

*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 Such other functions were, in particular, providing for a situation where a tender was withdrawn or modified after the deadline for submission of tenders and providing for a situation where the supplier or contractor winning the procurement contract failed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.*