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Summary record of the 945th meeting

Held at Headquarters, New York, on Tuesday, 26 June 2012, at 10 a.m.

Chair: Mr. Mr. Sikirić (Croatia)
later: Mr. Wiwen-Nillson (Vice-Chair)

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The meeting was called to order at 10.10 a.m.

Election of officers (*continued*)

1. **The Chair** said that Nigeria, on behalf of the Group of African States, had nominated Mr. Mugasha (Uganda) for the office of Rapporteur of the Commission at its forty-fifth session.
2. *Mr. Mugasha (Uganda) was elected Rapporteur by acclamation.*
3. *Mr. Wiwen-Nilsson (Sweden), Vice-Chair, took the Chair.*

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/745, A/CN.9/754 and Add 1 and 2, A/CN.9/WG.1/WP.79 and Add. 1-19)

4. **The Chair** said that documents A/CN.9/754 and Add. 1 and 2, and A/CN.9/WG.1/WP.79 and Add. 1-19 addressed related policy issues and provided an article-by-article commentary. All those documents together formed the Guide. He invited members of the Commission to comment on them.

Document A/CN.9/754

5. **Mr. Wallace** (United States of America), noting that paragraph 10, which referred to “security-related procurement”, said that he did not recollect that term having been used before and wondered whether it was the same as “procurement involving classified information”, mentioned in paragraph 12. He also queried the use of the words “accessible” and “available” in paragraph 16, as he thought that the Working Group had decided that in future no distinction would be made between the two.

6. **Ms. Nicholas** (Secretariat) said that “procurement involving classified information” was broader than “security-related procurement”. Following expert consultations, it had been decided to use the latter term to denote procurement involving essential national security or defence issues. As for the use of the words “accessible” and “available”, the Working Group had indeed decided to cease distinguishing between them in the more general discussion. However, as the purpose of paragraph 16 was to explain the changes made to the 1994 text, the two terms had been retained there. Moreover, both terms were used in the text of the Model Law itself, with different meanings. She

suggested the more neutral wording of “give the public access to ... legal texts” in place of “legal texts ... made accessible to the public”.

7. **Mr. Maradiaga** (Honduras) said that he shared the concern of the United States with regard to classified information. In countries like his own, where problems of corruption were not unknown, public procurement was subject to manipulation. It was therefore essential to have a legal instrument that would foster transparency in such matters. The concept of classified information should not lend itself to the concealment of manipulation.

8. **Ms. Nicholas** (Secretariat) emphasized that the section of the Guide under discussion was concerned only with changes to the 1994 text. During extensive discussion of the importance of ensuring full transparency, the point had been made that information could be withheld from the public only when it was legally classified and for no other reason. Care would be taken to ensure due prominence for that concern.

9. **Mr. Wallace** (United States of America) said that the wording of the second sentence of paragraph 35 was unclear. A successful applicant for pre-qualification would be able to present a submission.

10. **Ms. Nicholas** (Secretariat) said that paragraph 35 reflected article 25, paragraph 3, of the 2011 Model Law, which stated that, subject to legal requirements, the portion of the procurement record relating to the submission process should be made available to those who had presented submissions. The intent of the sentence in question was to explain that that provision did not apply to those excluded at the pre-qualification stage. She agreed that it should be rephrased for the sake of clarity.

11. **Ms. Miller** (World Bank) said that paragraph 24 of document A/CN.9/754/Add.1 contained a fuller statement of the basis for selection than that set out in the first sentence of paragraph 57 in the document under discussion. The latter might usefully be aligned with the former. The footnote to paragraph 58 of A/CN.9/754 was not easy to understand: it seemed to be referring to the 1994 text, except for the last sentence which clarified the terminology currently in use in the 2011 text.

12. **Ms. Nicholas** (Secretariat) said that the references to the 1994 text would be put into the past tense so as to avoid confusion.

