# 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