United Nations A/CN.9/SR.925

General Assembly

Distr.: General
15 July 2011

Original: English

United Nations Commission on International Trade Law

Forty-fourth session

Summary record of the 925th meeting
Held at the Vienna International Centre, Vienna, on Monday, 27 June 2011, at 10 a.m.

Temporary Chairperson: Mr. Sorieul.....(Secretary of the Commission)
Acting Chairperson: Mr. Wiwen-Nilsson.....(Sweden)

Contents

V.11-84461 (E) 150711 180711

The meeting was called to order at 10.30 a.m.

Opening of the session

1. **Mr. Sorieul** (Secretary of the Commission) called the forty-fourth session of the United Nations Commission on International Trade Law to order.

Election of officers

2. **Mr. Sorieul** (Secretary of the Commission) said that it was the turn of the African Group to nominate a Chairperson.

3. **Mr. Yatani** (Kenya), speaking on behalf of the African Group, said that the Group wished to nominate Mr. Moollan (Mauritius) for the office of Chairperson.

4. *Mr. Moollan (Mauritius) was elected Chairperson by acclamation.*

5. **Mr. Mungur** (Mauritius) said that the election of Mr. Moollan to the office of Chairperson was a great honour for, and reflected the Commission's confidence in, his country. He thanked the African members of the Commission for endorsing the candidature of Mr. Moollan.

6. Mr. Moollan was unable to be present during the first week of the session owing to previous commitments, but the Commission could rest assured that during the second week he would exercise his functions with great dedication.

7. **Mr. Fruhmann** (Austria), speaking on behalf of the Western European and Others Group, proposed that Mr. Wiwen-Nilsson (Sweden) be elected, in his personal capacity, as a Vice-Chairperson of the Commission.

8. *Mr. Wiwen-Nilsson (Sweden) was elected, in his personal capacity, as a Vice-Chairperson of the Commission by acclamation*.

9. *In the absence of Mr. Moollan, Mr. Wiwen-Nilsson took the Chair as acting Chairperson*.

10. **The acting Chairperson**, having thanked the Commission for its trust, proposed that the Commission elect the other officers of the Bureau later in the week.

Adoption of the agenda (A/CN.9/711)

11. **Mr. Sorieul** (Secretary of the Commission) proposed the introduction, following agenda item 11, of an item on consideration by the Commission of the proposal of the International Chamber of Commerce (ICC) for a revised text of the Uniform Rules for Demand Guarantees. The request of the ICC for consideration of the proposal by the Commission had been communicated to the member States by means of a note verbale.

12. *The proposal for the introduction of an additional item, entitled "Endorsement of texts of other organizations: 2010 revision of the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce", was accepted.*

13. *The agenda, as amended, was adopted.*

Finalization and adoption of the UNCITRAL Model Law on Public Procurement (A/CN.9/729 and Add.1 to 8; A/CN.9/730 and Add.1 and 2; A/CN.9/731 and Add.1 to 9; A/CN.9/WG.I/WP.77 and Add.1 to 9; A/CN.9/713 and A/CN.9/718)

14. **The acting Chairperson** invited the Commission to consider the draft revised text of the Model Law (in documents A/CN.9/729/Add.1 to 8), together with proposed amendments, with a view to adoption of a final text.

15. In order to avoid discussion of drafting issues in the Commission's meetings, he proposed that a drafting group be established and that the Commission deal only with substantive issues.

16. **Mr. D'Allaire** (Canada), welcoming that proposal, asked whether delegations could raise drafting issues in the Commission's meetings or only in meetings of the drafting group.

17. **The acting Chairperson** said that the Commission should decide which issues raised during its meetings were substantive and which were drafting issues.

18. **Ms. Nicholas** (Secretariat) said that the Secretariat, including translators, stood ready to assist the drafting group.

19. **The acting Chairperson** said that Mr. Fruhmann (Austria) had volunteered to chair the drafting group and to prepare the group's report.

20. He proposed that the Commission proceed to consider the draft revised text of the Model Law.

21. **Mr. Fruhmann** (Austria) proposed that, in subparagraph (d) of the Preamble, the phrase "fair and equitable" be changed to "fair and equal". His delegation considered the word "equitable" to be synonymous with the word "fair", while "equal treatment" was a well-known concept, at least in Europe.