Document A/CN.9/754/Add.1

13. **Mr. Wallace** (United States of America) said that, as addendum 1 had not been submitted to the Working Group or been the subject of informal consultations, it would be advisable to give it a careful second reading.

14. **The Chair** asked the Secretariat to take on that task.

Document A/CN.9/754 Add.2

15. **Mr. Ezech** (Nigeria), noting the statement in paragraph 5 to the effect that the 1994 requirement to solicit quotations from a minimum of three suppliers or contractors "if possible" had been replaced in the 2011 text by an absolute requirement to solicit from at least three suppliers or contractors, said that it should be stipulated that the suppliers or contractors should be unrelated.

16. **The Chair** said that wording to that effect could be inserted into the Guide.

17. **Mr. Grand d'Esnon** (France) said that, while understanding the concern expressed by the representative of Nigeria, he could see obstacles to the inclusion of his proposal. Furthermore, the fact that two enterprises belonged to the same group did not mean that they would not be in competition with one another.

18. **The Chair** suggested that language might be found to guard against any relationship that could entail a distortion of competition, which would need to be determined by the procuring entity.

19. **Mr. Fruhmenn** (Austria) questioned the added value of such an addition. It seemed to him that Nigeria's concern was already taken care of by the guiding principles of the Model Law?

20. **Mr. Wallace** (United States of America), while appreciating the concern expressed by the representative of Nigeria, said that neither the Model Law nor the Guide could be rewritten. He stressed the need for a continuing discussion on electronic reverse auctions or frameworks which were believed, in some quarters, to be set to replace quotations.

21. **The Chair**, noting that the quotations requirement was a broader issue, said that a sentence might be inserted which, rather than referring to a relationship or link between contractors, should guard

against the possibility of one being the parent company of another.

22. **Mr. Wallace** (United States of America) said that the concern was already flagged by the reference in paragraph 35 to the risk of abuse and subjectivity in the selection of suppliers. The wording might need to be slightly changed in order to address that concern more fully.

23. **Mr. Zhao Yong** (China) suggested that what was to be avoided was an organizational conflict of interest rather than any relationship between suppliers.

The meeting was suspended at 10.55 a.m. and resumed at 11.30 a.m.

Document A/CN.9/WG.I/WP.79/Add.3

24. **Ms. Nicholas** (Secretariat) said that the Working Group had suggested the deletion of the call to ensure accuracy in the final sentence of paragraph 29, since that requirement was felt to be too onerous, and had considered, more generally, that the paragraph should be revised so as to give less prominence to the distinction between accessibility and availability. In the light of the Working Group's discussions, the issue to be emphasized was promptness of publication. Furthermore, as there might be differences in the nature and author of the information to be published, the reference in the part of the revised Guide dealing with article 5 should be not to the author of the texts but to those issuing the texts.

25. **Ms. Leblanc** (Canada) questioned the usefulness of the final sentence of paragraph 42 and, in particular, the rationale for choosing the regulation of communications as an example.

26. **Ms. Nicholas** (Secretariat) said that it was the secretariat's understanding that in some jurisdictions tender securities were regulated separately. If the Commission considered that that situation was the exception rather than the rule, the example could be deleted.

27. **Mr. Wallace** (United States of America) requested clarification of the last two sentences of paragraph 8. It had not yet become accepted international practice for a procuring entity from one State to act in its capacity as the lead procuring entity as an agent of procuring entities from other States.

28. **Ms. Nicholas** (Secretariat) recalled that, as noted in paragraph 17 (a) of its report (A/CN.9/745), the Working Group had agreed to delete those two sentences.

29. **Mr. Imbachi Cerón** (Colombia) said that international companies could sign legal stability contracts with his Government to protect their investments from changes to certain relevant provisions in the law. He wondered whether such contracts were within the scope of article 3 of the Model Law.

