ring. Moreover, the draft Model Law did not exclude recourse to criminal law, and it referred to the disqualification of suppliers and contractors found to have acted improperly.

28. Mr. MORAN BOVIO (Spain), agreeing with the representative of the United States of America, said that, if tender prices could be changed through negotiation, instability would result.

29. Mr. WALSER (Observer for the World Bank), agreeing with the representatives of the United States of America and Spain, said that the prohibition of negotiation was central to competitive tendering, where suppliers and contractors knew that they had just one chance to quote their best possible price.

30. In countries where negotiations were permitted, suppliers and contractors might quote prices 5-10 per cent above their best possible prices in the knowledge that they could come down by 3-4 per cent in the course of negotiations and still earn more than they would if no negotiations were permitted.

31. To his knowledge, price-fixing did not occur in international trading. If it ever should occur, the procuring entity could reject all bids under article 30 and resort to two-stage tendering, a request for proposals or competitive negotiation under article 14(d). Certainly article 31 should not be modified in order to provide for such an occurrence.

32. Mr. LEVY (Canada), recognizing the importance of the point raised by the representative of India, said it was facile to say that the procuring entity could reject all tenders; it might not be immediately apparent that they were not in order. Procuring entities often did not realize until after the conclusion of a contract that there had been collusion among the suppliers or contractors. In Canada, investigators had on two occasions discovered the existence of a cartel only about a year after conclusion of the contract.

33. The problem was a serious one, and he had not found any way of dealing with it in procurement law. To allow negotiations would not solve it, and article 31 should therefore be kept as it stood.

34. Mr. PEREZNIETO CASTRO (Mexico) said that there should be no negotiation in the competitive tendering process and that the Model Law provided for negotiation within the framework of other procurement methods.

35. The CHAIRMAN said it seemed that the Commission's view was that the prohibition of negotiation as reflected in article 31 should be retained as the Model Law provided for a variety of methods other than competitive tendering whereby negotiation could take place. If that was so, article 31 could be adopted as it stood.

36. *Article 31 was adopted.*

Article 32

37. Paragraphs (1) and (2) were adopted.
38. Mr. SAHAYDACHNY (Secretariat), introducing the amendment to paragraph (3) proposed by the Secretariat in document A/CN.9/377, said the intention was to make it clear that, if approval by a higher authority was required, the requirement—reflected in article 21(x)—should be referred to in the solicitation documents.
39. Paragraph (3) was adopted with the amendment proposed by the Secretariat.
40. Paragraphs (4) and (5) were adopted.
41. Ms. ZIMMERMAN (Canada), noting the Secretariat's proposal in document A/CN.9/377 relating to paragraph (6), recalled that, under article 11(2), a portion of the record of procurement proceedings was available for inspection by any person. Extending the disclosure requirement provided for in paragraph (6) of article 32 did not therefore seem very useful, and it might even result in an onerous duty for the procuring entity. Her delegation would prefer that paragraph (6) be left unchanged.
42. Mr. WALLACE (United States of America) said that, having examined a similar proposal made by Japan (in document A/CN.9/376/Add.2), he considered the Secretariat proposal to be useful. Publication of a notice of the procurement contract need not be an onerous duty; an official gazette or a similar journal could be used.
43. Mr. LEVY (Canada) said it was not clear from the Secretariat's proposal whether a notice would have to be published even in the case of a very small contract.
44. With regard to the idea of publishing in an official gazette or a similar journal, the notice would probably appear too late to serve any purpose, and official gazettes and the like were normally read only by civil servants.
45. Ms. CRISTEA (Observer for Romania) said that, although she was in favour of promoting transparency in the procurement process, she doubted whether States would agree to publish the notice of a procurement contract—for instance, by advertising in a national newspaper—if the contract had a bearing on national security.
46. Mr. JAMES (United Kingdom) said that, as article 11(2) required that a portion of the record of procurement proceedings be made available for inspection by any person, the concern behind the Secretariat's proposal could perhaps be met if the name and address of the successful tenderer were also included in the record.
47. He agreed with the observer for Romania that States were likely to be extremely reluctant about publishing the notice of a procurement contract which had a bearing on national security. Under article 1, however, procurement involving national security could be excluded from the Model Law's scope of application if the State so decided.
48. Mr. KOMAROV (Russian Federation), expressing support for the Secretariat's proposal, said, with regard to the point raised by the observer for Romania, that in cases of restricted tendering (provided for in article 18(3)) the obligation to publish would be restricted.
49. Mr. LEVY (Canada) suggested that article 11(1)(b) be amended along the lines envisaged by the United Kingdom rep-

resentative. As to the point raised by the observer for Romania, he was not sure that it was adequately met by article 11 as currently drafted.

50. Mr. WALLACE (United States of America), having also referred the observer for Romania to article 1, said that the requirement to publish the notice of a procurement contract might in some cases be burdensome, but the burdens imposed by the Model Law were in the interests of—*inter alia*—greater transparency. In any case, the provision could be worded in such a way as to ensure that the requirement was not unreasonable.
51. He agreed with the comment of the Japanese Government that the publication requirement should be extended to other procurement methods, including single-source procurement.
52. Mr. SHIMIZU (Japan) expressed support for the Secretariat's proposal.
53. Ms. ZHANG Yuejiao (China) said her delegation was in favour of transparency provided that there was no conflict with considerations of public interest, law enforcement and national security.
54. She suggested that, in order to meet any concerns about publication costs, wording on the lines of “. . . the procurement contract shall be made publicly available” might be used; publication would then not be necessary, but it should be possible for interested parties to obtain the information they wanted.
55. The CHAIRMAN said he took it that the Commission wanted paragraph (6) to allow for publication of the notice of a procurement contract, but in a manner that would not involve undue expense for the procuring entity, and article 11(1)(b) to be amended by the addition of the words “and the name and address of the supplier or contractor to which the contract is awarded”.
56. *It was so decided.*
- Articles 33 and 34
57. Articles 33 and 34 were adopted.
- Article 35
58. Mr. WALLACE (United States of America) noted that in document A/CN.9/377 the Secretariat proposed the addition in paragraph (4) of the sentence “The procuring entity shall select the successful offer on the basis of the best and final offers.” He suggested that the end of the sentence be amended to read “. . . on the basis of such best and final offers”.
59. Article 35, as amended, was adopted.
- Article 36
60. Mr. SAHAYDACHNY (Secretariat) said that, on reflection, the Secretariat wished to withdraw the proposal made in document A/CN.9/377 for amending paragraph (1).
61. Mr. KOMAROV (Russian Federation) suggested that the problem of deciding what elements were to be included in the price could be resolved by a reference, in the Guide to Enactment, to INCOTERMS, published by the International Chamber of Commerce (ICC).
62. Ms. CRISTEA (Observer for Romania) and Mr. MORAN BOVIO (Spain) agreed with the representative of the Russian Federation.

63. The CHAIRMAN said that a reference to INCOTERMS could be included in the Guide to Enactment and took it that the Commission wished to adopt paragraph (1) as submitted by the Working Group in document A/CN.9/371.

64. *It was so decided.*

65. Paragraph (2) was adopted.

66. Mr. WALLACE (United States of America), in response to the representatives of Mexico and Thailand, said that the word "reliable" in paragraph (5) related to "the supplier or contractor".

67. Mr. TUVAYANOND (Thailand) said he found the phrase "responsive to the needs" in paragraph (3) too vague; who decided on the needs of the procuring entity?

68. Mr. WALSER (Observer for the World Bank) said that the phrase "considered reliable" was vague and suggested instead "considered qualified".

69. Also, he suggested the replacement of "responsive to the needs of the procuring entity" by "responsive to specifications".

70. Mr. KOMAROV (Russian Federation) supported the suggestions made by the observer for the World Bank.

71. Mr. SAHAYDACHNY (Secretariat) said that the words "responsive to specifications" would be in line with the intention of the Working Group. However, the words "considered qualified" might imply that requests for quotations involved the full panoply of provisions of articles 6 and 7.

72. Mr. LEVY (Canada), supporting the remarks made by the representative of the Secretariat, said that "responsive to specifications"

might represent an improvement, but not "considered qualified".

73. Mr. WALLACE (United States of America) said he felt that the words "responsive to specifications" implied too much formality; as indicated in article 15, requests for quotations were made for the procurement of "readily available goods that are not specially produced to the particular specifications of the procuring entity".

74. He shared the opinion of the Secretariat regarding the words "considered qualified".

75. Mr. JAMES (United Kingdom), referring to the words "responsive to specifications", said that it would be wrong to use wording which suggested that requests for quotations could be used in procuring goods other than readily available ones.

76. Ms. ZIMMERMAN (Canada) agreed with the representative of the United Kingdom.

77. Mr. WALLACE (United States of America) suggested that perhaps the concerns of the representative of Thailand could be met by replacing "responsive to the needs" by "meeting the needs".

78. Mr. TUVAYANOND (Thailand) welcomed the suggestion made by the representative of the United States of America.

79. The CHAIRMAN said that he took it that the Commission wished to adopt paragraph (3) with "responsive to the needs" replaced by "meeting the needs".

80. *It was so decided.*

The meeting rose at 12.30 p.m.

Summary record of the 507th meeting

Tuesday, 13 July 1993, at 2 p.m.

[A/CN.9/SR.507]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (*continued*)

Article 37

1. Mr. GRIFFITH (Observer for Australia) said that it might be appropriate for article 37 to become part of article 16, so that single-source procurement was dealt with entirely in article 16 rather than in two articles.

2. Mr. HERRMANN (Secretary of the Commission) said that, during the Commission's previous session, the drafting group had felt that there should be a clear separation between the conditions for using different procurement methods (dealt with in chapter II) and the procedures for procurement methods other than tendering (dealt with in chapter IV). There was little to be said about pro-

cedures in the case of single-source procurement, but for the sake of consistency it had been felt that an article concerning that method should appear in chapter IV.

3. Mr. WALLACE (United States of America) suggested that, like article 36(3), article 37 conclude with a phrase concerning the reliability of the supplier or contractor. He could go along with the words "considered qualified", which had been considered at the previous meeting in connection with article 36(3), provided it was understood that, in the present case also, they did not imply that all the provisions of articles 6 and 7 would come into play.

4. Mr. WALSER (Observer for the World Bank) said that, in his opinion, the words "considered qualified" did not mean that the procuring entity would have to ascertain the qualifications of suppliers and contractors or engage in prequalification proceedings. Perhaps a phrase like "that is qualified as defined in article 6(2)" at the end of article 37 would be appropriate as it appeared to be generally agreed that article 6(2) should apply whatever procurement method was used.

5. It was surprising that article 37 referred back to article 16 ("Conditions for use of single-source procurement"), while articles 33-36 did not refer back to articles 14 and 15. Perhaps the appropriate references should be inserted in articles 33 to 36.
6. Mr. LEVY (Canada) felt that one could safely add the phrase "that is considered reliable by the procuring entity" at the end of article 37.
7. Mr. SAHAYDACHNY (Secretariat) suggested that, if such a phrase was added, the Commission might wish the drafting group to devise language that would ensure that, in assessing the reliability of a supplier or contractor, the procuring entity did not consider factors other than those whose consideration was envisaged in article 6.
8. Mr. JAMES (United Kingdom) said that, as he understood it, the Commission wished to allow the procuring entity to assess reliability, but not by means of the formal procedures provided for in article 6.
9. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had moved article 6 into chapter I, "General provisions", because it had felt that it should apply to all methods of procurement. In any case, perhaps there was not much difference between the information which the procuring entity might seek pursuant to article 6 and the information which it might seek in assessing reliability in connection with requests for quotations and with single-source procurement.
10. Mr. WALLACE (United States of America), pointing out that the enumeration in article 6(2)(a) actually included "reliability", said that in the wording which was being sought a distinction should be made between article 6 and the criteria set forth in subparagraphs (2)(a) to (e) of that article.
11. Mr. LEVY (Canada) felt that in the case of requests for quotations and single-source procurement it was not necessary to refer to the criteria set forth in subparagraphs (2)(a) to (e) of article 6.
12. Perhaps one could add at the end of article 6(1) a phrase like "except for procurement made in accordance with articles 36 and 37".
13. Mr. TUVAYANOND (Thailand) said he understood that article 6 applied to all the procurement methods envisaged in the Model Law. Accordingly, he felt that articles 36 and 37 should be linked in some way to article 6, paragraph (2) of which was in any case not mandatory—as made clear by the words "the procuring entity may require" in the *chapeau*.
14. Mr. WALSER (Observer for the World Bank) said that use of the word "reliable" might open the way to subjective judgments and that he did not see why the criteria set forth in subparagraphs (2)(a) to (e) of article 6 should not apply to all procurement methods. The procurements envisaged by paragraph (2) were not very complicated.
15. Ms. PIAGGI-VANOSI (Argentina) supported the views expressed by the observer for the World Bank.
16. Mr. LEVY (Canada), agreeing that the words "the procuring entity may require" in the *chapeau* of paragraph (2) of article 6 meant that that paragraph was not mandatory, suggested that article 36(3) and article 37 might be drafted in such a way as to convey the idea that "the procuring entity may have regard to the criteria set forth in article 6(2)(a) to (e) if it so desires".
17. Mr. TUVAYANOND (Thailand), supporting the suggestion made by the representative of Canada, suggested that the expression "*mutatis mutandis*" be incorporated into the wording in question.
18. Mr. JAMES (United Kingdom) suggested for article 36(3) and article 37 a formulation on the lines of "supplier or contractor that is considered by the procuring entity to satisfy such of the criteria set forth in subparagraphs (a) to (e) of article 6(2) as the procuring entity considers appropriate in the circumstances".
19. Mr. TALICE (Uruguay) suggested that, given the non-mandatory character of article 6(2), one might speak in article 36(3) and article 37 of "full or partial compliance with the criteria set forth in article 6(2)".
20. The CHAIRMAN suggested that the Commission request the drafting group to devise wording on the lines of "supplier or contractor that is considered reliable and satisfies such requirements as stipulated in article 6(2)(a) to (e)".
21. Mr. LEVY (Canada) asked whether the Commission wished to redraft article 6(1) so as to exempt requests for quotations and single-source procurement from the scope of application of article 6.
22. Mr. TUVAYANOND (Thailand) said that, in his opinion, article 6 should remain as it stood.
23. Mr. HERRMANN (Secretary of the Commission) said that the inclusion in article 36(3) and article 37 of wording on the lines of "the procuring entity may have regard to the criteria set forth in article 6(2)(a) to (e) if it so desires" would result in doubts about the position as regards procurement methods other than requests for quotations and single-source procurement.
24. Mr. WALLACE (United States of America) suggested that no phrase about reliability be added to article 37 and that the words "and that is considered reliable by the procuring entity" in article 36(3) be deleted.
25. Mr. LEVY (Canada) supported the suggestion.
26. Mr. JAMES (United Kingdom) said that the suggestion made by the representative of the United States of America would sever the link between article 36(3) and article 37 on one hand and article 6 on the other. If there was to be no reference to reliability in article 36(3) and article 37, there should be a reference to qualifications.
27. Mr. TUVAYANOND (Thailand) said he would like to see a reference to reliability in both article 36(3) and article 37.
28. Mr. WALSER (Observer for the World Bank), agreeing with the United Kingdom representative, said he believed that there should be a reference to qualifications not only in article 36(3) and article 37, but also in articles 33 to 35.
29. Ms. PIAGGI-VANOSI (Argentina) supported the United States representative's suggestion that there should be no reference to reliability in article 36(3) and article 37 and the suggestion made by the representative of Thailand with regard to the addition of "*mutatis mutandis*".
30. Mr. WALLACE (United States of America) suggested asking the drafting group to devise a form of words for article 6 which would authorize the procuring entity to have maximum regard to the criteria set forth in subparagraphs (2)(a) to (e) of that article.

31. The CHAIRMAN said that the drafting group could be asked to redraft article 6(1). The Commission still had to decide whether there should be references to reliability in article 36(3) and article 37.

32. Mr. TUVAYANOND (Thailand) said he would not press his view if article 6 could be construed as permitting the procuring entity to take account of the reliability of the supplier or contractor.

33. The CHAIRMAN asked the United States representative whether, in his opinion, a supplier or contractor could meet the standards of article 6(2)(a) to (e) without being reliable.

34. Mr. WALLACE (United States of America) said he thought that article 6 could be modified in such a way as to address the point made by the representative of Thailand and the point made by the observer for the World Bank.

35. Mr. TALICE (Uruguay) suggested that, if the last phrase of article 36(3) was to be deleted, article 6(1) be modified so as to indicate that all procurement methods fell within the scope of application of article 6.

The meeting was suspended at 3.35 p.m. and resumed at 4.15 p.m.

36. Mr. SAHAYDACHNY (Secretariat) proposed the insertion, near the beginning of article 6, of a sentence on the lines of "No procurement shall be entered into unless the supplier or contractor is qualified". He also proposed that paragraph (2) include a provision on the lines of "Suppliers or contractors shall be deemed qualified to perform the procurement contract if they meet such of the following criteria as the procuring entity deems appropriate in the particular case", followed by the criteria set forth in subparagraphs (2)(a) to (e).

37. The intention behind those proposals was that all methods of procurement should be covered, but that the procuring entity should not be required to carry out exhaustive assessments of qualifications. There would be due regard to the importance of reliability in the context of requests for quotations and single-source procurement without, however, any reference to reliability in article 36(3) or article 37.