22. He suggested that the proposal be considered in the drafting group.

23. **Mr. Yukins** (United States of America) said that the issue was not just a drafting issue.

24. The essence of the procurement process was the unequal treatment of bidders in the sense that, ultimately, only one bidder was selected. Bidders treated unequally often still felt that they had been treated equitably.

25. If the word "equitable" were replaced by the word "equal", challenges might ensue from bidders claiming that they had been treated unequally.

26. **Mr. Grand d'Esnon** (France), endorsing the proposal made by the representative of Austria, said that use of the word "equal" would prevent favouritism through misuse of the word "equitable", which was open to different interpretations.

27. **Mr. Yukins** (United States of America) proposed that, if "equitable" was replaced by "equal", the Guide to Enactment include a note to the effect that the principle of equality applied only in situations in which the circumstances of bidders were the same; if their circumstances were different, bidders could be treated differently.

28. **The acting Chairperson** asked whether the Commission wished to accept the proposal that the word "equitable" be replaced by the word "equal", with the inclusion of a note in the Guide to Enactment as proposed by the representative of the United States of America.

29. **Mr. D'Allaire** (Canada), expressing support for retention of the word "equitable", said that the issue now under discussion had been raised in Working Group I, which had favoured retention of the word "equitable" since that word had been used in the 1994 Model Law.

30. **Mr. Phua** (Singapore) suggested the formulation "fair, equitable and equal treatment".

31. **Mr. Grand d'Esnon** (France) and **Mr. Maradiaga Maradiaga** (Honduras) said that the suggested formulation represented an acceptable compromise.

32. **The acting Chairperson** proposed that the formulation "fair, equitable and equal treatment" be accepted, with an explanation of the words "fair", "equitable" and "equal" in the Guide to Enactment.

33. *It was so decided.*

34. **Mr. Piedra** (Observer for Ecuador), referring to paragraph (b) of the Preamble, said that his country, which was endeavouring to promote national development through support for domestic enterprises, would not be able to foster and encourage "participation in procurement proceedings by suppliers and contractors regardless of nationality".

35. **The acting Chairperson** said that the draft revised Model Law contained provisions that took national interests and socio-economic conditions into account.

36. **Mr. Fruhmann** (Austria) proposed the replacement of "may disqualify" by "shall disqualify" in article 9 (8)(b), stating that a supplier or contractor submitting materially inaccurate or materially incomplete information should be disqualified on the grounds of untrustworthiness.

37. Referring to article 10 (4), he proposed the expansion of the phrase "specific origin or producer" to read "specific origin, producer or production method", on the grounds that, by requiring the use of a particular production method, the procuring entity could discriminate between suppliers.

38. Referring to article 11 (3), he proposed that "and expressed in monetary terms" be replaced by "and/or expressed in monetary terms", on the grounds that "and" alone implied that all non-price evaluation criteria must be expressed in monetary terms. In some cases, it might not be possible to express non-price evaluation criteria in monetary terms.

39. **Mr. Grand d'Esnon** (France) expressed support for the proposals made by the representative of Austria regarding article 10 (4) and article 11 (3).

40. Regarding article 9 (8)(b), he said that the word "may" should be retained in order to provide for the possibility that the submission of materially inaccurate or materially incomplete information was attributable to innocent error, as was often the case. It should be left to the procuring entity to decide whether the submission of such information was deliberate. Automatic disqualification was undesirable.

41. **Mr. Yukins** (United States of America), endorsing the comments made by the representative of France with respect to article 9 (8)(b), said that, if a procuring entity were required to automatically disqualify bidders submitting materially inaccurate or materially incomplete information, the procuring entity might face a large number of challenges.

42. His delegation was opposed to the proposed expansion of "specific origin or producer" to "specific origin, producer or production method" in article 10 (4), since it was common in the United States of America for a procuring entity to require the use of a particular production method — for example, in order to ensure the quality of the item to be procured. Of course, in such cases the procuring entity had to explain why it was requiring the use of the production method in question.

43. With regard to article 11 (3), he endorsed the proposal that "and" be replaced by "and/or".

44. **The acting Chairperson** wondered whether the concern of the United States delegation regarding the proposed change in article 10 (4) was not met by the wording of the remainder of that paragraph — "unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as 'or equivalent' are included."