30. **Ms. Nicholas** (Secretariat) said that the flexible wording of article 3 allowed for the differences between the various federal and constitutional systems and could be tailored to specific national circumstances, as was the case with the Model Law as a whole. It was not the practice of the Commission or the Working Group to provide detailed commentary on issues that concerned just one jurisdiction and that could be dealt with by tailoring the Model Law to suit local circumstances.

31. **Mr. Wallace** (United States of America) said that the expression “socio-economic policies” was commonly understood as referring to national policies, not obligations arising in connection with international regulations. He was curious to hear the reasoning behind including “international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes” in the definition of “socio-economic policies” as set out in the first sentence of paragraph 9.

32. **Mr. Zhao Yong** (China) agreed that the Security Council anti-terrorism measures or sanctions regimes were not socio-economic policies, but rather international obligations, and suggested moving the sentence to the commentary to article 3.

33. **Ms. Nicholas** (Secretariat) said that that sentence had been discussed in the context of article 8 of the Model Law, which allowed the exclusion of suppliers of particular nationalities. Definition (o) of “socio-economic policies” contained in article 2 of the Model Law included any policies of the State that might be required to be taken into account by the procuring entity in procurement proceedings and allowed for the less common situation where restrictions were imposed by international agreements or obligations. The reference to United Nations Security Council measures and regimes would be moved from paragraph 9 to the

commentary to article 3. In addition, the obligations under such measures and regimes would be noted in the commentary to article 8 contained in document A/CN.9/WG.I/WP.79/Add.4, making it clear that States had the flexibility in the application of international restrictions.

34. **Mr. Wallace** (United States of America) said that the last sentence of paragraph 15 stated that article 3 established “a general prevalence of international treaties”. That statement was too narrow and a reference to international agreements should be added to reflect the wording of article 3 more closely.

35. The second sentence of paragraph 24 was ambiguous and did not appear to reflect the intention of article 5 regarding the publication of legal texts, which was not to exclude from publication internal rulings that concerned a group or a class of companies. He wished to know whether the phrase “general application” excluded all internal documents or only those that pertained to certain procuring entities or groups thereof.

36. **The Chair** suggested that the words “internal documents” in that sentence could be replaced with “internal legal texts”, to reflect the term used in paragraph 1 of article 5.

37. **Ms. Nicholas** (Secretariat) said that paragraph 1 of article 5 was not intended to include internal documents that regulated how one procuring entity did business. Since the commentary in paragraph 24 could not usefully discuss what was meant by “general application” and “legal texts”, it could be left to the State to determine how the article should be applied in the light of national circumstances.

38. **Mr. Grand d'Esnon** (France) said that contracts, laws, regulations and decisions were all legal texts that should be publicly accessible, as were internal documents. The second sentence of paragraph 24 was unclear and should be deleted to avoid confusion.

39. *It was so decided.*

40. **Mr. Wallace** (United States of America), supported by **Mr. Grand d'Esnon** (France) and **Mr. Maradiaga** (Honduras), said that the words “and lobbying” in the fourth sentence of paragraph 39 should be deleted, as lobbying was a separate concern from collusion.

41. *It was so decided.*

Document A/CN.9/WG.I/WP.79/Add.4

42. **Mr. Ezeh** (Nigeria), referring to the qualification criteria discussed in paragraph 16, said that, since pre-qualification should not limit competition by excluding those who might normally compete, particularly in international procurement exercises, it should be stipulated that foreign companies were not subject to local laws, including on the incorporation of companies or compliance with tax and security requirements.

43. **Ms. Nicholas** (Secretariat) said that one way of addressing the concern raised by the representative of Nigeria would be to include some of the examples cited by him in the final sentence of paragraph 17, among the unnecessary requirements that discriminated against overseas suppliers.

44. **The Chair** said that care should be taken, however, not to discourage the legitimate application of local tax laws, but only the abuse of requirements aimed at excluding foreign suppliers.

45. **Mr. Wallace** (United States of America) said that the Guide should explain what was meant by “misrepresentation” and “materially inaccurate or materially incomplete”, as used in article 9 of the Model Law.