38. Mr. LEVY (Canada) and Mr. TUVAYANOND (Thailand) welcomed the proposals.

39. The CHAIRMAN took it that the Commission wished to adopt article 37 in the light of those proposals.

40. *It was so decided.*

41. Mr. WALLACE (United States of America), recalling the decisions taken by the Commission at its previous meeting regarding article 32(6) and article 11(1)(b), said that the Commission appeared not to have dealt with the comment of the Japanese Government (in document A/CN.9/376/Add.2) that "this requirement of publication should . . . be extended to other methods of procurement, including single-source procurement".

Articles 15 bis and 36 bis

42. The CHAIRMAN, recalling the discussion on article 18(3) during the Commission's 502nd meeting, opened for discussion the articles on restricted tendering proposed by the Inter-American Development Bank in document A/CN.9/XXVI/CRP.5. He said that, if the two articles were adopted, article 18(3) would be deleted.

43. Mr. SAHAYDACHNY (Secretariat) said that, if the two articles were adopted, their wording would need to be aligned

with the terminology used elsewhere in the Model Law; unless matters of substance were involved, that task could be left to the drafting group.

44. It might be helpful to compare paragraphs (a) to (d) of article 15 *bis* with paragraph 3 of the commentary on article 18 in the Guide to Enactment (document A/CN.9/375). In that connection, he recalled that during the Commission's 502nd meeting several members had felt that the phrase "for reasons of economy and efficiency" in article 18(3) should be made more explicit.

45. Mr. MORAN BOVIO (Spain), commending the idea of including articles on restricted tendering in the Model Law, said that details of wording could be settled by the drafting group.

46. Mr. LEVY (Canada) said he had doubts about making restricted tendering so visible, but if the Commission wished to accept the proposals before it, he would not object.

47. He presumed that the last phrase of paragraph (2) of article 36 *bis*—"except that publicity requirements shall not apply"—was intended to refer to the early stages of tendering, since publicizing of the outcome was required with all other procurement methods.

48. Mr. GRIFFITH (Observer for Australia) said that, like the Canadian representative, he was not sure about the wisdom of including separate articles on restricted tendering. The draft Model Law already contained provisions relating to restricted tendering which the Commission had discussed at length without reaching agreement. In such circumstances, he preferred that the existing language be left as it stood since it had the sanction of the Working Group.

49. If the Commission did decide to adopt the two articles, the reference to "small quantities" in paragraph (d) of article 15 *bis* should be brought into line with the corresponding phrase in paragraph (b) of article 17, which the Commission—at its 501st meeting—had decided to change from "low amount or value" to "small quantity or low monetary value".

50. Mr. AZZIMAN (Morocco), commending the proposal submitted by the Inter-American Development Bank, said that it would result in the Model Law's having a more logical structure—open tendering, the preferred method, accompanied by certain derogations dependent on specific conditions.

51. Noting that the language of the proposed articles would need to be harmonized with that employed elsewhere in the Model Law, he suggested that in paragraph (c) of article 15 *bis* and paragraph (2) of article 36 *bis* "public tendering" be replaced by "open tendering" (in contrast to restricted tendering) and that in paragraph (2) the word "prior" be inserted before "publicity".

52. Mr. JAMES (United Kingdom) said he too was not sure whether the introduction of two new articles was the best way of dealing with restricted tendering.

53. If article 15 *bis* was to be adopted, it would require a paragraph (e) dealing with "any other exceptional cases". He was not convinced that paragraphs (b) and (c) of article 15 *bis* provided valid reasons for recourse to restricted tendering. Nor did he see the point of the reference to "small quantities" (or something on the lines of "small quantity or low monetary value") in paragraph (d) given the basic principle that restricted tendering was justifiable only if the value of the contract and the costs of the procurement procedure were so out of balance as to render open tendering undesirable.

54. The second sentence in paragraph (1) of article 36 *bis* would need to be examined in the light of the decision taken earlier in the meeting with regard to article 6.

55. Mr. TUVAYANOND (Thailand) agreed with the representative of the United Kingdom about the need, in article 15 *bis*, for a paragraph (e) dealing with "any other exceptional cases".

56. Regarding paragraph (b) of article 15 *bis*, he considered the words "duly justified" to be unnecessary; it was for the national authorities of enacting States to decide what constituted an "urgent need".

57. Like the observer for Australia, he did not like the formulation "small quantities" in paragraph (d) of article 15 *bis*; perhaps

that paragraph might be amended to read "the procurement is of minor significance".

58. With regard to paragraph (1) of article 36 *bis*, he questioned the use of the word "reputable" in the second sentence as it might lead to discrimination against new firms to the benefit of established ones. He thought that "reasonable" would be more appropriate than "sufficient" in the third sentence.

The meeting rose at 5.05 p.m.

Summary record of the 508th meeting

Wednesday, 14 July 1993, at 9.30 a.m.

[A/CN.9/SR.508]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377, A/CN.9/378 and Add.1, A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (*continued*)

Articles 15 bis and 36 bis (continued)

1. Mr. PEREZNIETO CASTRO (Mexico) supported the proposal by the Inter-American Development Bank as restricted tendering would thereby be treated as a method of procurement in chapter II and not buried in chapter III among the tendering proceedings. With regard to article 15 *bis*, he proposed that paragraphs (b), (c) and (d) be replaced by a new paragraph (b) reading as follows: "the time and cost of the examination and evaluation of a large number of tenders would be disproportionate to the value of the goods or construction to be procured". That wording was derived from paragraph 3 of the commentary on article 18 in the draft Guide to Enactment (document A/CN.9/375).

2. With regard to article 36 *bis*, he proposed the deletion of "except that publicity requirements shall not apply".

3. Mr. WALLACE (United States of America) said that—like the representatives of Canada and the United Kingdom and the observer for Australia, who had expressed their views towards the end of the previous meeting—he had doubts about the advisability of introducing two articles on restricted tendering; one should not give it unwarranted publicity. He would have preferred to make the provisions of article 18(3) more stringent.

4. If it was the wish of the Commission to adopt the proposed articles, however, he would support the Mexican representative's proposal for amending article 15 *bis* and reserve the right to propose additional changes in that article.

5. He agreed that the reference to publicity requirements in article 36 *bis* should be deleted, although it should be made clear that the aim of the deletion was to remove the need for advance publicity as opposed to *ex post facto* publicity.

6. Mr. PARRA-PEREZ (Observer for Venezuela), expressing strong support for the proposal of the Inter-American Develop-

ment Bank, said that in Latin America restricted tendering was widely used as a procurement method intermediate between single-source procurement and totally open tendering.

7. If the Model Law did not provide for restricted tendering, it was possible that Latin American countries would resort increasingly to single-source procurement. The proposal of the Inter-American Development Bank would therefore promote—rather than inhibit—competition and freedom of trade.

8. The proposals just made by the Mexican representative would have to be studied. Meanwhile, he felt that in paragraph (d) of article 15 *bis* the words "for small quantities" should be changed to something like "of low value".

9. Ms. PIAGGI-VANOSI (Argentina) said that the possibility that the procuring entity would resort to restricted tendering should be reduced as far as possible. She therefore supported the proposals made by the representative of Mexico, and particularly the deletion of the last phrase of article 36, for publicity should be as wide as possible in cases of restricted procurement.

10. Mr. SHIMIZU (Japan), also supporting the Mexican proposal to delete the last phrase of article 36, referred to the suggestion made by the Japanese Government regarding article 18 in document A/CN.9/376/Add.2 and said that publicity was particularly important in the case of restricted tendering; people had access to the record, but only after the event. He would therefore favour the publication of some kind of notice in an official gazette or a similar journal, it being understood that the notice would not be published too late to be of anything but historical interest.

11. With regard to the burden on the procuring entity resulting from publicity requirements, he associated himself with what the United States representative had said at an earlier meeting about such burdens being in the interests of transparency.

12. Mr. GRIFFITH (Observer for Australia) expressed misgivings about the proposed introduction of two new articles into the Model Law at such an advanced stage in the Commission's examination of the draft. There might not be sufficient time to reflect on the consequences of introducing the two articles, and the Commission might afterwards find that it had made a mistake.

13. As there were already provisions in the draft covering restricted tendering, the Commission should try to adapt them to what it considered necessary with a minimum of change.
14. Mr. JAMES (United Kingdom) expressed concern that the discussion appeared to be developing into a debate between countries where restricted tendering was employed and countries where it was not; in fact, restrictive tendering was employed throughout the world—for example, it was permitted by European Community directives. At the same time, all agreed that restricted tendering was less desirable than public tendering and that it should be treated as an exception.
15. He was attracted by the Mexican proposal for amending article 15 *bis* as it highlighted an important point—namely, that restricted tendering should be permitted in cases where, for example, the cost of evaluating large numbers of tenders was greater than the cost of the goods to be procured.
16. With regard to paragraph (b) of article 15 *bis* as proposed by the Inter-American Development Bank, he said that in cases of urgency restrictive tendering would not take a significantly shorter time than public tendering, and procedures for meeting urgent needs were already provided for in the Model Law.
17. With regard to paragraph (c), he felt that where public tendering had failed restrictive tendering was unlikely to be successful—unless the suppliers or contractors had meanwhile formed a cartel.
18. With regard to paragraph (d), the problems that arose where the costs of tendering were disproportionately high would be overcome by the formulation proposed by the representative of Mexico, in which he would suggest that the word “significantly” be inserted before “disproportionate”.
19. With regard to the second sentence in paragraph (1) of article 36 *bis*, if qualification was mandatory for all procurement methods one could delete the words “reputable firms well known in the field and”.
20. He agreed with the comment made by the United States representative that it should be made clear that the aim of the deletion of the last phrase of article 36 *bis* was to remove the need for advance publicity and suggested that the phrase be replaced by “except the solicitation requirements set forth in articles 18(1) and (2)”. He also agreed with the comment made by the Japanese representative regarding the publication of some kind of notice in an official gazette or a similar journal.
21. In reply to a question from the Chairman, he said that in the light of the proposal made by the Mexican representative for amending article 15 *bis* he could withdraw his proposal—made at the previous meeting—for the addition of a paragraph (e).
22. Mr. TUVAYANOND (Thailand), noting that the proposals of the Mexican representative would entail the disappearance of paragraph (b) of article 15 *bis*, said he could not accept that; countries experiencing rapid economic growth were often faced with urgent needs that public tendering could not meet rapidly enough.
23. With regard to paragraph (d) of article 15 *bis*, he repeated the suggestion he had made at the previous meeting that the paragraph be amended to read “the procurement is of minor significance”.
24. While he agreed that publicity might be desirable in order to ensure transparency, he felt it would suffice if a record was kept and made available to the public on request.
25. Mr. ANDERSEN (Denmark) expressed misgivings about the practical implications of adopting the two articles under consideration; he felt it would be better to keep article 18 as proposed by the Working Group.
26. If article 36 *bis* was going to be accepted, however, he would like to see the word “may” in paragraph (1) replaced by “shall”.
27. Mr. MORAN BOVIO (Spain) said that, with the amendments suggested during the discussion, the Commission seemed to be well on the way to reaching a consensus on the two new articles.
28. Mr. WALLACE (United States of America), agreeing with the representative of Spain, said he felt there was a need for publicity over and above that achieved by keeping a record and making it available to the public on request.
29. He suggested that in paragraph (a) of article 15 *bis* the word “only” be added before “a limited number” and that “products or works” be amended to “goods or construction”.
30. Mr. LEVY (Canada) said he could not support the consensus that seemed to be emerging. There were provisions elsewhere in the Model Law covering restricted tendering, and he did not see the need to elevate such tendering into a special method of procurement.
31. Mr. PHUA (Singapore) said that the reference to “reasons of economy and efficiency” in article 18(3) should be included in article 15 *bis* and that the requirement—also in article 18(3)—that the grounds and circumstances for employing restricted tendering should be recorded in the record of the procurement proceedings should be reflected in article 36 *bis*, the final phrase of which should be replaced by a reference to articles 18(1) and 18(2).
32. Mr. SAHAYDACHNY (Secretariat) said that, if an article on restricted tendering was included in chapter II, the recording requirement would be covered by article 11(2).
33. Mr. TUVAYANOND (Thailand) said he found it difficult to understand why more thought was not being given to the danger of delaying governmental projects and why the deletion of paragraphs (b), (c) and (d) of article 15 *bis* was being so seriously contemplated.
34. The CHAIRMAN reminded the representative of Thailand that other procurement methods, such as single-source procurement, were envisaged for cases of urgency.
35. Mr. WALLACE (United States of America) said he agreed with the United Kingdom representative that in cases of urgency restricted tendering would not take a significantly shorter time than public tendering.
36. Mr. PEREZNIETO CASTRO (Mexico), responding to a point raised by the United States representative, said that paragraph (a) of article 15 *bis* was concerned with the complexity or specialized nature of the goods or construction, whereas paragraph (b) as proposed by him was concerned with situations where the time and cost of the tendering procedure were disproportionately high in relation to the value of the envisaged contract.
37. Mr. WALSER (Observer for the World Bank) said that, ideally, restrictive tendering should be permitted only under the circumstances envisaged in paragraph (a) of article 15 *bis*. However, if only a limited number of suppliers or contractors existed, the procuring entity should be obliged to send invitations to all of them.

38. If paragraph (b) as proposed by the representative of Mexico were adopted, the selection of suppliers or contractors to be invited to tender would be necessary, since to solicit a large number of tenders would result in disproportionately high evaluation costs.
39. Mr. PEREZNIETO CASTRO (Mexico) suggested that the words "selected by it" be deleted from the first sentence in paragraph 1 of article 36 *bis* as the underlying idea was conveyed by the words "selected in non-discriminatory manner" in the second sentence.
40. The CHAIRMAN asked the Commission whether it wished, subject to the advice of the drafting group, to adopt article 15 *bis* amended to read as follows:
- (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of restricted tendering, when necessary for reasons of economy and efficiency, in accordance with article 36 *bis*, when:
- (a) by reason of the highly complex or specialized nature of the goods or construction required, only a limited number of suppliers or contractors of those goods or construction exist;
- (b) the time and cost of the examination and evaluation of a large number of tenders would be significantly disproportionate to the value of the goods or construction to be procured.
41. *It was so decided.*
42. The CHAIRMAN then asked the Commission whether it wished, subject to the advice of the drafting group, to adopt article 36 *bis* without the phrases "selected by it" and "reputable firms well known in the field and" in paragraph (1) and with the words "that publicity requirements shall not apply" in paragraph (2) replaced by "the solicitation requirements set forth in articles 18(1) and (2)".
43. *It was so decided.*
44. The CHAIRMAN finally asked the Commission whether it wished to request the drafting group: to devise wording conveying the idea—put forward by the observer for the World Bank—that invitations to tender should be sent to all suppliers or contractors under the circumstances envisaged in paragraph (a) of article 15 *bis*; to consider whether, in paragraph (1) of article 36 *bis*, "may solicit" should be replaced by "shall solicit"; and to consider how provision might be made for the publication of some kind of notice in an official gazette or a similar journal.
45. *It was so decided.*
- The meeting was suspended at 11.25 a.m. and resumed at 11.55 a.m.*
- Articles 38-43*
46. Mr. TUVAYANOND (Thailand), referring to article 38(1), said loss or injury should not be the main justification for having recourse to the review mechanism; recourse should be permissible if the supplier or contractor had reasonable grounds to believe that the procuring entity was in breach of its duty under the Model Law. It was sometimes very difficult to prove loss or injury as a result of a breach of duty on the part of the procuring entity.
47. Mr. JAMES (United Kingdom) said that there must, of course, be an alleged breach of duty by the procuring entity for review to be sought, but under most common law systems and, he believed, in most civil law jurisdictions the supplier or contractor must, in order to be able to initiate review proceedings, claim loss or injury—or potential loss or injury. One should not depart from the principle that such a claim should be made in addition to a claim that there had been a breach of duty on the part of the procuring entity.
48. Mr. PHUA (Singapore), agreeing with the United Kingdom representative, said that article 38(1) should be left as it stood. In that connection, he noted that the comments on article 38 in the draft Guide to Enactment (document A/CN.9/375) referred to the avoidance of "an excessive degree of disruption that might impact negatively on the economy and efficiency of public purchasing"; it was also pointed out that the degree of detriment that was required to be claimed was an issue to be resolved under the relevant legal rules in the enacting State.
49. Mr. PEREZNIETO CASTRO (Mexico) supported what had been said by the representative of the United Kingdom. The various issues had been discussed by the Working Group and a balanced text arrived at. A change would affect the structure of chapter V of the Model Law.
50. Mr. KOMAROV (Russian Federation) thought that it was logical that the possibility of seeking review should be limited to suppliers or contractors that had suffered or might suffer loss.
51. Mr. MORAN BOVIO (Spain) suggested that, as a matter of procedure and to save time, when a proposal to amend the Working Group's text met with opposition and no further support was expressed for it, it might be best to drop the matter and decide simply to leave the text as it stood.
52. Mr. WALLACE (United States of America) drew attention to the footnote to the heading of chapter V, which made it clear that the provisions for review were optional. There was perhaps no need for the text of that chapter to be debated in detail.
53. The CHAIRMAN suggested that the Commission consider articles 38-43 (chapter V) as a whole.
54. Mr. TUVAYANOND (Thailand) said that he could support adoption of the chapter as a whole, but would like to inquire whether it was intended that the square brackets around certain phrases should remain in the final text.
55. Mr. SAHAYDACHNY (Secretariat) said it was intended that the square brackets should remain; the idea was to offer options to enacting States.
56. Ms. CLIFT (Observer for Australia), supporting the adoption of articles 38-43, said that the commentary in the draft Guide to Enactment should say more about the reasons for choosing either option I or option II in the case of article 40(3)(f).
57. The CHAIRMAN said that the point would be borne in mind when the Commission took up the draft Guide to Enactment.
58. Ms. CRISTEA (Observer for Romania), recalling that the Commission had agreed to delete article 18(3), asked whether article 38(2)(c) should be deleted as a consequence.
59. Mr. SAHAYDACHNY (Secretariat) said that, in his opinion, the subparagraph in question should be deleted; the matter would now be covered by subparagraph (a) of article 38(2).
60. Mr. JAMES (United Kingdom) supported the amendment to article 38(2)(d) proposed in document A/CN.9/377 by the Secretariat. The drafting group might consider whether there should also be a reference in article 38(2) to article 21(s).
61. The CHAIRMAN asked whether the Commission was ready to adopt articles 38-43 with the change proposed by the Secretar-

iat to article 38(2)(d), on the understanding that the references would be looked at by the drafting group.