45. **Mr. Yukins** (United States of America) said that the problem lay with the phrase "or equivalent" — the procuring entity might not be able to ascertain whether the production method that the contractor proposed to use was indeed equivalent to the production method that it would like to be used. That problem could be particularly serious in the case of some low-cost contractors.

46. **Mr. D'Allaire** (Canada), referring to article 2 (Definitions), pointed out that in the French and Spanish versions of document A/CN.9/729/Add.1 the definitions were listed in the English alphabetical order. He asked whether the definitions would be listed in the French alphabetical order and the Spanish alphabetical order in, respectively, the final French version and the final Spanish version of the revised Model Law.

47. Regarding article 9 (8)(b), he shared the concern of the representatives of France and the United States of America about the proposed replacement of "may" by "shall".

48. Regarding article 10 (4), he requested the representative of Austria to elaborate on the explanation given by him for his proposal for change.

49. Regarding article 11 (3), he called for retention of the word "and", which he considered preferable to "and/or", particularly given the phrase "to the extent practicable" in that paragraph.

50. **Ms. Nicholas** (Secretariat) said that, in the final versions of the revised Model Law, the definitions in article 2 would be listed in the appropriate alphabetical order — in the French alphabetical order in the French final version, in the Spanish alphabetical order in the Spanish final version, and so on.

51. **Mr. Fruhmann** (Austria), responding to the comments made with respect to article 10 (4), said that there were cases where a procuring entity might legitimately require the use of a particular production method. However, expansion of the phrase "specific origin or producer" to "specific origin, producer or production method" would not prevent the procuring entity from requiring the use of a particular production method in such cases. At all events, the use of a particular production method should be required only under very special circumstances.

52. He agreed that the phrase "or equivalent" could pose problems, but in his view such problems were unlikely to arise often.

53. **Ms. González Lozano** (Mexico) said that in article 8 (4) the expression "reasons and circumstances" in the English text had been translated literally into Spanish as "razones y circunstancias", whereas the Spanish expression that would normally be used in civil law systems was "motivos y fundamentos" ("reasons and legal arguments"), the meaning of which was more complex: "reasons and circumstances" could only refer to the factual justification for the decision of the procuring entity,

whereas "motivos y fundamentos" referred also to the legal justification for that decision. If a procuring entity did not explicitly state the legal basis for its decision, problems of legality were likely to arise. Her delegation would appreciate the Secretariat's clarification as to whether the intention of the English text was to require the procuring entity to provide only a factual justification for its decision. If that were the case, the matter was only one of translation. However, if both factual and legal justification were being referred to, the issue was a substantive one and the distinction should be made clear in the Spanish text.

54. In article 9 (8)(b), the words "was materially inaccurate or materially incomplete" in the English text had been translated into Spanish as "adolece de inexactitudes u omisiones graves" ("contains serious errors or omissions"), which raised the question of whether, if the word "may" were replaced by the word "shall" as proposed, disqualification would be automatic only if the error or omission in question was serious. Her delegation would appreciate clarification of that point also.

55. **Ms. Nicholas** (Secretariat), referring to article 8 (4), said that the expression "grounds and circumstances" had been used in the 1994 text of the Model Law and that Working Group I had considered it with a view to resolving the very issue raised by the delegation of Mexico.

56. Since the Model Law of 1994 had indicated that the procuring entity was not required to justify the grounds for its decision but only to provide a statement of facts, Working Group I had agreed to replace the word "grounds" by the word "reasons".

57. **The acting Chairperson**, referring to article 11 (3), suggested that the word "and" be replaced by the word "or" rather than "and/or", since non-price evaluation criteria could be quantifiable without being expressed in monetary terms.

58. **Mr. Yukins** (United States of America), referring to article 10 (4), proposed the inclusion in the Guide to Enactment of a sentence reflecting the fact that in some situations it might be necessary for a procuring entity to specify a production method. The note might read "With regard to specified production methods, and with due regard to paragraph (5), which calls for standardized technical requirements, in some cases there may be no equivalent production methods and the solicitation may so note." If that sentence were included, his delegation could accept the proposal made by the representative of Austria.