46. **Ms. Nicholas** (Secretariat), referring to paragraph 18 (f) of the Working Group's report (A/CN.9/745), said that it had been decided that no meaningful explanation could be provided for either in the context of the Guide. The Working Group had found that “materiality” was a threshold concept and that it referred to omissions or inaccuracies that might affect the integrity of the competition in the circumstances of the procurement concerned. Consistency would be ensured in the discussion of the concepts of materiality throughout the Guide.

47. **Mr. Imbachi Cerón** (Colombia), supported by **Mr. Maradiaga** (Honduras), suggested that the second sentence of paragraph 9 in the Spanish version be revised to avoid implying that any restriction of participation of suppliers or contracts in procurement proceedings necessarily restricted trade.

48. **The Chair** said that the text could be amended to read “may restrict trade”, rather than “restricts trade”.

49. **Mr. Grand d'Esnon** (France) said that restricting the number of participants would logically restrict

trade, making the addition of “may” unnecessary. Meanwhile, the phrase “may violate commitments”, or “*peut contrevenir aux engagements*” in the French version, could be understood as authorizing the violation of commitments. The word “*peut*” should be replaced with “*est susceptible de*” in the French.

50. **Ms. Nicholas** (Secretariat) said that the intention was to draw attention to the fact that such restriction could violate free trade commitments. She proposed replacing “restricts trade and may violate commitments” with “may violate free-trade commitments”.

51. **The Chair** said that paragraph 9 incorrectly stated that the purpose of paragraph 1 of article 8. It did not spell out the grounds that might be invoked to justify restricting participation. Rather, it allowed restrictions on nationality only where permitted by national regulations.

52. **Mr. Bonilla Muñoz** (Mexico) said that his delegation did not agree with the latest change proposed by the Secretariat.

53. **Mr. Ezeh** (Nigeria) said that the wording proposed by the secretariat satisfactorily addressed the issues raised by his delegation.

54. **The Chair** said that while nationality should not be a criterion for restricting participation in procurement proceedings, regulations might allow the procuring entity to restrict participation on grounds of nationality. However, the fact that regulations allowed such a restriction did not mean that the law allowed it, since there could be other overriding international obligations that restricted the right to limit participation on the basis of nationality.

55. **Mr. Grand d'Esnon** (France) said that the issue of national preference should be spelled out clearly in paragraph 9.

56. **Ms. Nicholas** (Secretariat) said that paragraph 9 would be reworded to serve as a descriptive introduction of article 8, setting the stage for the detailed commentary contained in the paragraphs that followed. She suggested that the revised paragraph should state that the purpose of article 8 was to provide for the full and unrestricted international participation in public procurement, and should set out the limited situations in which participation could be restricted. References would be added to the relevant commentary addressing sanctions or anti-terrorism measures under

article 3 and the implementation of socio-economic policies. The revised paragraph would further state that any such restriction of participation might be a violation of free-trade commitments by States under relevant international instruments; and, lastly, that paragraph 1 and 2 provided procedural safeguards when any such restriction was imposed.

57. *It was so decided.*

Document A/CN.9/WG.I/WP.79/Add.5

58. **Ms. Nicholas** (Secretariat) drew attention to paragraph 19 of the Working Group's report (A/CN.9/745), which set forth the changes to document A/CN.9/WG.I/WP.79/Add.5 proposed by the Working Group. The Working Group had requested a significant redrafting of paragraphs 21 and onwards, the wording of which had not yet been finalized by the Secretariat.

59. **Mr. Wallace** (United States of America) asked what changes had been made to paragraph 30 of the document. Small and medium enterprises could not easily provide tender security and such a requirement tended to discourage them from participating in procurement proceedings.

60. **The Chair** said that, in line with the reformulation of paragraph 30 that had been requested in paragraph 19 (f) and (j) of the Working Group's report, the commentary would be revised with a view to ensuring balance.

The meeting rose at 1 p.m.