62. *It was so decided.*

Article 32 (continued)

63. Mr. WALLACE (United States of America), recalling that, at its 506th meeting, the Commission had agreed that article 32(6) should allow for publication of the notice of a procurement contract, but in a manner that would not involve undue expense for the procuring entity, suggested that article 32(6) provide for the establishment of a cut-off figure below which publication in an official gazette or a similar journal would be sufficient, or no publication would be required, and above which there would be a notice requirement designed to ensure that the appropriate audience was reached.

64. Mr. TUVAYANOND (Thailand) thought it would be sufficient to provide that the public should have access to information on all the decisions taken.

65. Mr. LEVY (Canada) said that he could accept the idea behind the suggestion made by the representative of the United States and proposed that the amendment to article 32(6) take the form of a new sentence along the following lines: "Procuring entities shall, in accordance with the regulations, publicize the award of procurement contracts".

66. Mr. JAMES (United Kingdom) thought that the solution was perhaps too simple; the extent of the publicity required should depend on the value of the contract.

The meeting rose at 12.30 p.m.

**Summary record of the 509th meeting
on Wednesday, 14 July 1993, at 2 p.m.**

[A/CN.9/SR.509]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377, A/CN.9/378 and Add.1, A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (*continued*)

Article 11 bis

1. The CHAIRMAN invited the United States delegation to introduce its proposal.

2. Mr. WALLACE (United States of America), recalling the brief discussion on article 32 at the end of the previous meeting, submitted the following proposal for an article 11 *bis*: "Public notice of procurement contract awards. The procuring entity shall in all procurement proceedings publish notice of any procurement contract, promptly after its entry into force, in a manner to be provided for in the procurement regulations."

3. Ms. ZHANG Yuejiao (China) said that she could go along with the proposal made by the United States representative, although she preferred the proposal made by the representative of Canada at the end of the previous meeting.

4. Mr. JAMES (United Kingdom) said that the Model Law should not place an obligation on the procuring entity to publish notice of procurement contracts of low value. Notice of most contracts should be published, but contracts of a value below a certain monetary amount, which would have to be fixed in relation to the economy of the enacting State, should not have to be publicized.

5. Mr. LEVY (Canada), expressing support for the comments of the United Kingdom representative, said that the proposal made by the Canadian delegation at the end of the previous meeting contained the same pitfall as the proposal of the United States

representative—namely, it was mandatory in all cases; his delegation had not intended that. The regulations should provide guidance as to the manner and extent of the publicizing of procurement contract awards, and there should be a cut-off point below which publicizing was not mandatory.

6. He proposed the following wording: "The procurement regulations shall specify in what instances and in what manner notice of a procurement contract shall be published by the procuring entity".

7. Mr. WALLACE (United States of America) suggested the following revised wording: "The procuring entity shall promptly publish notice of procurement contract awards, in the manner and to the extent provided for in the procurement regulations".

8. Mr. SAHAYDACHNY (Secretariat) advised caution as regards referring to procurement regulations; the Model Law was not based on the assumption that such regulations would be issued.

9. Mr. PHUA (Singapore) suggested that the revised wording suggested by the United States representative be paragraph (1) of article 11 *bis*, followed by a paragraph (2) reading as follows: "Paragraph (1) shall not apply to procurement contracts below the value of . . .". The appropriate figure could be inserted by the enacting State.

10. Mr. PRIESTLEY (Observer for Australia) urged the Commission to make the provision mandatory and proposed the following wording: "The procuring entity shall promptly publish notice of all procurement contract awards".

11. If it was felt that such a provision would give rise to undue expense in the case of small procurement contracts, perhaps official gazettes could be used as the normal place of publication of notices.

12. Ms. PIAGGI-VANOSI (Argentina), supporting the proposal of the United States representative, agreed with the observer for Australia regarding the use of official gazettes.
13. Mr. GRIFFITH (Observer for Australia) said that his delegation could go along with the suggestion of the Singapore representative, except that, in its view, the provision in paragraph (2) should be optional—"Paragraph (2) need not apply . . .".
14. With regard to paragraph (1), he suggested the following wording: "The procuring entity shall promptly publish notice of procurement contract awards. Regulations may make provision for advertising".
15. Mr. SAHAYDACHNY (Secretariat) said there appeared to be a wish that paragraph (1) of article 11 *bis* should state the rule that awards of procurement contracts would be publicized in the official gazettes of enacting States and that the rule should be subject to paragraph (2), which would state that procurement regulations might set a monetary value below which the publication requirement would not apply.
16. Regarding the idea that the provision in paragraph (2) should be optional, he pointed out that the entire Model Law was, in a sense, optional.
17. Mr. GRIFFITH (Observer for Australia) said his delegation understood the wording favoured at present to be on the following lines:
- "(1) The procuring entity shall promptly publish notice of procurement contract awards. Regulations may be made providing for publication.
- (2) Paragraph (1) shall not apply to procurement contract awards below the value of . . .".
18. The Guide to Enactment could mention the possibility of using official gazettes in cases where countries had them.
19. Mr. JAMES (United Kingdom) suggested that paragraph (2) be modified to read as follows: "Paragraph (1) shall not apply to procurement contract awards below the value specified in the procurement regulations". The provision would thus be optional, since it would depend on whether a State issued procurement regulations.
20. Mr. LEVY (Canada) said that, in the light of what had just been said by the representatives of Australia and the United Kingdom, he would propose wording on the following lines:
- "(1) Procuring entities shall promptly publish notice of procurement contract awards.
- (2) Regulations may be issued providing for the manner in which and the extent to which such notice shall be published.
- (3) Paragraph (1) shall not apply to procurement contracts below a certain value specified in the procurement regulations."
21. The CHAIRMAN asked whether the Commission could accept the wording of article 11 *bis* proposed by the representative of Canada.
22. *It was so decided.*
23. The CHAIRMAN said that the Commission had completed its consideration of the draft Model Law, and he invited the Commission to proceed with consideration of the draft Guide to Enactment.
- Consideration of draft Guide to Enactment (A/CN.9/375)*
24. Mr. WALLACE (United States of America), referring to the note by the Secretariat on the procurement of services (document A/CN.9/378/Add.1), asked whether the Commission would be able to deal with that aspect of its possible future work during its current session. He also asked whether the Commission would be discussing the possibility of the Secretariat's preparing a short paper on electronic data interchange (EDI) in procurement.
25. The CHAIRMAN said he hoped there would be an opportunity for the Commission to consider both matters before the end of the session, in the context of its future work.
26. Ms. ZIMMERMAN (Canada) asked whether the Commission would consider the report of the drafting group before or after the draft Guide to Enactment.
27. The CHAIRMAN said that the drafting group would complete its report soon, but he felt that the Commission should meanwhile consider the draft Guide to Enactment.
28. Mr. MORAN BOVIO (Spain) suggested that comments on purely linguistic matters be submitted directly to the Secretariat.
29. The CHAIRMAN agreed.
30. Mr. WALLACE (United States of America) recalled that, on many occasions in the course of its consideration of the Model Law, the Commission had agreed that certain points should be reflected in the Guide to Enactment. That raised the question of how to proceed with the draft Guide, which the Commission wished to approve during its current session.
31. Mr. LEVY (Canada) suggested that the Commission deal first with the report of the drafting group, turning to the draft Guide whenever it had completed a section of the report.
32. The CHAIRMAN said he would prefer it if the Commission began with the draft Guide.
33. Mr. GRIFFITH (Observer for Australia), agreeing with the representative of Canada, said that one section of the drafting group's report was already available (document A/CN.9/XXVI/CRP.4) and could be studied by delegations before the next meeting. It would then be possible to decide how much time should be devoted to consideration of the draft Guide.
34. The CHAIRMAN urged the Commission to take up the draft Guide, beginning with the Introduction.
- Introduction to the draft Guide and commentary on the Preamble*
35. Mr. KOMAROV (Russian Federation), commenting on paragraph 11 (*Procurement methods in the Model Law*), recalled that the Commission had adopted an article 15 *bis*, making restricted tendering a method of procurement. That should be reflected in the second part of paragraph 11 of the Introduction, or somewhere else in the draft Guide.
36. Mr. SAHAYDACHNY (Secretariat) said that the Secretariat would reflect in the draft Guide all changes made by the Commission to the Model Law.
37. Mr. FRIES (United States of America), referring to paragraphs 12-16 of the Introduction (*Administration of procurement*), said that greater emphasis should be placed on the key role of public administrative bodies in implementing procurement legislation and on the need to equip them to do so.

38. Mr. GRIFFITH (Observer for Australia) agreed with the United States representative.

39. Paragraphs 17 and 18 of the Introduction (*Procurement of services*) should be brought up to date in the light of the Commission's decision to deal with the procurement of services on another occasion.

40. Also, greater emphasis should be placed in the Guide to Enactment on the basic philosophy underlying the Model Law, especially as regards the need for transparency and honesty on the part of public administrations. Perhaps the Commission could give the Bureau instructions to that effect.

41. Mr. WALLACE (United States of America), suggesting deletion of the last sentence of paragraph 18, said that a question yet to be settled by the Commission was the extent to which procuring entities should take price into account when awarding contracts for services.

42. Reverting to matters of procedure, he said he was reluctant to entrust to the Secretariat the task of reflecting in the Guide to Enactment the conclusions reached by the Commission in all their nuances.

43. The CHAIRMAN said it was for the Commission to instruct the Secretariat as to what the draft Guide should contain.

44. Mr. GRIFFITH (Observer for Australia) said he was confident that the Bureau was capable of reflecting the conclusions of the Commission in the Guide to Enactment. However, time was now too short for the Commission to go through the entire text of the draft Guide.

45. Perhaps the Commission could go through the draft Guide as far as possible and then entrust to the Bureau the task of preparing a new draft—to be circulated for comments which should be submitted within, say, 90 days.

46. At all events, the Commission should avoid having to return to the item at its next session.

47. Mr. LEVY (Canada), endorsing that approach, said that the United States representative was perhaps being unduly pessimistic about the Secretariat's ability to reflect in the Guide the conclusions reached by the Commission.

48. Mr. WALLACE (United States of America) said that the Guide to Enactment was an extremely important document and that the Commission should give it the attention which it deserved.

49. A practical—but by no means ideal—approach might be one along the lines suggested by the observer for Australia: the Commission could adopt the draft Guide provisionally; the Secretariat would revise it in the light of relevant reports of the Working Group and the comments made during the present session; the revised draft would be circulated to members of the Commission for early comment; and the Secretariat would produce the final text in the light of the comments received by it.

50. Ms. DODSWORTH (United Kingdom) said that no one underestimated the importance of the Guide to Enactment. In the time still available during the present session, however, the Commission could do no more than highlight key points, leaving the detailed drafting to the Secretariat. Any points missed could be taken up by Commission members when commenting on the revised draft.

51. Ms. ZIMMERMAN (Canada) asked whether the Commission had ever adopted a document provisionally, before it was actually completed.

52. Mr. HERRMANN (Secretary of the Commission) said that the only instance he could immediately recall concerned the Legal Guide on International Countertrade Transactions. There, however, the open questions had been merely terminological ones.

The meeting was suspended at 3.32 p.m. and resumed at 4.05 p.m.

53. The CHAIRMAN asked the representative of the United States of America to present a compromise approach agreed upon during the suspension of the meeting.

54. Mr. WALLACE (United States of America) said it had been agreed that: the Commission would discuss the draft Guide as fully as possible in the time still available; the Secretariat would then, within a reasonable time, prepare a revised draft in the light of the Commission's deliberations and the changes made to the Model Law and in the light of various reports of the Commission and the Working Group; a revised draft would be sent to Commission members for comments which should be submitted within 30-40 days, and preparation of the final draft would be entrusted to the Secretariat.

55. The CHAIRMAN said that, as far as he could see, the only problem with that approach was that Commission members might submit conflicting comments.

56. Mr. PEREZNIETO CASTRO (Mexico) did not think that would be a problem; the Secretariat had enough experience to deal with conflicting comments.

57. Mr. GRIFFITH (Observer for Australia), agreeing with the representative of Mexico, said a problem might arise if the Secretariat received a comment calling for a major reformulation or for the incorporation of something not discussed in the Working Group or the Commission. But again, the Secretariat had enough experience to judge whether such a comment should be reflected in the Guide to Enactment.

58. Mr. MORAN BOVIO (Spain), warning against overburdening the Secretariat, said that the draft Guide to Enactment merely needed to be updated in the light of the discussions which had taken place and the decisions which had been reached during the Commission's present session.

59. The CHAIRMAN said that the Commission appeared to agree that the draft Guide to Enactment should be adopted provisionally pending the incorporation by the Secretariat of comments received from Member States within a specified period of time.

60. Mr. TUVAYANOND (Thailand) suggested that the Guide to Enactment be designated as a "commentary"; all the Secretariat would then have to do would be to update it.

61. Mr. MORAN BOVIO (Spain) expressed misgivings about the suggestion made by the representative of Thailand.

62. Mr. WALLACE (United States of America) said it was not clear to him whether the commentary which the representative of Thailand had in mind was the same thing as the commentary referred to in paragraph 5 of the Introduction to the report of the Working Group on its fifteenth session (document A/CN.9/371).

63. Mr. HERRMANN (Secretary of the Commission) said that with so many references having been made to provisional adoption of the Model Law and the Guide to Enactment, the Commission might usefully consider when final adoption should take place.

64. On the question of the Secretariat's future tasks, he said that the Working Group had earlier operated on an informal basis, without reports, and that the Secretariat might indeed have problems with conflicting comments on the draft Guide.

65. Mr. FRIES (United States of America) agreed that the Commission should give thought to the question of final adoption.
66. He imagined that most of the comments received on the revised draft would relate to drafting, only a few being of a substantive nature. Either way, they should reflect the discussions taking place during the present session and not raise controversial new issues.
67. Mr. TUVAYANOND (Thailand) said he was sure that the Secretariat had noted all comments and conclusions of relevance to the Guide to Enactment and that there would be no need for the Commission to wait until its next session before adopting it.
68. Mr. KOMAROV (Russian Federation), supporting what had been said by the representative of Thailand, said he would not like final adoption of the Model Law to be delayed by protracted work on the draft Guide. The Commission might use the same kind of working method as it had used in the preparation and adoption of the Legal Guide on International Countertrade Transactions.
69. The CHAIRMAN said that, if the Commission wished to approve the draft Guide subject to its reflecting the conclusions reached by the Commission at the present session, the Commission should go through the Guide in order to see whether anything had been overlooked.
70. *It was so agreed.*
71. *The Introduction to the draft Guide and the commentary on the Preamble were approved.*
Commentaries on articles 1-8
72. *The commentaries on articles 1-8 were approved.*
Commentary on article 9
73. Mr. PHUA (Singapore) said that the last sentence of paragraph 1 presupposed that domestic legislation already authorized the use of EDI in procurement. The text should make it clear that the use of EDI in procurement was subject to domestic legislation.
74. Mr. WALLACE (United States of America), referring to the comment made by the representative of Singapore, said that the text might state that article 9 had not been drafted as a general enabling provision for the use of EDI in procurement and that the Model Law at present contained no such general enabling provision.
75. Reverting again to matters of procedure, he asked whether it was the intention of the Secretariat to send a revised draft Guide to Commission members for comment.
76. The CHAIRMAN said his impression was that the Commission had moved away from that idea and that it wanted everything to be decided at the present session subject to updating by the Secretariat. However, that would not prevent any delegation from making suggestions later for reflection in the report.
77. Mr. WALLACE (United States of America) said he was not sure that should be the consensus in the Commission. While believing that the Model Law should be adopted in its final form before the end of the present session, he also believed that only a properly revised Guide to Enactment would enhance the impact of the Commission's work. There must be sufficient time for deliberation, comment and reflection.
78. Mr. KOMAROV (Russian Federation) said that the greatest problem undoubtedly related to new text concerning articles amended or introduced during the present session, and he wondered whether Commission members would have an opportunity to look at that new text before they left Vienna.
79. Mr. HERRMANN (Secretary of the Commission) replied that the Secretariat could produce new text very quickly if requested to do so, but it would prefer not to as it wanted to do a proper job.