59. **The acting Chairperson** asked the Mexican delegation whether it would accept the proposal to replace the word "may" by "shall" in article 9 (8)(b) if the Spanish translation of "materially inaccurate or materially incomplete" were amended so as not to include the word "graves" ("serious").

60. **Ms. González Lozano** (Mexico) said that the phrase "adolece de inexactitudes u omisiones graves" was appropriate to a stricter provision than was the phrase "was materially inaccurate or materially incomplete" — to a provision requiring the word "shall" rather than "may". The word "may" should be used only if the errors or omissions in question were not serious.

61. **Ms. Nicholas** (Secretariat) suggested that the Secretariat and the representative of Mexico together examine the English and Spanish versions of article 9 (8)(b) with a view to finding a satisfactory Spanish translation of "materially inaccurate or materially incomplete".

62. **Mr. Fruhmann** (Austria) said that, in the light of comments made by the representatives of France, Canada and the United States of America, he wished to withdraw his proposal for replacing "may" by "shall" in article 9 (8)(b).

63. Regarding article 10 (4), he could go along with the proposal made by the representative of the United States of America.

64. Regarding article 11 (3), he had thought that the phrase "to the extent practicable" referred only to the words "be objective, quantifiable". He would welcome the Secretariat's opinion as to whether it referred also to the words "and expressed in monetary terms". In his view, if the phrase referred to those words also, the problem would be solved.

65. **The acting Chairperson** recalled his suggestion that "and" be replaced by "or" in article 11 (3).

66. **Mr. Jezewski** (Poland) said that he would prefer "may" to be replaced by "shall" in article 9 (8)(b). In his view, a supplier or contractor submitting "materially incorrect or materially incomplete" information concerning qualifications should be disqualified. He did not think that the replacement of

"may" by "shall" would unduly restrict the flexibility available to the procuring entity.

67. **Mr. D'Allaire** (Canada) said that he shared the concern of the representative of Mexico about the words "reasons and circumstances" in article 8 (4), but they did achieve the desired policy objective. Also, they had been agreed upon in Working Group I, and he therefore believed that they should be left.

68. As regards the word "materially" in article 9 (8)(b), it often gave rise to problems when it had to be translated into French, and probably into some other languages as well. His delegation stood ready, on the basis of Canada's experience, to discuss such problems in the drafting group.

69. As regards article 10 (4), he would not like a reference to "production methods" to be included unless an example could be given of a production method that had been patented or registered.

70. **Mr. Phua** (Singapore) said that article 10 (4) seemed to draw extensively on article VI.3 of the WTO Government Procurement Agreement of 1994, which did not mention "production methods", which he would not like to see mentioned in the text under consideration.

71. **The acting Chairperson** suggested that language relating to "production methods" be included in the Guide to Enactment but linked to article 10 (2) — not to article 10 (4).

72. **Ms. Morillas Jarillo** (Spain), referring to article 11 (3), said that in the case of electronic reverse auctions all non-price evaluation criteria should, in all cases, be objective, quantifiable and expressed in monetary terms. The phrase "to the extent practicable" should therefore be replaced by the phrase "in all cases".

73. **The acting Chairperson** said that article 11 (3) referred to procurement methods other than electronic reverse auctions, which were dealt with in other UNCITRAL documents.

74. **Mr. Xiao** (China) said that his delegation was in favour of the retention of "may" in article 9 (8)(b).

75. In China, the procurement process was divided into two phases — the bidding phase and the selection phase. Before the start of the selection phase, bidders were allowed to correct or add to the information submitted by them; once the selection phase had started, they were not.

76. As regards article 10 (4), his delegation was opposed to the inclusion of a reference to "production methods". Countries at different stages of development often employed different production methods, and the inclusion of a reference to "production methods" could open the door to discrimination against the bidders in certain countries.

77. **The acting Chairperson** recalled his suggestion regarding the inclusion of language relating to "production methods" in the Guide to Enactment, with a reference to article 10 (2).

78. Other open questions from the meeting were: how to translate "materially inaccurate or materially incomplete" in article 9 (8)(b) into Spanish, and maybe into other languages; what was covered by the phrase "to the extent practicable" in article 11 (3); and the suitability of the phrase "reasons and circumstances" in article 8 (4).

The meeting rose at 12.30 p.m.