The meeting rose at 5 p.m.

Summary record of the 510th meeting

Thursday, 15 July 1993, at 9.30 a.m.

[A/CN.9/SR.510]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.45 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Guide to Enactment (A/CN.9/375) (continued)

1. The CHAIRMAN said he hoped the Commission could conclude its consideration of the draft Guide to Enactment that morning, so that it could begin work that afternoon on the report of the drafting group. He asked if there were any further comments on the section of the Guide relating to article 9.
2. Mr. WALLACE (United States of America) said that he would appreciate the opportunity to revert to the commentary on the Preamble and to commentaries on some early articles.
3. In order to dispel any possible misunderstanding, he wished to stress that nothing he had said the previous day should be taken to mean that his delegation was opposed to adoption of the draft Guide at the current session. He had merely wished to point out that, because of shortage of time, it might be difficult to reach agreement on a final version that would be satisfactory to all. It would have to be left to the Secretariat to revise the Guide in the light of the discussion that had taken place during the session.

4. The CHAIRMAN said there would be no difficulty in proceeding in the way suggested by the United States representative.

Commentary on the Preamble

5. Mr. WALLACE (United States of America) said that the first sentence of the commentary on the Preamble raised difficulties, since, depending on the legal system of the country concerned, the reason for including a statement of objectives might or might not be to provide guidance on the interpretation and application of the Model Law. The question of whether the Preamble had any force in law was a difficult one, and he was not sure whether the Guide should make such a broad statement.

6. Mr. TUVAYANOND (Thailand) said that, for his country at least, the Preamble was important, and he would like it to be retained as it stood.

7. Mr. JAMES (United Kingdom) said that, although a number of countries did not adopt preambles as part of their enacted laws which would have an effect in relation to the interpretation of those laws, that point was covered by the recommendation made in the last sentence of the commentary on the Preamble.

8. He reminded the Commission that the wording contained in the Preamble had once been incorporated in the Model Law itself, as article 3. It had then been decided that it would be more appropriate as a preamble because it did not of itself create substantive rights or obligations. However, it had certainly been regarded as a provision which was meant to influence interpretation of the Model Law. He himself considered the principles enunciated in the Preamble extremely important.

9. Mr. PHUA (Singapore) agreed that the last sentence of the commentary on the Preamble should be sufficient to address the United States representative's concern. If that was not enough, the phrase "or to use preambles in interpreting and applying laws" could perhaps be inserted after "to include preambles" in that sentence.

10. Mr. MORAN BOVIO (Spain) said that, at least in those countries where the system of civil law—rather than common law—applied, the Preamble as now worded would be useful, because the statement of objectives would indeed provide guidance on the interpretation and application of the law, and would be taken into account by legislators and judges. Any difficulties that common law countries might encounter could be overcome by the amendment proposed by the representative of Singapore.

11. Mr. SOLIMAN (Egypt) said he favoured retention of the Preamble as it stood.

12. Mr. LEVY (Canada) supported the proposal made by the representative of Singapore.

13. *The commentary on the Preamble, as amended, was adopted.*

Commentary on article 1

14. Mr. TUVAYANOND (Thailand) said that in paragraph 1 of the commentary on article 1 the phrase "coverage of all types of procurement" might be understood to mean that the procurement of services was covered. He would prefer the phrase "coverage of procurement of all types of goods and construction".

15. Mr. WALLACE (United States of America) said that he could go along with such a drafting change.

16. With regard to the first two sentences of paragraph 2 of the commentary, he felt that they should be expanded in order to convey the Commission's views about what kinds of regulations should be issued and how they should be issued.

17. Mr. MORAN BOVIO (Spain), pointing out that paragraph 9 of the Introduction stated that the Model Law was a "framework" law intended to be complemented by regulations, suggested that a reference to that paragraph be included in paragraph 2 of the commentary on article 1.

18. Mr. SAHAYDACHNY (Secretariat) said there would be no difficulty in making it clear, perhaps in paragraph 9 of the Introduction, that the procurement regulations referred to in the Model Law should be open and transparent; that point could also be brought out in the commentary on article 1, by means of a cross-reference. In addition, the types of procurement covered could also be specified more clearly.

19. Mr. PHUA (Singapore) suggested the insertion, after the second sentence in paragraph 2, of a reference to article 5 ("Public accessibility of legal texts").

20. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 1, which would be finalized by the Secretariat in the light of the Commission's discussion.

21. *It was so decided.*

Commentary on article 2

22. Mr. FRIES (United States of America) considered that paragraph 2 should offer guidance on the weight to be attached to the various factors listed there.

23. Mr. WALLACE (United States of America) added that it was not clear what kinds of entities were meant in the case of subparagraph 2(f) and that subparagraph 2(g) touched on matters which might be controversial.

24. Mr. LEVY (Canada) said there were limits to the amount of guidance the Commission should offer to sovereign States and doubted whether it could usefully attempt to provide more guidance than that already contained in the Guide, especially where social policy decisions were involved.

25. Mr. MORAN BOVIO (Spain) said that, while he believed that the Commission should not attempt to tell legislators in sovereign States how to deal with internal matters, he also believed that more guidance would assist sovereign States in exercising their sovereignty more effectively.

26. Mr. KINGA (Cameroon) said that the guidance given in paragraph 2 was sufficient. Legislators in developing countries such as his were quite capable of deciding what should be taken into account in applying the Model Law.

27. Mr. PEREZNIETO CASTRO (Mexico), agreeing with the representative of Cameroon, said that the Commission should not attempt to provide guidance on matters properly belonging to the internal affairs of sovereign States. However, national legislators should ideally have all the necessary information, so a balance needed to be struck between providing as much information as possible and not appearing to interfere in the internal affairs of enacting States.

28. Mr. KOMAROV (Russian Federation) said that, while he considered the point raised by the United States delegation to be a valid one, he would not like to see the Commission opening a Pandora's box—for example, by broaching issues related to the social and economic structures of enacting States.

29. Paragraph 2 as it stood at present was, in his opinion, sufficient for drawing the attention of States to factors which should be taken into account. In order to make it even clearer that the list of factors in that paragraph was not an exhaustive one, one might

perhaps add in the *chapeau* the expression "in particular" between "consider" and "factors".

30. Ms. CRISTEA (Observer for Romania) said that the situation envisaged in subparagraph 2(g) was covered by subparagraph 2(b), since any entity integrated within a centralized economic plan would be entirely managed or controlled by the Government; in her opinion, subparagraph 2(g) could therefore be deleted. Also, she felt that the second part of subparagraph 2(f) should be deleted as it lacked clarity.

31. Mr. TUVAYANOND (Thailand) supported the views expressed by the observer for Romania.

32. The CHAIRMAN said that, leaving aside the question of the deletions envisaged by the observer for Romania in paragraph 2, the commentary on article 2 appeared to be acceptable to the Commission as it stood. The second comma in the penultimate sentence of paragraph 1—a typographical error—would be deleted.

33. *It was so decided.*

Commentary on article 3

34. Mr. WALLACE (United States of America) said that in the last sentence of paragraph 1 it should be made clear that, where international agreements did not apply, procurement would be governed not only by the Model Law but also by other bodies of law—such as contract law. He suggested the addition of a reference to paragraph 10 of the Introduction to the Guide to Enactment.

35. He also suggested that the inconsistency between "EC" and "EEC" in the first sentence of paragraph 1 be eliminated.

36. The CHAIRMAN said that those points would be dealt with by the Secretariat. On that understanding, he took it that the Commission wished to adopt the commentary on article 3.

37. *It was so decided.*

Commentary on article 4

38. Mr. WALLACE (United States of America) thought that, in the first line of paragraph 1, the reference to "paragraph 7" should be to "paragraphs 7 and 9" and that the last sentence of paragraph 1 should either be spelt out more clearly or deleted.

39. With regard to paragraph 2, in the example "limitation of the quantity of procurement carried out in cases of urgency using a procurement method other than tendering (to what is required to deal with the urgent circumstances)" the words in parentheses should be placed after "quantity" in order to make it clear that procuring entities should not exploit emergencies and procure more than what was needed in order to deal with them.

40. That point was a very important one, and the Guide should highlight it and other important points that did not stand out clearly in the Model Law itself.

41. Mr. TUVAYANOND (Thailand), agreeing to the moving of the words in parentheses in paragraph 2, said that, if there was fear of abuse, a high-level governmental decision could be required in such cases.

42. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 4 subject to the comments made.

43. *It was so decided.*

Commentaries on articles 5-10

44. Mr. WALLACE (United States of America), referring to the last sentence of paragraph 1 of the commentary on article 8, said that some regional economic groupings did more than just grant procurement preferences to members of the grouping—boycott arrangements being a case in point. With regard to paragraph 2, concerning the problematic "margin of preference" question, he wondered whether that paragraph, which appeared to give advice to Governments rather than merely clarifying issues, should not be deleted. There was no mention of "margin of preference" in article 8.

45. Mr. HUNJA (Secretariat) said that a problem the Secretariat had encountered in discussions with delegations from potential enacting States, especially developing countries, concerned the compatibility of international procurement proceedings with the need to develop local industry, and the Secretariat had felt it important, in connection with article 8, to stress that it was not necessary to exclude foreign suppliers and contractors in order to help local suppliers and contractors; the latter could be given a certain advantage through "a margin of preference".

46. Mr. TUVAYANOND (Thailand) said that it should be possible to grant preference to national suppliers and contractors and that it was for the particular Government to decide whether it wished to authorize the granting of preference.

47. Ms. ZHANG Yuejiao (China) said that the granting of a margin of preference to local suppliers and contractors was a common practice and should be allowed for.

48. Mr. JAMES (United Kingdom) said he thought it was useful to refer in the commentary on article 8 to the existence of possibilities for protecting local suppliers and contractors in various ways. However, perhaps the text should be redrafted so as to make it clear that it was not the purpose of the references to articles 17 and 29 to de-emphasize the importance of the "without regard to nationality" principle underlying article 8.

49. Mr. WALSER (Observer for the World Bank), supporting the retention of paragraph 2, said that the paragraph explained why foreign competition should not be completely excluded. It could perhaps be improved by drawing attention to the disadvantages of granting a margin of preference for local suppliers and contractors: firstly, the cost increase if the overall lowest-price tender was not selected and, secondly, reciprocal action on the part of other countries.

50. Mr. PRIESTLEY (Observer for Australia) and Mr. SOLIMAN (Egypt) also supported the retention of paragraph 2.

51. Mr. WALLACE (United States of America) said that, if paragraph 2 was to be retained, it should be redrafted along the lines indicated by the representative of the United Kingdom.

52. The CHAIRMAN said that the comments made by the observer for the World Bank should also be taken into account in the redrafting of the paragraph.

53. Drawing attention to the commentary on article 9, he informed the Commission that the drafting group was finalizing the wording of articles 9 and 25 in the light of the conclusions reached during the Commission's 501st meeting.

54. Mr. UEMURA (Japan) recalled that in its comments on article 9, in document A/CN.9/376/Add.2, his Government had raised the question whether a procuring entity could prohibit the submission of tenders by mail. He hoped the Guide would give a clear indication in that regard.

55. Mr. WALLACE (United States of America) agreed with the representative of Japan; it was important that the matter be dealt with in the Guide.
56. He did not think the intention was that it should be permissible to use electronic data interchange (EDI) for transmitting all the documents involved in procurement under the Model Law, but article 9 as it stood might be taken as implying that EDI could be so used. He felt that the Guide should contain a caveat regarding the limitations of EDI use and that the possibilities of EDI should be considered at a later session.
57. Mr. HERRMANN (Secretary of the Commission) said that article 9 as it stood did not exclude any form of communication except a purely oral message, and it did not preclude the transmission of any type of document by EDI, although there had been talk of not permitting the use of EDI for the transmission of certain documents, such as tender securities. However, the area in question had not been studied in detail by those who had produced the draft Model Law.
58. Mr. WALLACE (United States of America) said that, in the light of what the Secretary of the Commission had just said, the Guide to Enactment should perhaps warn potential enacting States against inadvertently authorizing the unlimited use of EDI.
59. Ms. WEINMEIR (Austria) felt that States could be trusted to resolve the problems associated with the use of EDI in procurement.
60. Mr. LEVY (Canada), supporting the remark made by the Austrian representative, said that EDI was going to be used very extensively in procurement and that in the real world the law had to follow technology, not the other way round.
61. Mr. PHUA (Singapore) said that the Model Law should not be formulated in such a way as to restrict the use of EDI, but he feared that, if the commentary on article 9 was left unchanged, technocrats eager to jump on the EDI bandwagon might interpret the article as an enabling provision. Perhaps the Guide could contain—rather than the caveat envisaged by the United States representative—a statement to the effect that the Model Law should be applied in conjunction with domestic laws enabling the use of EDI; that would focus legislators' minds on the issues raised by the use of EDI.
62. Mr. HERRMANN (Secretary of the Commission), expressing doubts about the suggestion made by the representative of Singapore, said he understood article 9 of the Model Law to mean that all forms of communication except oral messages were acceptable—in other words, all forms including EDI. That being so, he felt it would be illogical to say in the Guide to Enactment that special enabling legislation would be necessary in the case of EDI.
63. Mr. PHUA (Singapore) said that the issue was whether the domestic legislation of potential enacting States permitted the use of EDI. If the use of EDI was already permitted, well and good: the Model Law could be integrated into the domestic legislation with no problem. However, where—for example—it was stated in the domestic legislation that tender securities should be submitted in writing, there would be a conflict with the Model Law, which gave the impression that tender securities could be submitted in electronic form.
64. Mr. FRIES (United States of America) said that it was not necessary to speak of “enabling legislation” in the Guide. A simple reference could be made to “relevant domestic legislation concerning EDI”, calling the attention of legislators to the connection between the Model Law and the implementation of EDI technology in their country.
65. Ms. ZIMMERMAN (Canada) said her delegation had been assuming that article 9 provided for the use of EDI provided confidentiality and other requirements were met. Her delegation was now confused as to the Commission's intentions.
66. Mr. WALSER (Observer for the World Bank) said he was unhappy with the language of article 9, which spoke of “a form [of communication] that provides a record of the content of the communication”. The Guide should explain what was meant by providing a record of the content of the communication, giving examples of cases where a record was and was not provided.
67. Mr. HERRMANN (Secretary of the Commission), referring to the comments made by the representative of Singapore, said that there need not be a conflict with the Model Law in cases where the domestic legislation required—say—tender securities to be submitted in written form.
68. The Model Law did not envisage the transmission of every conceivable kind of communication by means of EDI. For example, bills of exchange—listed among the forms of “tender security” in article 2—were subject to very strict requirements in most countries, and their transmission by means of EDI was unlikely to be accepted; much the same would apply in the case of—say—documents providing evidence of nationality.
69. In his opinion, the reference to EDI in the Guide should—on the lines envisaged by the United States representative—take the form of a warning that enactment of the Model Law would open the way to the use of EDI without any enabling legislation and that enacting States might wish to bear in mind various operational considerations.
70. Mr. PHUA (Singapore) said that he would be satisfied if the Secretary's comment could be reflected in the Guide.
71. The CHAIRMAN, indicating that it would, said he took it that the discussion of the commentary on article 9 was concluded.
72. Since there were no comments on article 10, he considered that the discussion of the commentaries on articles 1-10 was concluded.

The meeting rose at 12.30 p.m.

Summary record of the 511th meeting

Thursday, 15 July 1993, at 2 p.m.

[A/CN.9/SR.511]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.15 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

Consideration of draft Model Law on Procurement (*continued*)

Report of the drafting group (A/CN.9/XXVI/CRP.4)

1. Mr. SAHAYDACHNY (Secretariat) explained that the report of the drafting group was in the form of a corrigendum, showing the insertions and deletions made by the drafting group in the Working Group's text (A/CN.9/371, annex) in implementing the Commission's decisions. The first part of the report covered the preliminary matter and articles 1 to 10 of the Model Law. The remaining articles would be covered in addenda. In the final text of the Model Law, to be prepared by the drafting group, the articles would be renumbered as appropriate, and all cross-references checked.

2. The CHAIRMAN invited the Commission to consider the amendments to the draft Model Law article by article, beginning with the title.

Title

3. Mr. MORAN BOVIO (Spain) noted that the title in the Spanish version of the report spoke of "*la contratación pública*" instead of "*la adjudicación de contratos públicos*", the correct formula.

4. *The text for the title proposed by the drafting group was adopted.*

Preamble

5. *The change proposed by the drafting group was adopted.*

Article 1, paragraph (2)(a)

6. *The proposed change was adopted.*

Article 2(b)(ii)

7. *The proposed change was adopted.*

Article 2(c)

8. *The proposed change was adopted.*

Article 2(g)

9. Mr. LEVY (Canada) said his delegation preferred the second of the two versions submitted by the drafting group (the "alternative version").

10. Mr. PEREZNIETO CASTRO (Mexico) said that, since stand-by letters of credit were unknown in many developing countries, it would be better to refer to "letters of credit" rather than "stand-by letters of credit".

11. Mr. BURMAN (United States of America) thought that both terms should be included. As a form of security, stand-by letters of credit were quite different from ordinary letters of credit.

12. Ms. ZIMMERMAN (Canada) said that, at its fourteenth session, the Working Group had agreed "to delete the reference to letters of credit from the illustrative list of instruments that could serve as tender securities so as not to give undue prominence to what would be an unusual use of ordinary commercial letters of credit in a guaranty function" (A/CN.9/359, para. 31).

13. Mr. AL-NASSER (Saudi Arabia) said that the verb "to secure" was not adequately rendered in the Arabic version of the definition.

14. The CHAIRMAN said the necessary correction would be made. He asked whether the word "stand-by" should be deleted.

15. Mr. MORAN BOVIO (Spain) thought that both the stand-by letter of credit and the ordinary letter of credit could be mentioned.

16. In reply to a question from Mr. WALSER (Observer for the World Bank), Mr. HERRMANN (Secretary of the Commission) said that the stand-by letter of credit was a special form of letter of credit which was a functional equivalent of an independent bank guarantee.

17. Mr. PHUA (Singapore) noted that tender securities were dealt with in the whole of article 27, and asked why only article 27(1)(f) was referred to in the proposed text.

18. Mr. JAMES (United Kingdom) explained that the purpose of the reference was to define the obligations that could be guaranteed by means of a tender security. The obligations in question were set out in article 27(1)(f).

19. *The alternative version of article 2(g) preferred by the drafting group was adopted.*

Article 3(b)

20. *The proposed text was adopted.*

Article 6, paragraphs (6) and (7)

21. Mr. SAHAYDACHNY (Secretariat) said that the drafting group had found it hard to implement the decision of the Commission with regard to article 6. The Commission had decided that paragraph (6) of article 6 should be amended to include materially incomplete information concerning the qualifications of a supplier or contractor. The Commission had also decided that the supplier or contractor should be allowed, up to the deadline for the submission of tenders, to correct material inaccuracies or incompleteness in the information. That decision had caused difficulty. According to paragraph (7), the right of rectification was excluded where prequalification proceedings had taken place. On the other hand, where there had been no prequalification proceedings, the fact that tenderers had submitted inaccurate or incomplete infor-

mation would usually only be discovered at the time when the bids were opened; yet at that time the right to rectify such information would expire. It was therefore suggested that paragraph (7) be revised to make the deadline for providing complete proof of qualification either "within a reasonable time after the deadline for the submission of tenders or best and final offers" or "in the course of the procurement proceedings".

22. Mr. WALLACE (United States of America) pointed out that, according to the text proposed for paragraph (6)(b), a procuring entity could disqualify a supplier or contractor if it found at any time that the information submitted was materially inaccurate or incomplete. That provision would have to be made subject to paragraph (7).

23. Mr. HERRMANN (Secretary of the Commission) said that the drafting group had preferred to define the scope of application of paragraph (7) in relation to paragraph (6).

24. Mr. WALSER (Observer for the World Bank) agreed with the view that the original text of paragraph (7) raised problems, but had grave misgivings about the new text proposed, which would allow bidders to submit additional information or make corrections after the opening of tenders. There was a risk that a bidder would provide inadequate information so that, if his bid turned out to be too high after the opening of tenders, he could subsequently refuse to provide the further information required in order to be rejected without loss of tender security. In any case, it would be dangerous to allow the bidder merely "to undertake" to provide the necessary information; he should provide it immediately. He would prefer the paragraph to be dropped altogether.

25. Mr. JAMES (United Kingdom) said that the reference to paragraph (6)(a) in the proposed text for paragraph (7) was intended to make it clear that the right to complete the information or correct inaccuracies did not apply where the information was false. To avoid any ambiguity, paragraph (6)(b) should be made subject to paragraph (7).

26. Mr. PRIESTLEY (Observer for Australia) wondered whether paragraph (7) would apply to a supplier or contractor who had already prequalified but whose tender contained inaccurate or incomplete information. The first phrase of paragraph (7), "except where prequalification proceedings have taken place" was perhaps unnecessary.

27. Ms. ZIMMERMAN (Canada) felt that the word "may" in paragraph (6)(a) should be changed to "shall" in order to make the obligation to disqualify a supplier or contractor for false information mandatory rather than discretionary.

28. Mr. TUVAYANOND (Thailand) expressed agreement with what had been said by the representative of the World Bank. To allow suppliers or contractors to rectify incomplete or inaccurate information after the deadline for the submission of tenders would open the door to abuse.

29. Mr. PEREZNIETO CASTRO (Mexico) also considered the remarks of the representative of the World Bank to be highly relevant. The problem was to define the deadline for the rectification of inaccurate or incomplete information. As far as deleting the reference to prequalification proceedings was concerned, he thought that prequalified bidders would already have demonstrated their qualifications.

30. Mr. WALLACE (United States of America) said that it would perhaps be sufficient for paragraph (7) to deal solely with the case of the rectification of materially inaccurate or incomplete

information. Regarding the question raised by the observer for Australia, he pointed out that, under paragraph (8) of article 7, a prequalified bidder could be required to update his qualification. The reference to prequalification proceedings in paragraph (7) of article 6 had been deliberately included to rule out a supplier or contractor that had failed to qualify.

31. Mr. TUVAYANOND (Thailand) said that the procuring entity should perhaps be allowed to disqualify a bidder if it had reasonable grounds to believe that the latter was using the provision as a loophole to avoid his responsibilities. But a supplier or contractor should not be disqualified for minor or unintentional errors.

32. Mr. JAMES (United Kingdom) said that the first phrase of paragraph (7) had been included because the question of prequalification was dealt with elsewhere in the Model Law. A bigger problem was the point raised by the observer for the World Bank. As a procuring entity would not discover a defect until the opening of tenders, the drafting group had felt that paragraph (7) as amended by the Commission did not make sense. The Commission had decided that the supplier or contractor should be given the opportunity to make corrections, and therefore it had to decide between the two deadline options proposed in paragraph (7) in square brackets. He himself slightly preferred the first option but had no strong feelings. If neither was acceptable, there was no point in retaining paragraph (7).

33. Mr. PRIESTLEY (Observer for Australia) thought that the policy decided upon the previous week should be adhered to. His question regarding the first phrase of paragraph (7) concerned the situation in which a supplier or contractor had prequalified and submitted a tender which, on being opened, proved to contain materially inaccurate or materially incomplete information. Would that supplier or contractor be given a chance to make corrections? The problem did not arise with the original version of paragraph (7).

34. Mr. AL-NASSER (Saudi Arabia) said that paragraph (7) provided an opportunity for abuse and should be deleted unless a more satisfactory text could be produced.

35. Mr. WALSER (Observer for the World Bank) agreed with the representative of Canada that paragraph (6)(a) should be mandatory and that "may" should be amended to "shall". In regard to paragraph (7), it was a well-accepted principle in public procurement throughout the world that a bid that was not acceptable as submitted could not be made acceptable later. That would be an open door to abuses not in the public interest. A bidder might deliberately provide incomplete information in order to be able to withdraw, or complete the information if he saw it as profitable to remain in the competition. In prequalification proceedings, where no money or legal commitment was involved, something like paragraph (7) made sense, but a tender had to be legally binding and provide for a penalty—loss of tender security—in the case of withdrawal.

36. Mr. PEREZNIETO CASTRO (Mexico) supported that position. In his view, the only case in which it would be unjust to rule out the possibility of submitting further information was when such information was not available to or obtainable by the supplier or contractor at the time. The latter could then be given a chance to submit it later.

37. Mr. LEVY (Canada) said that his delegation had come to the conclusion that the Commission should stop trying to be generous to bidders and close off the opportunity to make any corrections whatsoever after the deadline for submission of tenders. Alternatively, the entire paragraph should be deleted.

38. Mr. TUVAYANOND (Thailand) proposed that, instead of the two formulas in square brackets, the word "promptly" be inserted. It should be left to the discretion of the procuring entity to decide whether or not a bidder, particularly if he was the most promising one, should be allowed to remain eligible to execute the contract in a case in which he had made a minor or unintentional error. His delegation was not looking at the question from the point of view of generosity but of the interests of the country. In the course of informal discussions the question of corruption had been raised; in spite of the existence of corruption in many countries, Governments should operate on the presumption of good faith.
39. Mr. KINGA (Cameroon) said that any reputable bidder would be expected to discover his errors between the times of submission and opening of tenders and it should not be necessary to give further time for correction. His delegation was in favour of the proposal to delete paragraph (7) in its entirety.
40. Mr. WALSER (Observer for the World Bank) thought that subparagraph (1)(a) of article 29 covered the case of minor errors raised by the representative of Thailand.
41. Mr. KOMAROV (Russian Federation) said that Thailand's concerns would also be met by paragraph (6)(b) of article 6, which would not authorize disqualification for minor errors. Article 22 dealt with similar questions.
42. Mr. JAMES (United Kingdom) said that, despite those reassurances, the difficulty concerned the potential problem of impermissible conduct on the part of the procuring entity. It had been pointed out that officials of a procuring entity might scrutinize the documentation of tenders that they wished to reject in order to find some technical matter which would justify disqualification. On balance, he felt that paragraph (7) was required, although the wording of the drafting group needed tightening. The proposal to insert the word "promptly" would certainly be acceptable, or a precise deadline of 14 or 28 days might be specified.
43. Mr. WALSER (Observer for the World Bank) thought the text might state that a bidder should not be disqualified for non-material errors provided that the necessary information was submitted either promptly or within a given period, whichever the Commission might prefer.
44. Mr. MORAN BOVIO (Spain) said that the Commission might also consider the possibility of a bidder being allowed to submit incomplete documentation on the undertaking that the documentation would be completed within a certain time period. If necessary a sworn undertaking could be made. That procedure was used frequently in both administrative and judicial proceedings, and would fit in with other proposed formulations. The Commission should in any event try not to be excessively rigid.
45. Mr. PRIESTLEY (Observer for Australia) supported the idea put forward by the representative of the World Bank and suggested a subparagraph (c) of paragraph (6) reading: "A procuring entity may not disqualify a supplier or contractor on the ground that the information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect". It would then be possible to delete paragraph (7).
46. Mr. LEVY (Canada), supported by Mr. RENGER (Germany), said that his delegation preferred the deletion of paragraph (7) because special cases made bad law. It supported the Australian suggestion for a subparagraph (c) of paragraph (6).
47. Mr. WALSER (Observer for the World Bank) said that his delegation also supported the deletion of paragraph (7). It could accept the Australian suggestion with the addition of the words "provided that the supplier or contractor remedies such deficiency promptly on being requested to do so by the procuring entity".
48. Mr. PHUA (Singapore) wondered whether it would be better to retain the original wording of paragraph (7) as set out in the draft Model Law.
49. Mr. JAMES (United Kingdom) asked whether it was proposed that the words "except where prequalification proceedings have taken place" should be kept.
50. It was also necessary to include the words "other than in a case in which paragraph (6)(a) of this article applies", because the procuring entity should in any case be entitled to disqualify a supplier or contractor who gave false information.
51. Mr. PRIESTLEY (Observer for Australia) said that he understood the word "false" in the proposed subparagraph (a) of paragraph (6) to imply deliberate falsehood; a supplier or contractor providing such "false" information should be disqualified.
52. Mr. KOMAROV (Russian Federation) wondered whether application of subparagraphs (b) and (c) would mean that any mistake concerning substance or any inaccuracy or incompleteness, whether formal or concerning substance, would give the right to disqualify the supplier or contractor. The term "materially" did not indicate the scale of the mistake.
53. Mr. PRIESTLEY (Observer for Australia) said that subparagraph (b) concerned an inaccuracy or incompleteness relating to substance. Even a formal mistake relating to substance would be included.
54. Subparagraph (c) was designed to refer to mistakes not relating to substance, so that a procuring entity would be prevented from seizing upon an inaccuracy or incompleteness that was, in reality, of no commercial importance to it.
55. Mr. PHUA (Singapore) said that the Commission had not dealt with the situation where information was accurate but the contractor had not provided proof. That had been the original intention behind paragraph (7).
56. Mr. JAMES (United Kingdom) said that the point made by the representative of Singapore was valid. He wondered whether the Commission was discussing proof or statements about qualifications or both.
57. Mr. WALSER (Observer for the World Bank) wondered whether there was a need to add the words "except where prequalification proceedings have taken place". In his delegation's view, there was no place for those words in the proposed new subparagraph (c).
58. If prequalification had already taken place and it was subsequently found that there was a minor non-material incompleteness in the prequalification submission, that would not be a reason for disqualifying the supplier or contractor.
59. The CHAIRMAN asked the representatives of the United Kingdom and Thailand and the observer for Australia to endeavour to produce a suitable form of words to assist the drafting group.

Summary record of the 512th meeting

Friday, 16 July 1993, at 9.30 a.m.

[A/CN.9/SR.512]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Model Law on Procurement (continued)

Report of the drafting group (continued) (A/CN.9/XXVII/CRP.4)

1. The CHAIRMAN invited the Commission to continue its consideration of the amendments to the draft Model Law proposed by the drafting group in its report (A/CN.9/XXVII/CRP.4). Article 6 would be left aside for the time being.

Commentary on article 7, paragraph 1

2. The amendment proposed by the drafting group was adopted.

Commentary on article 7, paragraph 2

3. The additional text proposed was adopted.

Commentary on article 7, paragraph 3, chapeau

4. The proposed text was adopted.

Commentary on article 7, paragraph 4

5. The proposed text was adopted.

Commentary on article 7, paragraph 5

6. The proposed amendment was adopted.

Commentary on article 7, paragraph 8

7. Ms. CLIFT (Observer for Australia) suggested that, at the end of the proposed new text, the words "to the satisfaction of the procuring entity" be added. That would make the meaning clearer.

8. The CHAIRMAN took it that the Commission wished to adopt the new text for paragraph 8 with the amendment suggested by the observer for Australia.

9. *It was so decided.*

Commentary on article 9, paragraph 1

10. The proposed amendment was adopted.

Commentary on article 9, paragraph 2

11. The CHAIRMAN took it that the Commission wished to correct the reference to take into account the proposed deletion of paragraph 18(3) and its replacement by new text.

12. *It was so decided.*

13. The CHAIRMAN said that consideration of the drafting group's report would continue at the next meeting.

Consideration of the draft Guide to Enactment (continued) (A/CN.9/375)

14. The CHAIRMAN, drawing attention to the commentary on article 11, took it that the Commission wished to adopt the text on the understanding that the Secretariat would make any necessary changes to reflect relevant decisions of the Commission.

15. *It was so decided.*

16. Ms. CRISTEA (Observer for Romania) said that comments would presumably be needed on the proposed new article 11 *bis*.

17. Mr. WALLACE (United States of America), referring to the commentary on article 12, said that it was not clear from the last sentence of paragraph 1 whether the Commission expected that the enacting State would already have an effective system of sanctions against corruption in place, or whether the State was being urged to put such a system in place. Perhaps the text should be amended to say that the State would have an effective system of sanctions in place elsewhere.

18. Mr. TUVAYANOND (Thailand) suggested that the text should also mention the prevention of corruption by personnel of public enterprises responsible for procurement.

19. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 12 on the understanding that the Secretariat would incorporate the changes suggested.

20. *It was so decided.*

21. Mr. WALLACE (United States of America), referring to the commentary on article 13, said that it should be made clearer, either at that point in the Guide or in the Introduction (paragraph 11), that the Working Group had decided it did not wish to create a hierarchy of procurement methods and that the Commission had a strong preference for tendering proceedings. The great importance of keeping records should be emphasized.

22. In order to ensure that the various procurement methods were understood, explanations should be provided in the Guide and the reasons for decisions relating thereto in the Model Law should be explained.

23. Mr. JAMES (United Kingdom) supported the views of the representative of the United States. In particular, he considered that maximizing economy and efficiency was not the only reason for using tendering proceedings. There should be a reference to the principles contained in the Preamble, and to the fact that tendering best met the requirements of those principles.

24. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 13 on the understanding that the Secretariat would take into account the comments of the representatives of the United States of America and the United Kingdom.

25. *It was so decided.*

26. Mr. FRIES (United States of America), referring to the commentary on article 14, noted the words "the case in which the procuring entity is unable to formulate specifications". Perhaps it should be pointed out that a procuring entity could, if it were not capable of drafting specifications itself, engage experts to do so. That would serve to reinforce the preference for tendering proceedings.
27. Mr. TUVAYANOND (Thailand) suggested that the wording "it is not feasible for the procuring entity to formulate specifications" be used rather than "the procuring entity is unable to . . .".
28. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 14 on the understanding that the comments of the representatives of the United States of America and Thailand would be taken into account by the Secretariat.
29. *It was so decided.*
30. The CHAIRMAN drew attention to the commentaries on articles 15, 16 and 17 and took it that the Commission wished to adopt them.
31. *It was so decided.*
32. Mr. WALLACE (United States of America), referring to the commentary on article 18, noted that the second sentence of paragraph 1 implied that the procurement law would specify the publications that interested suppliers and contractors should employ. He wondered whether that was likely or indeed whether it would be wise. In the last sentence of paragraph 3, he thought that the suggestion that restricted tendering was appropriate where high-value goods or construction were involved was unfortunate. That example would serve better as an example of circumstances making prequalification desirable.
33. The CHAIRMAN said that the Secretariat would take into account those comments. He took it that the Commission wished to adopt the commentary on article 18 on that understanding.
34. *It was so decided.*
35. The CHAIRMAN drew attention to the commentary on article 19 and took it that the Commission wished to adopt it.
36. *It was so decided.*
37. After a brief discussion on the commentary on article 20, the CHAIRMAN said that the Secretariat would make sure that the terminology used in reference to costs of "printing and providing" documents was aligned with the Commission's decisions. On that understanding, he took it that the Commission wished to adopt the commentary on article 20.
38. *It was so decided.*
39. The CHAIRMAN drew attention to the commentary on article 21 and took it that the Commission wished to adopt it.
40. *It was so decided.*
41. The CHAIRMAN invited comments on the commentary on article 22.
42. Mr. WALLACE (United States of America) asked whether the title of the article was to be changed. He thought that the emphasis was now to be placed on ensuring objectivity and non-discrimination.
43. Regarding the last sentence of paragraph 1, he thought that the argument was unclear and that the sentence should perhaps be recast or deleted.
44. Mr. SAHAYDACHNY (Secretariat) reported that the drafting group had agreed on a shorter title for article 22.
45. Ms. ZIMMERMAN (Canada), referring to paragraph 3, said that the argument put forward in that paragraph seemed to be that, in the case of bilingual documents, suppliers and contractors would have to ascertain that the two language versions were identical. In Canada, both English and French were official languages and solicitation documents would normally be issued in English and French, but that did not mean that the supplier must compare the versions. He could submit the tender in either language. Her delegation took exception to the text of paragraph 3.
46. Mr. KINGA (Cameroon) said that English and French were also official languages in his country. He could not accept the view that the two language versions should not form a single publication. There was no need for contractors to compare the two versions.
47. Mr. MORAN BOVIO (Spain) suggested that it should be made clear that the point made would not apply when the languages concerned were official languages of the country. The Secretariat could undoubtedly find a satisfactory wording for the text.
48. Mr. TUVAYANOND (Thailand) thought that it could be made clear in the solicitation documents in such cases that both language versions were equally authoritative. A reference should perhaps also be made to the need to use a language that was normally used in international trade.
49. Mr. WALLACE (United States of America) said he thought that the draft Model Law adequately took care of the language point in articles 22(4) and 24. When there were several language versions, the main point was that the tenderer would be fully protected if he based himself on one language version without reference to the others.
50. Mr. LEVY (Canada) suggested that the reference to the need for different language versions to be independent of each other should be deleted.
51. Mr. GRUSSMANN (Austria) supported that suggestion. In any case, he believed that the relevant clause in the draft Model Law would now be not in article 22 but rather in a new article 12 *ter*.
52. The CHAIRMAN said he thought that there was no need to add anything to paragraph 3. It could be redrafted and the reference to language versions having to be independent could be deleted. The last sentence of paragraph 1 could also be redrafted to give the correct meaning.
53. Mr. WALLACE (United States of America) noted that, to take into account the points raised, it would be necessary also to have another look at the fourth sentence of paragraph 3.
54. The CHAIRMAN suggested that the commentary on article 22 be adopted subject to amendments to take into account the points raised.
55. *It was so decided.*
56. The CHAIRMAN invited comments on the commentary on article 23.
57. Mr. WALLACE (United States of America) thought that, in the second sentence of paragraph 1, the words "fundamental and necessary" were too strong. He suggested that they be replaced by the word "important".

58. *It was so agreed.*
59. The CHAIRMAN said he took it that the commentary on article 23 was adopted as amended.
60. *It was so decided.*
61. The CHAIRMAN invited comments on the commentary on article 24.
62. Mr. TUVAYANOND (Thailand) thought that it would be useful to state that documents should be in a language normally used in international trade.
63. The CHAIRMAN said that the drafting group was proposing that there be a new article 12 *ter* in the Model Law providing for documents to be issued in a language chosen by the State concerned and in a language customarily used in international trade. If he heard no objection, he would take it that the commentary on article 24 was adopted and that the comment made would be taken into account.
64. *It was so decided.*
65. The CHAIRMAN invited comments on the commentary on article 25.
66. Mr. FRIES (United States of America) said that the last sentence of paragraph 3 was no longer in line with what the Commission had decided in relation to electronic data interchange (EDI) techniques. With regard to paragraph 4, he did not think that a recommendation such as that in the last sentence should be made, since no decision had been taken by the Commission on that point.
67. The CHAIRMAN said that he thought that the last sentence of paragraph 3 should be deleted.
68. Mr. PHUA (Singapore) said that paragraph 2 should include the point that a decision of the procuring entity to extend the submission deadline would not be subject to review under chapter V of the Model Law. He recalled that the text of article 25(3) had been amended on the proposal of the Australian delegation and that it had been agreed that the point raised should be mentioned in the Guide.
69. After some discussion as to what the Commission's decision had been, Ms. ZIMMERMAN (Canada) said that, according to her notes, it had been suggested that the Guide should mention that the exercise of discretion by the procuring entity in the case under discussion would not be subject to review.
70. The CHAIRMAN said that it seemed reasonable that a discretionary decision could not be subject to review. The Guide would reflect that point. He took it that, subject to the points raised, the commentary on article 25 could be adopted.
71. *It was so decided.*
72. The CHAIRMAN said that, if he heard no comments on the commentary on article 26, he would take it as adopted.
73. *It was so decided.*
74. The CHAIRMAN invited comments on the commentary on article 27.
75. Mr. WALLACE (United States of America), referring to paragraph 1, said he thought that the words "at least a portion of" in the second sentence were rather weak and that the drafting could perhaps be looked at. Paragraph 6 would need to be revised to take into account the Commission's decision on the relevant paragraph of the Model Law. In the second sentence of paragraph 6, a better term could perhaps be found than "transferable", which suggested a reference to foreign exchange controls.
76. The CHAIRMAN said that those points would be taken into account. Subject to those points, he took it that the Commission could adopt the commentary on article 27.
77. *It was so decided.*
78. The CHAIRMAN drew attention to the commentary on article 28 and said that, if he heard no objection, he would take it as adopted.
79. *It was so decided.*
80. The CHAIRMAN invited comments on the commentary on article 29.
81. Mr. WALLACE (United States of America), referring to paragraph 5, noted that the second, bracketed sentence of that paragraph referred the reader to paragraph 4 (presumably it should be paragraph 2) of the comments under article 8 concerning "the advantages" of using a margin of preference. His delegation would find the expression "factors involved in" more acceptable than "advantages of".
82. In paragraph 6, he suggested that the details given in the last sentence of possible ways of applying a margin of preference might be omitted.
83. Mr. SAHAYDACHNY (Secretariat) said that the intention was to give legislators an indication of the various possibilities in order to draw attention to the fact that the provision in article 29(4)(d) would not be sufficient in itself and that detailed regulations might be needed.
84. Mr. WALLACE (United States of America) thought that a possibility would be merely to indicate in the Guide that "such matters might be dealt with further in the procurement regulations".
85. In reply to a question from Mr. PRIESTLEY (Observer for Australia), the CHAIRMAN said that the reference to paragraph 4 in the second sentence of paragraph 5 was a mistake; the reference should read "paragraph 2 of the comments to article 8".
86. He suggested that paragraph 5 be amended to refer to the "reasons for" a margin of preference, and that paragraph 6 be retained as an indication to legislators. He took it that the commentary on article 29 was adopted on that understanding.
87. *It was so decided.*
88. Mr. FRIES (United States of America), referring to the commentary on article 30, said that the concept of an "abuse of right" mentioned in the last sentence of paragraph 1 was not generally applicable in common law jurisdictions and he wondered how it would apply in other legal systems.
89. Mr. HERRMANN (Secretary of the Commission) noted that the text referred to an abuse of right or a violation of fundamental principles of justice. It had not been thought necessary to give an interpretation of those terms; it would not matter if one of the two alternatives did not apply in certain jurisdictions.
90. Ms. CRISTEA (Observer for Romania) said that there had been an example of an abuse of right in her country when three

tenders had been submitted and all had been rejected because the procuring entity had wished to make some money and to pocket the tender securities on the pretext of covering costs. There was no law protecting tenderers in Romania, and protection was needed against the abuse of the right to reject tenders.

91. Mr. TUVAYANOND (Thailand) said that the notion of an abuse of right existed in many countries and there should be no problem in accommodating the concerns of all countries.

92. *The commentary on article 30 was adopted.*

93. Mr. WALLACE (United States of America), referring to the commentary on article 31, suggested the addition of a sentence to cover the point that had been made that another purpose served by prohibiting negotiation was to avoid unnecessarily high prices. Bidders who believed they would be subject to negotiation would artificially inflate their prices to anticipate being driven down in price later.

94. The CHAIRMAN took it that the text could be adopted on the understanding that that point would be reflected.

95. *It was so decided.*

96. Mr. WALLACE (United States of America), referring to the commentary on article 32, asked the Secretariat to consider re-drafting the third, fourth and fifth sentences of paragraph 3. Article 32 dealt solely with the question whether a contract entered into force on notice of acceptance or later, whereas the question of the completeness of the contract was dealt with elsewhere. The present text seemed to confuse those two points. In paragraph 6, he suggested that the words "should be" in the penultimate line be changed to "shall be".

97. The CHAIRMAN took it that the text was adopted on the understanding that those points would be taken into account.

98. *It was so decided.*

99. Mr. WALLACE (United States of America), referring to the introduction to the commentary on chapter IV, asked whether the word "incorporate" in the third sentence meant "incorporate in the Model Law". If so, the sentence should be made more explicit.

100. The CHAIRMAN said he took it that the text could be adopted on that understanding.

101. *It was so decided.*

102. The CHAIRMAN drew attention to the commentary on article 33 and said that, if he heard no objections, he would take it as adopted.

103. *It was so decided.*

104. Mr. FRIES (United States of America), referring to the commentary on article 34, said that the last sentence of paragraph 2 referred rather casually to a potential extra burden for the procuring entity at a time when it was already busy as a reason for not using a wider notification procedure. It might be better to refer to "important administrative difficulties", or something of that nature.

105. The CHAIRMAN said he took it that the text could be adopted on the understanding that that comment would be taken into account.

106. *It was so decided.*

107. Mr. JAMES (United Kingdom), referring to the commentary on article 35, noted the reference in paragraph 1 to the article being a "skeleton provision". The real point was that the advantage of competitive negotiation was its flexibility, and the provisions in article 35 were as comprehensive as it was appropriate to make them. To call the article a skeleton provision would give the incorrect impression that it should be supplemented by additional regulations.

108. Mr. WALLACE (United States of America) thought that paragraph 3 should also be changed, since the Model Law was to be amended to include a reference to "best and final offers". If such a reference were inserted in paragraph 3, a good deal of the illustrative detail in the paragraph could be dropped.

109. The CHAIRMAN took it that the text could be adopted on the understanding that those comments would be taken into account.

110. *It was so decided.*

111. Mr. KOMAROV (Russian Federation), referring to the commentary on article 36, recalled that, during the discussion on the article it had been agreed that it would be useful to indicate in the Guide that the procurement entity might use internationally recognized terminology systems such as INCOTERMS.

112. Mr. WALLACE (United States of America) noted that the descriptions under both articles 36 and 37 were minimal. It would be useful for the Guide to include a description in lay language of the seven or eight procurement methods covered by the Model Law in order to ensure that legislators were adequately informed.

113. Mr. PRIESTLEY (Observer for Australia) said he understood that single-source procurement would be subject to article 11 on record requirements and the proposed article 11 *bis* on the publication of notices of awards; attention should be drawn to those articles under article 37.

114. Mr. JAMES (United Kingdom) felt that it did not do justice to the Model Law to say in article 37 that the reason it did not contain procedures to be followed in single-source procurement was that that method was to be used only in exceptional cases. It had been thought inappropriate to specify procedures because there was no need for the Law to regulate what amounted to a contractual negotiation between the procuring entity and one person. The second sentence should be redrafted.

115. Mr. SAHAYDACHNY (Secretariat), replying to a point raised by Ms. CRISTEA (Observer for Romania), said that the Guide should make clear that the general provisions of the Model Law, where relevant, would be applicable to single-source procurement, so that there was not a total void as far as that procedure was concerned.

116. The CHAIRMAN took it that the commentaries on articles 36 and 37 could be adopted subject to those comments.

117. *It was so decided.*

118. Mr. FRIES (United States of America), referring to the introduction to the commentary on chapter V, noted that paragraph 7 mentioned that chapter V did not deal with possibilities of dispute resolution through arbitration since the types of situation contemplated did not lend themselves to arbitration. That suggested a more general point which could be elaborated, either in the introduction to the commentary on chapter V or elsewhere, that the Model Law was addressed to contract formation and not to all the issues of contract implementation or administration, including the important one of dispute resolution concerning issues of contract performance.

119. Mr. KOMAROV (Russian Federation) said that it would be useful to add that resolution by arbitration of conflicts between the procuring entity and the contractor was not excluded by the Model Law if it was not prohibited by international laws and treaties.
120. Mr. WALLACE (United States of America) said that arbitration had not been covered during the drafting of the protest provisions. If it was to be said that arbitration was not excluded, it should be made clear that the reference was to circumstances where its use was appropriate. It had been deliberately decided not to make explicit reference to arbitration in the Model Law. The wording of any reference in the Guide should be careful and precise.
121. Mr. KOMAROV (Russian Federation) said that, should a dispute arise, the contractor and the procuring entity should not be deprived of the possibility of concluding an arbitration agreement to resolve it. A reference in the commentary to the existence of such a possibility would be useful.
122. Mr. TUVAYANOND (Thailand) said that in real life resort to arbitration in the matters under discussion was inconceivable. A settlement by arbitration was possible only in the case of a breach of contractual obligation and with the consent of all parties to the dispute. Paragraph 7 was appropriately worded as it stood.
123. The CHAIRMAN said that everyone's concern seemed to be covered in paragraph 7 as it stood.
124. *The introduction to the commentary on chapter V was adopted.*
125. Mr. WALLACE (United States of America), referring to the commentary on article 38, said that in the second sentence of paragraph 1 the words "as such" could be deleted. The drafting of the third sentence should be looked at. Lastly, the language used in the penultimate sentence of paragraph 1 was less specific than the language adopted for article 38 of the Model Law. It was risky to attempt to paraphrase the Model Law in the Guide and perhaps change the concepts. It was also misleading to refer to "other issues relating to the capacity of the supplier", as though the question of suffering loss or injury related to "capacity", which was a technical term. It might be better to say "other issues, for example those relating to the capacity . . .".
126. Referring to the commentary on article 39, he suggested that the phrase "to ensure that grievances are filed and resolved" in paragraph 3 be amended to read "to ensure that grievances are promptly filed". In paragraph 8, the last sentence should be expanded so as to make clear to the legislator what paragraphs (4) and (5) of article 39 contained.
127. Referring to the commentary on article 40, he suggested that the word "large" be deleted before the word "contract" in the second sentence of paragraph 12, since any contract entered into on the basis of fraud, whether large or small, should be subject to annulment.
128. Referring to the commentary on article 42, he said that the wording of paragraph 4 needed some redrafting, since the reference to an extension up to a "thirty-day total period" was not very clear.
129. Mr. JAMES (United Kingdom), referring to the commentary on article 42, said that there had been a long debate in the Working Group as to whether suspension of proceedings was appropriate: some had argued that, although it had some advantages, it militated against economy and efficiency. He suggested that paragraph 1 reflect that debate and make clear that the text adopted struck a balance between, on one hand, the need to give the supplier or contractor concerned the right of complaint and, on the other, the need to enable the procuring entity to proceed expeditiously, thus promoting economy and efficiency. It was important that that point be made clear to enacting States, since otherwise legislators might wonder why only fairly short time limits had been provided for.
130. Mr. WALLACE (United States of America) said he could accept that the United Kingdom point should be taken into account, but urged that the Secretariat should take care not to upset the balance reflected in the article, which was the result of a hard-fought battle in the Working Group.
131. The CHAIRMAN took it that the section of the Guide dealing with articles 38 to 43 could be adopted subject to those comments.
132. *It was so decided.*
133. Mr. WALLACE (United States of America) said that he would like to make some comments on the Introduction to the draft Guide. The Introduction was in some ways akin to an executive summary of a substantial report, and was thus of great importance. His delegation believed that it should be further recast, since it did not give sufficient emphasis to some of the Model Law's most important features. In many ways, the Model Law represented significant progress: for example, it took as its norm international procurement open to contractors and suppliers from all countries, it contained review provisions which had been the subject of much discussion, and were not known in all legal systems, and it provided for various procedures for record-keeping and rights of complaint for aggrieved bidders. Those points should be given more prominence in the Introduction.
134. The section on administration of procurement (paragraphs 12-16) could be made somewhat more concentrated. His delegation would be glad to submit some suggestions in writing as to how that section could be reformulated.
135. In his delegation's view, the Introduction should try to encapsulate just what it was that the Guide to Enactment sought to do—a matter that had been deliberated at length in the Working Group. For example, it had been pointed out that the Guide could serve as a means of helping executive authorities in States to prepare a section-by-section analysis of the Model Law, indicating to the legislator what policy choices had been made in the course of its preparation. The term "background information" in the second sentence of paragraph 5 was perhaps insufficiently forceful.
136. The CHAIRMAN took it that the Commission wished to adopt the Guide subject to the points raised in the discussion.
137. *It was so decided.*
138. Mr. WALLACE (United States of America) said his delegation would be pleased to send in to the Secretariat comments and suggestions on the drafting of the Guide, and hoped other delegations would do likewise. Such suggestions would not concern points of substance. Although the Guide had now been adopted, it would be useful for States to have an opportunity to comment on it again once the revised version had been prepared by the Secretariat and circulated to Member States.
139. Mr. MORAN BOVIO (Spain) said that, as he understood it, it had been agreed that, once work on the Guide was completed, delegations could submit any written comments they might have, so that the text could be further improved. He did not think that would in any way affect the decision just taken to adopt the Guide.
140. Mr. LEVY (Canada) said he was not happy with the turn the discussion was taking. The Secretary had already made it clear that, if the Commission were to adopt the Guide now, it would be

on the basis that comments already made were to be taken into account and the text reworded accordingly. His delegation had great difficulty with the suggestion that the Secretariat would have to revise the Guide a second time on the basis of written comments submitted after the Guide had been adopted. That would mean that the Commission had in effect not adopted the Guide, and was simply continuing to work on it, which was quite unacceptable to his delegation.

141. The CHAIRMAN stressed that the Commission had adopted the Guide. Comments would be submitted in the context of that decision.

142. Ms. PIAGGI-VANOSI (Argentina) said she thought that the procedure to be followed had been agreed the previous day. However, in the light of the points that had been made, it might be decided to allow comments to be submitted subsequently.

143. Mr. LEVY (Canada) said it was not clear to him whether, once the Secretariat had incorporated into the text of the draft Guide comments submitted by Governments, the Guide would become final.

144. Mr. BURMAN (United States of America) said his delegation did not share the concern expressed. The procedure proposed was a perfectly proper one, which had been used by the Commission in the past when it had approved a document to which final adjustments still needed to be made. It would not be reasonable to expect the Secretariat to have a fully revised text ready before the end of the session, and the document that had just been considered was clearly not the final version. The text would not be final until after the Secretariat had circulated its revised text for comment by Governments.

The meeting rose at 12.40 p.m.

Summary record of the 513th meeting

Friday, 16 July 1993, at 2 p.m.

[A/CN.9/SR.513]

Chairman: Mr. MOHAMMED (Nigeria)

The meeting was called to order at 2.15 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

Consideration of draft Guide to Enactment (*continued*) (A/CN.9/375)

1. Mr. GRUSSMANN (Austria) said it was his understanding that the Commission had adopted the Guide to Enactment of the Model Law. If the proposal made by the representative of the United States of America at the previous meeting for a written comment procedure leading to a redrafting of the Guide to Enactment were accepted, the resulting text would be a Secretariat rather than a Commission document.

2. Mr. KOUVSHINOV (Russian Federation) supported the views expressed by the representative of Austria. The Guide had been adopted and any further discussion would be of an adopted document. For his country the matter was of considerable practical importance since it was in the process of framing and adopting legislation on tendering. The work of the Commission was highly appreciated by his Ministry of External Economic Affairs; it was of great practical assistance to countries in economic transition.

3. Mr. PRIESTLEY (Observer for Australia) said he shared the views expressed by the representatives of Austria and the Russian Federation, and by the representative of Canada at the previous meeting. The procedure had already been agreed upon. He would not be in favour of the Commission reconsidering its decision to adopt the Guide. Firstly, the procedure proposed by the representative of the United States would cause an indefinite delay in the adoption of the Guide and, secondly, the members of the Commission had been assuming that the procedure would be as outlined by the Chairman. The decision should not be changed at such a late stage.

4. The CHAIRMAN concluded that the Commission did not wish to change its earlier decision. The Guide to Enactment had

been adopted and would remain so. Certain additions could be made to clarify points as long as they fell within the parameters of the Commission's decision. When issued in its final form, the Guide to Enactment would be a Commission document.

5. Mr. PHUA (Singapore) asked when the final text of the Guide would be ready.

6. Mr. SAHAYDACHNY (Secretariat) said that the revision of the Guide to reflect decisions taken by the Commission at the present session, including suggested changes and the alignment of the Guide with the final text of the Model Law, could not realistically be expected to be completed earlier than about October. It would be difficult to give a more precise date.

7. Mr. PHUA (Singapore) sought an assurance that the Guide would be precisely as had been decided so that he could report the decision to his Government.

8. The CHAIRMAN said that the Secretariat would make no changes to what had been adopted. He took it that the Commission wished to reconfirm its adoption of the draft Guide to Enactment subject to the agreed changes.

9. *It was so decided.*

Consideration of draft Model Law on Procurement (*continued*)

Report of the drafting group (continued) (A/CN.9/XXVI/CRP.4/Add.1-4)

Document A/CN.9/XXVI/CRP.4/Add.1

10. The CHAIRMAN invited the Commission to consider the changes to the draft Model Law proposed by the drafting group.

Article 11, paragraph (1) chapeau

11. *The text proposed by the drafting group was adopted.*

Article 11(1)(b)

12. *The text proposed by the drafting group was adopted.*

Article 11(1)(e)

13. *The text proposed by the drafting group was adopted.*

Article 11(1)(k)

14. *The changes proposed by the drafting group were adopted.*

Article 11(1)(l)

15. *The text proposed by the drafting group was adopted.*

Article 11(2)

16. Ms. ZIMMERMAN (Canada) asked why the provision was subject to article 28(3).

17. Mr. SAHAYDACHNY (Secretariat) said that the provisions in paragraphs (2) and (3) of article 11 concerning the disclosure of certain portions of the record only after the acceptance of a tender were, as they stood, inconsistent with article 28(3), which provided that the tender price would be announced at the opening of tenders. The Commission's decision to require a broader notification not limited to the suppliers or contractors engaged in the procurement proceedings had made the cross-references necessary.

18. Mr. AL-NASSER (Saudi Arabia) said that the phrase "be made available to any person after a tender . . . has been accepted" was not clear, at least in the Arabic version. He wondered whether the text could be amended to read: ". . . after acceptance of its tender . . .".

19. Mr. JAMES (United Kingdom) said that the text as drafted was correct, at least in the English version. The paragraph was intended to provide that the portion of the record concerned should be available to the public in general and not merely to suppliers and contractors. To say "its tender" would change the meaning.

20. The CHAIRMAN said that the Arabic text would be amended if necessary and that all language versions would be checked subsequently to ensure their alignment.

21. *The new text of article 11(2) proposed by the drafting group was adopted.*

Article 11(3), chapeau

22. *The text proposed by the drafting group was adopted.*

Article 11(3)(b)

23. *The text proposed by the drafting group was adopted.*

Article 11(4)

24. Ms. ZIMMERMAN (Canada) suggested that the words "the present article" in the last line be replaced by the words "this article".

25. Mr. HERRMANN (Secretary of the Commission) said that the United Nations generally preferred to say "the present article"

in such a case rather than "this article" as the latter might be misleading if, as often happened, the same provision contained a reference to some other article.

26. *The new text of article 11(4) proposed by the drafting group was adopted.*

Article 12

27. *The text proposed by the drafting group was adopted.*

Article 13(2)

28. *The changes proposed by the drafting group were adopted.*

Article 14(1), chapeau

29. *The change proposed by the drafting group was adopted.*

Article 14(1)(a)

30. *The change proposed by the drafting group was adopted.*

Article 14(1)(c)

31. *The change proposed by the drafting group was adopted.*

Article 14(1)(d)

32. *The change proposed by the drafting group was adopted.*

Article 14(2), chapeau

33. *The text proposed by the drafting group was adopted.*

Article 14(2)(a)

34. *The text proposed by the drafting group was adopted.*

Article 14(2)(b)

35. *The text proposed by the drafting group was adopted.*

Article 15(1)

36. *The change proposed by the drafting group was adopted.*

Article 15(2)

37. *The change proposed by the drafting group was adopted.*

Article 16, chapeau

38. *The changes proposed by the drafting group were adopted.*

Article 16(b)

39. *The text proposed by the drafting group was adopted.*

Article 16(c)

40. *The text proposed by the drafting group was adopted.*

Article 16(e)

41. *The change proposed by the drafting group was adopted.*

Article 16(f)

42. *The change proposed by the drafting group was adopted.*

Article 16(g)

43. *The change proposed by the drafting group was adopted.*

Article 17(b)

44. Ms. ZIMMERMAN (Canada) said that the words "small quantity and low value" implied that a large procurement of low value would not fall within the scope of article 17 and thus rule out domestic tendering for large quantities of goods of low value. It would be preferable to delete the reference to quantities and refer only to "low value".

45. Mr. JAMES (United Kingdom) said that the wording offered by the drafting group had been intended to cover articles of very high unit value but few in number. On reflection, he agreed with the representative of Canada that the reference to "small quantity" should be deleted.

46. The CHAIRMAN said he took it that there was agreement that the words "low amount or value" in the original text of article 17(b) submitted by the Working Group would be changed to "low value", rather than to "small quantity and low value" as proposed by the drafting group.

47. *It was so decided.*

Article 17, last paragraph

48. *The change proposed by the drafting group was adopted.*

Article 19(1), chapeau

49. *The change proposed by the drafting group was adopted.*

Article 19(1)(b)

50. *The text proposed by the drafting group was adopted.*

Article 19(1)(d)

51. *The change proposed by the drafting group was adopted.*

Article 19(2)

52. *The text proposed by the drafting group was adopted.*

Article 21(g)

53. Ms. ZIMMERMAN (Canada) asked for confirmation that the amendment concerned, proposed by the Secretariat, had been accepted by the Commission.

54. Mr. WALLACE (United States of America) said that he was under the impression that the amendment had not been adopted.

55. Mr. HERRMANN (Secretary of the Commission) replied that according to his notes a number of speakers had supported the Secretariat's text.

56. The CHAIRMAN said he thought there had been no strong objection to the text.

57. *The change proposed by the drafting group was adopted.*

Article 21(l)

58. *The insertion proposed by the drafting group was adopted.*

Article 21(n)

59. *The change proposed by the drafting group was adopted.*

Article 22, heading

60. *The proposed changes were adopted.*

Article 22(1)

61. *The proposed changes were adopted.*

Article 22(2)

62. *The proposed change was adopted.*

Article 22(3)(a)

63. Ms. ZIMMERMAN (Canada) said that the amendments made to article 22 reflected the decision of the Commission to move that article to chapter I of the Model Law and to reword the paragraphs so that they would apply both to tendering and to other methods of procurement. Consistent with that change, the phrase "in formulating the specifications" in the third line of article 22(3)(a) as it appeared in document A/CN.9/371 should read "in formulating any specifications".

64. *It was so agreed.*

65. *The change to article 22(3)(a) proposed by the drafting group was adopted.*

Article 22(3)(b)

66. *The text proposed by the drafting group was adopted.*

New article 12 ter (former article 22(4))

67. Mr. LEVY (Canada) said that, as drafted, the article appeared to require countries like Canada, both of whose official languages were customarily used in international trade, to provide documents in a third language. He suggested that an additional phrase might be inserted in brackets after the words "used in international trade" to make the sense clear.

68. Mr. JAMES (United Kingdom) said that the intention had been to leave the words "and in a language customarily used in international trade" in brackets, as in the original draft in document A/CN.9/371.

69. Mr. SAHAYDACHNY (Secretariat) said that the brackets would have to close at the end of subparagraph (b) for the sense to be as intended.

70. Ms. CLIFT (Observer for Australia) suggested that, in subparagraph (b), the words "small quantity and" be deleted.

71. *It was so agreed.*

72. *With those changes, the text proposed by the drafting group was adopted.*

*Document A/CN.9/XXVII/CRP.4/Add.2**Article 6(1) and (2)*

73. Mr. WALLACE (United States of America) wondered whether the new mandatory language of subparagraph (1)(b) was compatible with the provision in article 34(9)(d).

74. Mr. JAMES (United Kingdom) said that making qualification mandatory for all procurement procedures meant that a test of unreliability or incompetence was no longer needed in article 34, and that consequently article 34(9)(d) could be deleted.

75. Mr. PRIESTLEY (Observer for Australia) endorsed that suggestion.
76. Mr. LEVY (Canada) said that, while article 34(9)(d) might be redundant for lawyers and other experts, it did not conflict in any way with article 6(1)(b). Rather it made it quite clear what the rules were, and should therefore be retained.
77. Mr. WALLACE (United States of America) said that it would be bad practice to retain article 34(9)(d), because its meaning could be queried.
78. The CHAIRMAN said that, if there were no strong objections, he would take it that the Commission agreed to delete article 34(9)(d).
79. *It was so decided.*
80. *The text proposed by the drafting group for article 6(1) and (2) was adopted.*
- Article 6(3)*
81. Ms. ZIMMERMAN (Canada) said that a further amendment to the text as it appeared in document A/CN.9/371 was needed in order to ensure that the provision applied to other documents used in soliciting offers or proposals as well as prequalification and solicitation documents.
82. Mr. SAHAYDACHNY (Secretariat) thought that that concern might be met if the text were amended to read: "... prequalification documents, if any, the solicitation documents or any other documents used to solicit offers or proposals and shall apply equally . . .".
83. Ms. ZIMMERMAN (Canada) suggested that the paragraph might also be worded along the lines of article 22(3)(a) as just adopted.
84. Mr. JAMES (United Kingdom) said that the same amendment would need to be made in article 6(4).
85. *It was agreed that the drafting group would decide on the most appropriate wording.*
86. *On that understanding, article 6(3) was adopted.*
- Article 11(1)(i)*
87. *The Commission agreed to the deletion of the subparagraph.*
- Article 11 bis*
88. *The proposed text was adopted.*
- Article 13(2)*
89. *The proposed change was adopted.*
- Article 13 bis*
90. Mr. JAMES (United Kingdom) said he thought that the end of subparagraph (a) should read as follows: "suppliers or contractors; or".
91. Mr. WALLACE (United States of America), supported by Mr. LEVY (Canada), said that it had been his delegation's impression that the word "significantly" was to be inserted before "disproportionate" in subparagraph (b).
92. Mr. SAHAYDACHNY (Secretariat) said that the drafting group had considered the insertion of "significantly" and decided against it.
93. *The text proposed by the drafting group was adopted.*
- Article 18(3)*
94. *It was agreed to delete the paragraph.*
- Article 19(1)(d)*
95. *The proposed change was adopted.*
- Article 25*
96. The CHAIRMAN invited the Commission to take up article 25(3), which was not dealt with in the drafting group's report.
97. Mr. SAHAYDACHNY (Secretariat) reminded the Commission that it had decided to refer, in subparagraph (3), to "the absolute discretion" of the procuring entity, a matter which had been unintentionally passed over by the drafting group. Article 25(3) should begin with the following wording: "The procuring entity may, in its absolute discretion".
98. *It was so decided.*
99. Mr. PRIESTLEY (Observer for Australia), referring to article 25(1), recalled that his delegation had suggested the inclusion of a reference to the location for the submission of tenders in that paragraph. The Canadian delegation had produced a proposed wording which had been adopted by the Commission.
100. Mr. LEVY (Canada) said that his delegation had proposed the following wording: "The procuring entity shall fix a specific date and time as the deadline for and the location for the submission of tenders".
101. Mr. SAHAYDACHNY (Secretariat) suggested the following wording for the end of the sentence: "deadline for, and the place for, the submission of tenders".
102. Mr. WALLACE (United States of America) thought it would be better to mention the place before the date and time.
103. The CHAIRMAN took it that it was agreed that the wording of article 25(1) would be changed along those lines.
104. *It was so agreed.*
105. *The text proposed by the drafting group for article 25(5) was adopted.*
- Article 26(1)*
106. *The proposed change was adopted.*
- Article 26(2)(b)*
107. *The proposed change was adopted.*
- Article 26(3)*
108. *The proposed change was adopted.*
- Article 27(1)(b)*
109. *The proposed text was adopted.*

- Article 27(1)(c)
110. *The proposed change was adopted.*
- Article 27(1)(d)
111. *The proposed change was adopted.*
- Article 27(1)(e)
112. *The proposed changes were adopted.*
- Article 27(1)(f)(i)
113. *The proposed change was adopted.*
- Article 27(2)
114. *The proposed change was adopted.*
- Article 27(2)(b)
115. *The proposed change was adopted.*
- Article 27(2)(d)
116. Mr. JAMES (United Kingdom) said he thought that the word "such" should be added before the words "withdrawal is permitted".
117. *The proposed new text was adopted.*
- Article 29(1)(b)
118. *The proposed text was adopted.*
- Article 29(4)(d)
119. *The proposed change was adopted.*
- Article 29(5)
120. Ms. CRISTEA (Observer for Romania) said she thought it had been proposed that the text should read: "For the purposes of comparing and evaluating tenders, the tender prices of all tenders shall be converted to the same currency".
121. Mr. OLIVENCIA RUIZ (Spain) said that the wording had been discussed by the drafting group, which had preferred the form of words indicated.
122. *The change proposed by the drafting group was adopted.*
- Article 29(6)
123. Mr. WALLACE (United States of America) wondered whether the proposed change had any implications for other articles.
124. Mr. SAHAYDACHNY (Secretariat) noted that the wording "to demonstrate again" had already been adopted in article 7(8).
125. *The changes proposed in article 29(6) were adopted.*
- Article 29(7)
126. *The proposed change was adopted.*
- Article 31
127. *The proposed change was adopted.*
- Article 32(3)
128. *The proposed change was adopted.*
- Article 32(6)
129. *The proposed change was adopted.*
- Article 32 bis
130. *The proposed text was adopted.*
- Article 34
131. *The proposed changes were adopted.*
- Article 35(4)
132. *The proposed change was adopted.*
- Article 36(3)
133. *The proposed text was adopted.*
- Article 38(2)(c)
134. *It was agreed to delete the subparagraph.*
- Article 38(2)(d)
135. *The proposed change was adopted.*
- Article 38(2)(e)
136. Mr. JAMES (United Kingdom) said that the text of the proposed new subparagraph (f) should read "an omission referred to in article 21(s)".
137. *The proposed additional text was adopted.*
- Document A/CN.9/XXVI/CRP.4/Add.3
138. Mr. WALLACE (United States of America) wondered whether the provisions of article 6 also covered prequalification. If the procuring entity had excluded a tenderer at the prequalification stage on the basis of what it deemed to be a material inaccuracy or incompleteness, which was not promptly remedied, would the tenderer have recourse at the subsequent document solicitation stage?
139. Mr. JAMES (United Kingdom) said he thought there was no real difficulty. Article 6, paragraph (6), applied to all qualifications, including prequalifications. The effect of the new subparagraph (c) was that, in prequalification proceedings, a prospective supplier or contractor could not be eliminated for providing information which was incomplete or inaccurate in a non-material sense, provided it remedied the deficiencies promptly upon request. If a procuring entity examining the response to its invitation to prequalify found that the qualifications of one of its potential suppliers were deficient in a material sense, it could disqualify such a supplier under article 6, paragraph (6)(b). However, if the information was incomplete in a non-material sense, the procuring entity could not disqualify the supplier if the latter remedied the deficiency promptly. The procuring entity must therefore ask the supplier, at the relevant time, to provide the missing information. If it failed to do so, article 6, paragraph (6)(c), would not apply, so there was no likelihood of a supplier claiming, two years later, that the information given had been complete in all but non-material respects. Theoretically, a problem could arise if the procuring entity failed to identify the deficiency at the relevant time; but in that case it could ask the supplier to requalify.
140. Mr. GRIFFITH (Observer for Australia) said that, if the information was incomplete in a non-material respect, nobody would take the trouble to remedy it. As drafted, article 6, para-

graph (6)(c), failed to cover the situation where there was no request by the procuring entity to remedy the deficiency. In that event, there was no means of disqualifying the supplier. However, there was no need for the text to deal exhaustively with non-material inaccuracies, and the provision could perhaps be deleted.

141. Mr. SAHAYDACHNY (Secretariat) said that the intention in article 6, paragraph (6)(c), was to establish the rule that a procuring entity could not disqualify a supplier or contractor for non-material defects in the information presented for qualification, subject to the obligation on the part of the supplier or contractor to correct such defects if requested to do so. For the sake of clarity, he suggested replacing the words "provided that" by "unless" and the word "remedies" by "fails to remedy".

142. Mr. GRIFFITH (Observer for Australia) said that the new text appeared to be dealing with two issues at once: the obligation on the supplier or contractor to remedy defects on request, and the prohibition against disqualification for non-material deficiencies. Those points should perhaps be expressed in separate sentences. He suggested starting a new sentence after "non-material respect", to read "The supplier or contractor shall remedy such deficiencies promptly upon request by the procuring entity".

143. Mr. LEVY (Canada) said that there would be a problem of interpretation in the event that the supplier or contractor failed to remedy the deficiencies. Apparently, it would not be disqualified for failure to do so. He suggested replacing the words "provided that" by "if", keeping the two sentences together.

144. Ms. CRISTEA (Observer for Romania) suggested the formula: ". . . in a non-material respect, in which case the supplier or contractor is obliged to remedy such deficiencies promptly upon request by the procuring entity".

145. Mr. WALLACE (United States of America) said that the paragraph should then continue: "and shall be disqualified if it fails to do so".

146. Mr. GRIFFITH (Observer for Australia) said that the two rules contained in the subparagraph must be kept separate. Even if there was no request from the procuring entity, an issue of disqualification might still arise.

147. Mr. JAMES (United Kingdom) agreed that the draft was silent on the consequences of failure by a supplier or contractor to comply with a request by the procuring entity to supply deficient information. However, the Commission appeared to feel that even in the case of non-material deficiencies, the procuring entity should be able to disqualify a supplier or contractor that failed to remedy the deficiency promptly upon request. That could be achieved by starting a new sentence after "non-material respect" reading "A supplier or contractor shall be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity".

148. Mr. GRIFFITH (Observer for Australia) suggested replacing "shall" by "may". The disqualification should be at the discretion of the procuring entity.

149. The CHAIRMAN said he took it that the Commission wished to adopt the amendment suggested by the United Kingdom delegation with the change suggested by the Australian delegation.

150. *It was so decided.*

151. *The changes proposed by the drafting group in document A/CN.9/XXVII/CRP.4/Add.3, as amended, were adopted.*

152. Ms. ZIMMERMAN (Canada) expressed appreciation on behalf of the Commission for the efforts of the drafting group.

Arrangements for publication of the Model Law and Guide to Enactment

153. Mr. KOMAROV (Russian Federation) noted that the Commission had not yet decided how to link the text of the Model Law with the text of the Guide.

154. The CHAIRMAN said the Commission needed to decide whether the Model Law should be published in combination with the Guide, or separately, and how the texts should be presented.

155. Mr. MORAN BOVIO (Spain) asked the Secretariat for some guidance on the matter.

156. Mr. HERRMANN (Secretary of the Commission) said that the full text of the Model Law would be submitted to the Commission at the end of its session as an annex to the draft report. The revised draft Guide would be issued later as an ordinary document.

157. Mr. GRIFFITH (Observer for Australia) said that the text of the Model Law could usefully be prefaced by parts of the Guide as prepared by the Secretariat, for instance paragraphs 1 to 4 and 9 to 20, explaining the history and purpose of the Model Law. The Guide should, however, appear as a separate publication.

158. Ms. DODSWORTH (United Kingdom) said her delegation would be happy for the Model Law and the Guide to appear as two separate United Nations documents, according to standard practice.

159. Mr. SOLIMAN (Egypt) suggested annexing the Guide to the text of the Model Law.

160. Mr. MORAN BOVIO (Spain), supported by Mr. GRUSSMANN (Austria), thought the question whether and how to combine the two texts could be left to the Secretariat.

161. Mr. KOMAROV (Russian Federation) said that users of the Model Law would expect to have recourse to the Guide. The question was, therefore, how the Guide could be made readily available.

162. Mr. HERRMANN (Secretary of the Commission) said the Secretariat would add to the cover page of the Model Law a footnote referring to the existence of the Guide. He pointed out that, owing to the severe financial constraints under which the United Nations was currently operating, there were no funds available for special publications, unless Governments wished to contribute for that purpose.

163. Mr. KOUVSHINOV (Russian Federation) said that the Guide did not contain specific interpretations of each article of the Model Law. It could therefore be issued separately.

164. Mr. WALLACE (United States of America) suggested that the Guide be issued in a simple, stapled form. He agreed, however, that the form of publication of the Model Law and the Guide was a matter for the Secretariat to decide.

165. The CHAIRMAN said he thought it was the Commission's wish that the Model Law and the Guide should be issued as United Nations documents, with appropriate cross-references.

166. Mr. SAHAYDACHNY (Secretariat) suggested that the Commission might wish to adopt the Model Law by means of a formal resolution. The Secretariat could draft a resolution for consideration by the Commission later in the session.

167. *It was so agreed.*

The meeting rose at 5.05 p.m.

**IV. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE
WORK OF UNCITRAL: NOTE BY THE SECRETARIAT
(A/CN.9/402) [Original: English]**

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I. General

La Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI-UNCITRAL): numero monográfico [destinado] a conmemorar el vigésimoquinto aniversario de [su] creación. *Revista de derecho mercantil* (Madrid, Spain) 207:1-410, enero-marzo, 1993.

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Authentic texts of the Convention (Arabic, Chinese, English, French, Russian, Spanish) in General Assembly resolution 43/165, annex.

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VI. Guaranty letters

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VII. Procurement

Bock, C. UNO: UNCITRAL Model Law on Procurement. In *Das europäische Vergaberecht für Bauaufträge: unter besonderer Berücksichtigung der Auswirkungen auf das schweizerische Submissionsrecht*. Basel: Helbing und Lichtenhahn, 1993. (Basler Studien zur Rechtswissenschaft. Reihe B, Öffentliches Recht; Bd. 43) p. 74-76.

UNCITRAL Model Law on Procurement and Guide to Enactment. *Commonwealth law bulletin: Commonwealth Secretariat* (London, United Kingdom) 19:4:1631-1634, October 1993.

United Nations: Draft Model Law on Procurement. *EU public contract law* (Bonn, Germany) 3:4:57, 1993.

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ANNEX

**Check-list of short titles of UNCITRAL legal texts as cited in this bibliography
and their equivalents in full**

<i>Short title</i>	<i>Full title</i>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)
Legal Guide on Countertrade (1992)	UNCITRAL Legal Guide on International Countertrade Transactions (1992)
Limitation Convention (1974)	Convention on the Limitation Period in the International Sale of Goods (New York, 1974)
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods (New York, 1974, as amended by Vienna 1980 Protocol)
Terminal Operators Convention (1991)	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)
—	UNCITRAL Arbitration Rules (1976)
UNCITRAL Bills and Notes Convention (1988)	United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)
—	UNCITRAL Conciliation Rules (1980)
UNCITRAL Credit Transfer Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992)
UNCITRAL Model Arbitration Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985)
Uniform Rules on Liquidated Damages (1983)	Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983)
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

V. CHECK-LIST OF UNCITRAL DOCUMENTS

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A. List of documents before the Commission at its twenty-sixth session		
<i>1. General series</i>		
A/CN.9/370	Provisional agenda	Not reproduced
A/CN.9/371	Procurement: report of the Working Group on the New International Economic Order on the work of its fifteenth session	Part two, I, A
A/CN.9/372	International guaranty letters: report of the Working Group on International Contract Practices on the work of its eighteenth session	Part two, II, A
A/CN.9/373	Electronic Data Interchange: Report of the Working Group on Electronic Data Interchange on the work of its twenty-fifth session	Part two, III, A
A/CN.9/374 and Corr.1	International guaranty letters: report of the Working Group on International Contract Practices on the work of its nineteenth session	Part two, II, C
A/CN.9/375	Draft Guide to Enactment of UNCITRAL Model Law on Procurement	Part two, I, C
A/CN.9/376 and Add.1-2	Model Law on Procurement: compilation of comments by Governments	Part two, I, D
A/CN.9/377	Proposed amendments to the draft Model Law on Procurement	Part two, I, E
A/CN.9/378	Proposals for possible future work made at the UNCITRAL Congress	Part two, IV, A
A/CN.9/378/Add.1	Procurement of services	Part two, IV, B
A/CN.9/378/Add.2	Guidelines for pre-hearing conferences in arbitral proceedings	Part two, IV, C
A/CN.9/378/Add.3	Assignment of claims	Part two, IV, D
A/CN.9/378/Add.4	Cross-border insolvency	Part two, IV, E
A/CN.9/378/Add.5	Legal issues in privatization	Part two, IV, F
A/CN.9/379	Training and technical assistance	Part two, VII
A/CN.9/380	Coordination of work	Part two, V
A/CN.9/381	Status of UNCITRAL texts	Part two, VI
A/CN.9/382	Bibliography of recent writings related to the work of UNCITRAL	Part three, IV
<i>2. Restricted series</i>		
A/CN.9/XXVI/CRP.1 and Add.1-13	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session	Not reproduced
A/CN.9/XXVI/CRP.2	Draft Model Law on Procurement: proposal by United States of America concerning article 4	Not reproduced

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/XXVI/CRP.3	Draft Model Law on Procurement: proposal by Canada concerning articles 9(1) and 25(5)	Not reproduced
A/CN.9/XXVI/CRP.4 and Add.1-3	Report of the drafting group	Not reproduced
A/CN.9/XXVI/CRP.5	Draft Model Law on Procurement: proposal by Inter-American Development Bank concerning restricted tendering	Not reproduced
A/CN.9/XXVI/CRP.6	Draft Model Law on Procurement: adoption of the Model Law and recommendation	Not reproduced

3. *Information series*

A/CN.9/XXVI/INF.1/Rev.1	List of participants	Not reproduced
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B. List of documents before the Working Group on the New International Economic Order at its fifteenth session

1. *Working papers*

A/CN.9/WG.V/WP.35	Provisional agenda	Not reproduced
A/CN.9/WG.V/WP.36	Procurement: draft articles 1 to 41 of Model Law on Procurement	Part two, I, B

2. *Restricted series*

A/CN.9/WG.V/XV/CRP.1 and Add.1-7	Draft report of the Working Group on the New International Economic Order on the work of its fifteenth session	Not reproduced
A/CN.9/WG.V/XV/CRP.2 and Add.1-3	Report of the Drafting Group	Not reproduced

3. *Information series*

A/CN.9/WG.V/XV/INF.1	List of participants	Not reproduced
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C. List of documents before the Working Group on International Contract Practices at its eighteenth session

1. *Working papers*

A/CN.9/WG.II/WP.75	Provisional agenda	Not reproduced
A/CN.9/WG.II/WP.76 and Add.1	Independent guarantees and stand-by letters of credit: revised articles of draft Convention on international guarantee letters	Part two, II, B, 1
A/CN.9/WG.II/WP.77	Independent guarantees and stand-by letters of credit: proposal of the United States of America	Part two, II, B, 2

2. *Restricted series*

A/CN.9/WG.II/XVIII/CRP.1 and Add.1-9	Draft report of the Working Group on International Contract Practices on the work of its eighteenth session	Not reproduced
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<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
3. Information series		
A/CN.9/WG.II/XVIII/INF.1	List of participants	Not reproduced
D. List of documents before the Working Group on International Contract Practices at its nineteenth session		
1. Working papers		
A/CN.9/WG.II/WP.76 and Add.1	Independent guarantees and stand-by letters of credit: revised articles of draft Convention on international guarantee letters	Part two, II, B, 1
A/CN.9/WG.II/WP.77	Independent guarantees and stand-by letters of credit: proposal of the United States of America	Part two, II, B, 2
A/CN.9/WG.II/WP.78	Provisional agenda	Not reproduced
2. Restricted series		
A/CN.9/WG.II/XIX/CRP.1 and Add.1-7	Draft report of the Working Group on International Contract Practices on the work of its nineteenth session	Not reproduced
3. Information series		
A/CN.9/WG.II/XIX/INF.1	Provisional list of participants	Not reproduced
E. List of documents before the Working Group on Electronic Data Interchange at its twenty-fifth session		
1. Working papers		
A/CN.9/WG.IV/WP.54	Provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.55	Electronic data interchange: outline of possible uniform rules on the legal aspects of EDI	Part two, III, B
2. Restricted series		
A/CN.9/WG.IV/XXV/CRP.1 and Add. 1-12	Draft report of the Working Group on International Payments on the work of its twenty-fifth session	Not reproduced
A/CN.9/WG.IV/XXV/CRP.2	Text of a proposal by the French delegation	Not reproduced
3. Information series		
A/CN.9/WG.IV/XXV/INF.1/CRP.2	List of participants	Not reproduced

VI. LIST OF UNCITRAL DOCUMENTS REPRODUCED IN THE PREVIOUS VOLUMES OF THE *YEARBOOK*

This list indicates the particular volume, year, part, chapter and page where documents relating to the work of the Commission were reproduced in previous volumes of the *Yearbook*; documents that are not listed here were not reproduced in the *Yearbook*. The documents are divided into the following categories:

1. Reports on the annual sessions of the Commission
2. Resolutions of the General Assembly
3. Reports of the Sixth Committee
4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development
5. Documents submitted to the Commission (including reports of the meetings of Working Groups)
6. Documents submitted to the Working Groups:
 - (a) Working Group I: Time-Limits and Limitation (Prescription)
 - (b) Working Group II: International Sale of Goods (1968 to 1978: first to eleventh session); International Contract Practices (1981 to 1989: fourteenth and subsequent sessions)
 - (c) Working Group III: International Legislation on Shipping
 - (d) Working Group IV: International Negotiable Instruments (1974 to 1987: seventh to twentieth session); International Payments (1988 to 1992: twenty-first to twenty-fourth session); Electronic Data Interchange (1993: twenty-fifth and subsequent sessions)
 - (e) Working Group V: New International Economic Order
7. Summary records of discussions in the Commission
8. Texts adopted by Conferences of Plenipotentiaries
9. Bibliographies of writings relating to the work of the Commission.

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A/8017 (third session)	Volume I: 1968-1970	Part two, III, A	129
A/8417 (fourth session)	Volume II: 1971	Part one, II, A	9
A/8717 (fifth session)	Volume III: 1972	Part one, II, A	9
A/9017 (sixth session)	Volume IV: 1973	Part one, II, A	11
A/9617 (seventh session)	Volume V: 1974	Part one, II, A	13
A/10017 (eighth session)	Volume VI: 1975	Part one, II, A	9
A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A	9
A/32/17 (tenth session)	Volume VIII: 1977	Part one, II, A	11
A/33/17 (eleventh session)	Volume IX: 1978	Part one, II, A	11
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2502 (XXIV)	Volume I: 1968-1970	Part two, II, B, 3	127
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